

## APPEAL NO. 002210

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on August 24, 2000. With respect to the issues before him, the hearing officer determined that (decendent) sustained a compensable injury on \_\_\_\_\_, resulting in his death on the same day; that the respondent/cross-appellant (claimant/beneficiary) is an eligible beneficiary of the decendent; that decendent's daughter, was an eligible beneficiary from \_\_\_\_\_ to November 15, 1998; and that decendent's grandson, was not an eligible beneficiary. In its appeal, the appellant/cross-respondent (carrier) challenges the hearing officer's determination that the decendent sustained a compensable injury that resulted in his death. It further challenges the beneficiary determinations but only to the extent that there can be no eligible beneficiaries if there is not a compensable death claim. In her response to the carrier's appeal, the claimant/beneficiary urges affirmance. In her cross-appeal, the claimant/beneficiary contends that the hearing officer erred in not adding an issue as to whether the carrier waived its right to contest compensability under Downs v. Continental Cas. Co., No. 04-99-00111-CV (Tex. App.-San Antonio January 26, 2000) and the decision on rehearing Downs v. Continental Cas. Co., No. 04-99-00111-CV (Tex. App.-San Antonio August 16, 2000). In its response to the claimant's cross-appeal, the carrier does not address the question of whether the issue should have been added; rather, it contends that the decision in Downs should not be applied.

### DECISION

Affirmed.

There was substantial evidence presented in this case; however, we will only summarize those facts most germane to our decision. The parties stipulated that the decendent died on \_\_\_\_\_. It is undisputed that the decendent was an employee of (employer) on that date and that he was found dead at his office on \_\_\_\_\_ from a gunshot wound to the head. The question is whether the decendent committed suicide or was the victim of a homicide.

The claimant/beneficiary testified that on \_\_\_\_\_, the decendent came home for lunch to deliver some money for one of their children who needed to borrow it for a deposit on an apartment. She stated that as he left to return to work he told her not to make dinner because he would take her out to eat that evening. She stated that she called the decendent at work at about 5:30 p.m. and did not get an answer and that he likewise did not answer his cell phone or respond to her page. She testified that she became alarmed when the decendent still had not come home by 9:00 to 9:30 p.m.; thus, she called her sister who offered to have her husband, Mr. V, go out to look for the decendent.

Mr. V testified that his daughter drove him to the decendent's office and she waited in the car while Mr. V went into the office. Mr. V stated that he went inside the office and found the decendent laying face up in a pool of blood. Mr. V testified that he called 911 and

that the police arrived within 10 to 15 minutes after his call. Mr. V stated that there was no gun present at the scene and that he also did not see a suicide note. In addition, Mr. V maintained that he was only in the office for about two minutes; that after he called the police, he waited outside for them to arrive. Mr. V specifically denied that he removed anything from the office. Both the claimant/beneficiary and Mr. V testified that the decedent was not having any financial difficulty; that he was not treating for depression; that he did not own a gun; and that shortly before his death the decedent had finalized preparations and paid for a trip that they were going to take to Las Vegas. The claimant/beneficiary further testified that the decedent's wallet, watch and briefcase were not present when the decedent's body was found and have never been recovered and that the decedent kept an envelope of petty cash in his briefcase.

Ms. V testified that she drove her father, Mr. V, to the decedent's office on \_\_\_\_\_. Ms. V stated that her father was in the office for about five minutes and then he came outside to tell her what had happened. Ms. V testified that her father did not have anything with him when he went into the office or when he came out. She maintained that neither she nor Mr. V left the premises prior to the time the police arrived and that her father did not leave her presence while they waited for the police to arrive because she was "pretty shaken up."

Detective D testified that he was the lead investigator of the decedent's death for the sheriff's office. Detective D testified that his tentative conclusion was that the decedent's death was a suicide. Detective D explained that his conclusion would remain tentative until his supervisor determined that the suicide judgment should become official and/or until the medical examiner's office changed the outcome of the autopsy from homicide to suicide. Detective D explained that the decedent's body presented the greatest evidence to support his conclusion that the decedent committed suicide, as opposed to being the victim of a homicide. Detective D explained that there was a "hard contact" gunshot wound to the left side of the decedent's head directly above his left ear and that the powder and soot discharged from the firearm was "tattooed" on the exterior and interior of the decedent's skin, on the exterior and interior of the decedent's skull, and on the dura sac around the brain. He stated that he had not previously or subsequently seen the powder and soot penetrate to that extent. In addition, Detective D stated that the trajectory of the bullet was level and went straight across the head, which he explained was a "classic suicide pattern." In addition, Detective D stated that there was a deep laceration on the back of the decedent's head, which he believed had been made by the decedent's landing on the gun as he fell to the floor and that he found an indentation in the vinyl-covered plywood floor at the site where the gun would have fallen. Detective D acknowledged that it concerned him that the decedent would have had to shoot with his left hand despite the fact that he was right-handed and that neither a gun nor a suicide note were found at the scene; however, he stated that he believed the crime scene had been altered to remove the gun and the note, acknowledging that the correctness of his conclusion that the decedent committed suicide is dependent upon the existence of such alteration of the crime scene.

