

APPEAL NO. 950351

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001. *et seq.* (1989 Act.). On January 31, 1995, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding. The issue reported from the benefit review conference (BRC) was:

Did the claimant [sic, should be deceased] sustain a compensable heart attack on (date of injury)?

The hearing officer determined that the deceased's fatal heart attack is not compensable under the Act. Appellant, beneficiary claimant (herein claimant), contends that the hearing officer erred in certain factual determinations and that the deceased's fatal heart attack was caused by "an electrical shock or electrocution." Claimant further contends the hearing officer erred in failing to grant claimant a continuance in order that claimant could subpoena or otherwise obtain certain documents. Claimant requests that we reverse the hearing officer's decision and render a decision in her favor. Respondent (carrier) responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision and order of the hearing officer are affirmed.

The deceased was a 44 year old electronics repairman for (employer), the employer. The autopsy report indicated that he was six feet tall and weighed 221 pounds. It is undisputed that deceased had suffered a heart attack in April 1985, and had undergone a "left heart cardiac catheterization with coronary arteriography." Deceased was eventually released on medications. A hospital note of August 6, 1990, noted that the deceased "had evidence of triple vessel disease" and recommended a stress test for follow-up. Deceased was apparently scheduled for a stress test in November 1990 but the test was delayed because of the deceased's tachycardia. Claimant's testimony summarized that the deceased's life style changes after the 1985 heart attack were that he eliminated red meat from his diet, quit smoking (but apparently continued to use other tobacco products), sold his business and went to work for the employer.

Claimant testified that on the day in question the deceased appeared to be feeling well, had not complained of pain and went on his appointed service calls. The evidence based on the testimony of (Mr. S), deceased's supervisor, and transcribed statements of the customer that deceased was visiting, and her neighbor, was that the deceased arrived at the customer's house at about 1:30 p.m. (apparently the first service call after lunch) to repair a television set (TV). The customer stated deceased "seemed just fine," commented on the customer's baby and ". . . pulled the TV out, took the back off and looked at it and the phone rang." The customer's statement indicated the phone call was for the deceased and that "he talked on the phone a few minutes. . . ." The customer stated that the TV was unplugged and that the deceased looked at some papers (perhaps a wiring diagram), looked

up and said that "I got to go out to the truck to get some parts. . . . He didn't act like he was sick or anything!" Deceased apparently collapsed outside in the yard and the customer's neighbor (or someone else) called 911. An ambulance was dispatched. The ambulance report is somewhat illegible but appears to state at one part "male electrocuted, electric notified, 1349." The ambulance crew apparently performed CPR and deceased was taken to the hospital where he was apparently dead on arrival.

The autopsy report lists the cause of death as "severe occlusive coronary atherosclerosis due to hypertensive atherosclerotic cardiovascular disease." Specific findings included "Concentric left Ventricular hypertrophy. Moderate to Severe. Occlusive Coronary Atherosclerosis. Generalized. Severe with over 90% Occlusion." Claimant testified that she initially accepted the cause of death as natural and it was not until some months later when she first saw the ambulance report that she believed that deceased had sustained a shock or electrocution which precipitated the fatal heart attack.

Apparently, two BRCs were held in this case. Mr. S, the supervisor, testified, and is supported in carrier's pleadings, that at the first BRC, claimant requested some additional information from the employer in the nature of the deceased's work orders, route sheet assignments, personnel file and payroll records. Mr. S testified that the requested information was provided to claimant at the second BRC. Carrier's attorney, and correspondence, indicated that claimant's attorney was told that "he would need to request a subpoena for any other records that he believed existed." It is undisputed that claimant's attorney failed to do so, and he explained to the hearing officer that he was unaware that he could request a subpoena prior to the CCH. When the hearing officer pointed out to claimant's attorney that the Texas Workers' Compensation Commission's (Commission) transmittal letter specifically sets out the Commission's rules "that may be useful in preparation for the hearing," the attorney replied that he had been out of the country and "I didn't see that portion until right this minute." We would further note that claimant was represented as being a legal secretary "skilled in discovery in civil cases." Claimant requested a continuance and a subpoena directed at the carrier, in essence requesting carrier to produce all medical and personnel records as well as service invoices, and route schedules for the week prior to deceased's death that were available. Claimant's attorney conceded it had no medical expert ready or available to review the medical records and, in fact, presented no medical evidence at the CCH.

The challenged determinations are:

FINDINGS OF FACT

4. Deceased suffered from progressive heart disease including marked narrowing of his coronary arteries with over 90% occlusion and areas of calcification.

5.Deceased did not suffer an electric shock or electrocution causing his fatal heart attack.

6.Deceased's heart attack was not triggered solely by emotional or mental stress factors.

CONCLUSION OF LAW

2.Deceased's fatal heart attack of (date of injury), is not a compensable heart attack under the Act.

Claimant contends the preponderance of the evidence "refutes" the hearing officer's determinations that the deceased did not suffer an electrical shock or electrocution, citing the ambulance report. Even if there was evidence that the deceased sustained some kind of shock from some undefined source it is the hearing officer who is the sole judge of the weight and credibility to be given to the evidence. Section 410.165(a). We would note that there is no medical evidence of burns or other indicia of an electrical shock. The undisputed evidence was that the TV on which deceased was working was unplugged, and that claimant went to the truck to get a needed part. Exactly who called 911 and what that person said is not at all clear. Nor is it clear how that information was recorded or in fact exactly what the ambulance report says. The hearing officer was provided no evidence of a basis for the reference to electrical shock either from the ambulance service or the person who made the report. Claimant has presented no medical evidence that the deceased received any kind of electrical shock.

Section 408.008 provides as follows:

A heart attack is a compensable injury under this subtitle only if:

(1) the attack can be identified as:

(a)occurring at defined time and place; and

(B)caused by a specific event occurring in the course and scope of the employee's employment;

(2)the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack; and

(3)the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.

The hearing officer rejected the compensability of deceased's heart attack on the basis that the "medical evidence clearly shows that deceased had a prior heart condition and the autopsy establishes substantial blockage of the artery which is the result of progressive coronary disease." In fact, there is no evidence to the contrary other than the reference in the ambulance report to an electrocution. We find the hearing officer's determinations on this point supported by sufficient evidence.

Claimant's other point is that the hearing officer erred in denying her request for a continuance in order that claimant could complete discovery. Claimant acknowledges that she "is aware that the [CCH hearing officer's] decision in this regard will only be disturbed on an abuse of discretion basis." The hearing officer reserved her ruling on whether to leave the record open, which would have resulted in granting a continuance, until the available evidence had been obtained. The hearing officer inquired what claimant had done to obtain medical evidence on the point, and whether claimant had an expert available to review the medical evidence or to testify regarding this matter. Claimant had none and claimant's attorney acknowledged that he had not complied with Tex. W.C. Comm'n. 28 TEX. ADMIN. CODE §§ 142.10, 142.12(c) and 142.13 (Rules 142.10, 142.12(c) and 142.13), arguing only that carrier had failed to comply with his written request dated only four days before the CCH. The hearing officer considered claimant's request and denied the request for a subpoena and continuance as being untimely, with no good cause shown to grant claimant's requests. A determination of good cause is within the sound discretion of the hearing officer and should be set aside only if that discretion is abused. Morrow v. H.E.B., 714 S.W.2d 297 (Tex. 1986). To determine whether there has been an abuse of discretion, the reviewing court must look to see if the judge below acted without reference to any guiding rules and principles; the mere fact that a trial judge may decide a matter within his discretion in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion occurred. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238 (Tex. 1985). Accordingly, we determine that the hearing officer did not abuse her discretion in failing to find good cause to grant claimant's requests.

Upon review of the record submitted, we find no reversible error and we will not disturb the hearing officer's determinations unless they are so against the great weight and preponderance of the evidence as to be manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not so find and consequently the decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge