

## APPEAL NO. 970045

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 20, 1996, a contested case hearing (CCH) was held. The issues at the CCH were whether the deceased, whose surviving widow was the appellant, claimant, sustained a compensable fatal heart attack in the course and scope of employment, and whether the respondent, carrier, waived the right to dispute compensability of the heart attack.

The hearing officer found that the deceased did not sustain a compensable heart attack; that his heart attack did not result from a sudden stimulus; and that the natural progression of his preexisting heart disease resulted in the attack. The hearing officer further found that the carrier filed a dispute to compensability of the claim within 60 days of receipt of written notice of injury, and therefore did not waive its rights to dispute compensability.

The claimant has appealed the decision. First, the claimant argues that she proved the existence of a sudden stimulus leading to the heart attack. Second, the claimant argues that the medical evidence produced by the carrier in defense of the claim does not weigh the work-related factors against the natural progression of the heart disease and is therefore insufficient to support the decision. Finally, the carrier argues that the statute and rules provide that if the carrier does not pay or contest the compensability of the claim within seven days, it has waived the right to do so, and that Appeals Panel decisions indicating that the only sanction for failure to meet the seven-day deadline is an administrative penalty are wrong. The carrier responds that it was claimant that had the burden to prove the elements of compensability of the heart attack, and that she failed to produce any medical evidence. Second, the carrier points out that the memorandum produced at the CCH as the one purportedly causing sudden upset to the deceased was not in fact upsetting and memorialized a decision made with his approval. Finally, carrier agrees with the determination that it timely disputed the compensability of the heart attack.

## DECISION

We affirm.

The deceased was a hospital administrator at one of five hospital facilities managed by the (employer). According to the deceased's widow and to his former secretary, Ms. C, the demands of the position were inherently stressful. The claimant testified that her husband was a "Type A" personality who was conscientious. Ms. C stated that the deceased rarely became visibly upset and did not engage in any animated or upset behavior on \_\_\_\_, the day he died. Ms. C said that in the afternoon of \_\_\_\_, the deceased complained of right-sided pain. Claimant said that deceased also complained of this pain to her at home that night but did not take her suggestion to go to the emergency room. However, he sustained a heart attack that night, and an ambulance was called between 9:00- 9:30 p.m. He died at the hospital without regaining consciousness.

It was undisputed by the claimant that deceased had preexisting heart disease and that he continued to smoke even after an earlier cardiac episode in 1991.

The theories as to the stressful event that precipitated the deceased's heart attack appeared to be threefold. First, claimant testified that her husband had been instructed by his corporate offices to terminate two employees and that the deceased had been effectively told that, if he did not do so, he would be out of a job. This was the primary theory in the proceedings prior to the CCH. The claimant testified, however, that one of the employees had, by \_\_\_\_, been given a 60-day notice at an earlier point. Second, Ms. C testified that the employer's chief operating officer, Dr. B, was generally abusive to the deceased (according to what the deceased told her). This was disputed by Ms. R, the vice-president in charge of human resources, and by Ms. CR, who was directly under deceased in the chain of command as assistant administrator. Ms. C testified that Dr. B's secretary told her that Dr. B said, after deceased's death, "I killed him." There was no evidence of any specific contact or episode between Dr. B and the deceased alleged to have precipitated the heart attack. The third theory was the primary one urged by the claimant at the CCH, that the deceased had been unduly upset by a memo he received from Ms. CR.

Ms. C said that she was aware of the memo that Ms. CR sent to deceased on the morning of his death, and that she reviewed it and it had to do with Ms. CR's making a unilateral decision about something within deceased's area of responsibility. She concluded that deceased was upset by this, not from anything he said, but from the fact that he wrote a note to her on the memo, in large handwriting, asking her to set up a meeting with Ms. R. Ms. R said she was contacted on \_\_\_\_ by deceased about an appointment, but that the deceased indicated there was no emergency and they could meet the following morning. Ms. R said she had met before with deceased about various matters and the request for a meeting was therefore not unusual.

When a memo from Ms. CR was produced at the CCH and Ms. C was called again to testify, she could not identify the memo as the one she saw and then stated she had no knowledge of what the contents of the memo received on \_\_\_\_ had been, only that it was from Ms. CR. Ms. C said that the day after deceased died, she turned the memo over to Ms. R. Ms. C agreed that deceased had continuing conflicts over management with Ms. CR, and her impression was that the memo was not unique but was simply a continuation of the same problems. Ms. CR testified and agreed that, while she and deceased had a professional employee-boss relationship, she did not like him and believed he did not like her. A somewhat tense relationship was documented in a memo that deceased wrote on March 2, 1994, in which he set out various personnel matters on which he took issue with Ms. CR, including the fact that she arrived an hour late to work each day. The gist of this memo was that Ms. CR was somewhat more lenient on her employees than the deceased felt was warranted by the employer's policies. Ms. CR stated that the day before she wrote her memo, which was dated March 3rd and sent to deceased the next day, she had discussed some duty changes within the nursing department with the deceased and that

he approved them. She said the memo (which refers to the discussion the day before) simply memorialized the discussion and did not undertake to make changes that were not approved by deceased. Ms. CR said she did not send deceased any other memo after this one through the date of his death.

The claimant said that she had heard "through the grapevine" that the employer intended to make a financial provision for her, and when it did not, she filed a workers' compensation claim on March 6, 1995, the last day she understood she had to timely file a claim. The claimant said that her husband had told her two to three weeks before his death that if anything ever happened to him, she was to "sue the S.O.B.s." The claim and a record of the Texas Workers' Compensation Commission (Commission) shows that this was filed on March 6, 1995, and entered into the records of the Commission on March 15th. If there is a carrier's date-stamp, it cannot be deciphered. This record further indicated that the employer filed an Employer's First Report of Injury or Illness (TWCC-1) on March 22, 1995, and that the carrier filed a Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) disputing the compensability of the heart attack on May 9, 1995. We note that the claimant did not dispute the hearing officer's finding of fact that the carrier first received written notice of injury about the heart attack on March 22, 1995, from the employer, and it is this date that is included on the TWCC-21 as the first notice date. An affidavit from the adjuster indicated that this was the date that the carrier received claimant's claim for death benefits.

An autopsy report noted that in 1991, deceased had been found by cardiac catheterization to have complete blockage of the right coronary artery and 20-30% narrowing to 50% narrowing in his left arteries. The cause of death was severe coronary atherosclerosis with thrombus of the left circumflex artery. The catheterization report is also in the record.

A doctor reviewed the deceased's medical records for the carrier; he was Dr. F, a cardiologist. He opined that the deceased did not die of job-related causes at all, and had severe preexisting coronary disease which, along with his continued smoking and obesity, would have caused an attack regardless of work stress.

A heart attack is compensable, under Section 408.008 of the 1989 Act, only if it is caused by a specific event occurring in the course and scope of employment and the preponderance of the medical evidence indicates that it was work, rather than the natural progression of a preexisting heart condition or disease, that was a substantial contributing factor of the attack. Furthermore, where alleged, as in this case, to have occurred because of emotional or mental stress factors, the attack must be precipitated by a sudden stimulus. Section 408.008(3).

The hearing officer did not err by declining to find a sudden stimulus, and we agree that this is sufficiently supported by the record, which is essentially devoid of proof of any matter either beyond the ordinary stress of the day-to-day job, or something other than an ongoing event on \_\_\_\_\_. Although claimant argues that Ms. C testified he was "unusually"

upset, Ms. C stated that there were no displays of emotion from the deceased and that she merely surmised some agitation due to the size of deceased's handwriting on a memo to her asking her to set up an appointment which may or may not have been related to the contents of the memo. Furthermore, the requirement for medical evidence in support of the claimant's claim has not been met; the only medical evidence produced at the CCH weighs in favor of the preexisting heart disease, rather than work, being the causative factor. The burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Co. v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a).

The hearing officer did not err by finding that there had been a timely dispute of compensability. Section 409.021(c) expressly states that waiver is the consequence of the failure to contest compensability by the 60th day. Section 409.021(e) sets out the consequence of the failure to pay or dispute by the seventh day, and it is limited to an administrative penalty. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE. 124.6(b) (Rule 124.6(b)) additionally clarifies that, in the case of death benefits as opposed to temporary income benefits (TIBS) or lifetime income benefits (LIBS), a carrier has sixty days to dispute compensability of the death. Under either statutory construction, rule construction, or previous decisions of the Appeals Panel (Texas Workers' Compensation Commission Appeal No. 92532, decided November 13, 1992, and others following), claimant's contention that the carrier waived its right to dispute compensability of the heart attack by not paying or filing a TWCC-21 in seven days cannot be upheld.

In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as

to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

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Susan M. Kelley  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Christopher L. Rhodes  
Appeals Judge