The autopsy report and the death certificate conclude that homicide was the manner of death. Detective D testified that the doctor who performed the autopsy agreed with him that there were strong indicators of suicide; however, the death was ruled a homicide to assist law enforcement in the event that at a later date it was determined that the death was a homicide and someone was charged with the crime. On cross-examination, Detective D stated that the medical examiner made certain allowances to give a conclusion more favorable to law enforcement; however, he noted that such action was rare and stated that if this case had clearly been a suicide, the medical examiner would have listed suicide as the manner of death.

The claimant/beneficiary had the burden to prove that the decedent's death resulted from a compensable injury sustained on \_\_\_\_\_. That is, she had the burden to prove that the manner of death was a homicide and not a suicide. That presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165(a). The hearing officer resolves conflicts and inconsistencies in the evidence, decides what weight to give to the evidence, and determines what facts the evidence has established. Texas Employers Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To this end, the hearing officer as fact finder may believe all, part, or none of the testimony of any witness. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and manifestly unjust. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

On appeal, the carrier contends that the hearing officer's determination that the decedent died as a result of a compensable injury is against the great weight of the evidence, arguing that the claimant/beneficiary did not sustain her burden of proving that the decedent was the victim of a homicide as opposed to a suicide. We cannot agree that Detective D's testimony and his conclusion that the decedent committed suicide is the great weight of the evidence contrary to the hearing officer's decision. Rather, it is conflicting evidence, which the hearing officer had the responsibility to weigh. The hearing officer was acting within his province as the fact finder in discounting that evidence based upon his observation that "[t]here was sufficient corroborating factors to show a homicide, whereas the suicide theory could only be supported by the allegation of an altered crime scene." Our review of the record does not demonstrate that the hearing officer's determination that the decedent sustained a compensable injury that resulted in his death is so against the great weight of the evidence as to be clearly wrong or manifestly unjust; therefore, no sound basis exists for us to reverse that determination on appeal. Pool; Cain.

The success of the carrier's challenge to the determination that the claimant/beneficiary was an eligible beneficiary and that his daughter was an eligible beneficiary for the period from \_\_\_\_\_ to November 15, 1998, is dependent upon the success of its argument that the decedent did not sustain a compensable death. Given our affirmance of that determination, we likewise affirm his determination of the eligible beneficiaries.

Finally, we consider the claimant/beneficiary's cross-appeal that the hearing officer erred in refusing to add the issue of whether the carrier had waived its right to contest compensability under Downs, *supra*. The claimant/beneficiary timely filed a response to the benefit review conference (BRC) report stating that the carrier waiver issue had been discussed at the BRC but that the benefit review officer failed to certify that issue for resolution at the hearing. In its reply to the claimant's response to the BRC report, the carrier acknowledged that the issue had been discussed at the BRC. In ruling on the claimant/beneficiary's request to add the issue, the hearing officer stated that the issue the claimant/beneficiary proposed was a "nonissue" and that the request to add the issue was denied because Downs was never intended to apply retroactively. It was error for the hearing officer to focus on the merits of the issue rather than looking to see if the claimant/beneficiary had satisfied the procedural requirements to add an issue in making his ruling. That is, it is inappropriate to refuse to add an issue based upon a determination that the issue will ultimately be resolved against the party seeking to add it. In this instance, it is undisputed that the Downs waiver issue was discussed at the BRC. Thus, the hearing officer erred in not adding the issue. Texas Workers' Compensation Commission Appeal No. 981770, decided September 21, 1998; Texas Workers' Compensation Commission Appeal No. 980683, decided May 21, 1998. Nonetheless, we will not reverse and remand in this instance because based on directives from the Executive Director of the Texas Workers' Compensation Commission (Commission) and the Director of the Hearings Division, Downs is not to be considered precedent and the hearings staff have been instructed to follow the Commission's position that the carrier has 60 days to contest compensability. See Texas Workers' Compensation Commission Appeal No. 001717, decided September 7, 2000. However, for the purposes of satisfying the requirement to exhaust her administrative remedies, the waiver issue should be considered to have been added and resolved against the claimant/beneficiary.

The hearing officer's decision and order are affirmed.

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Elaine M. Chaney  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge