

APPEAL NO. 011542-S
FILED AUGUST 23, 2001

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 May 16, 2001, with the record closing on May 29, 2001. The hearing officer is to determine whether the death of (decedent) resulted from his compensable injury of _____, and the identity of his beneficiaries. The hearing officer determined that the decedent's death on _____, was caused by a massive pulmonary embolus, which resulted from the compensable injury he sustained to his left lower extremity on _____. She also determined that the decedent's beneficiaries are respondent/cross-appellant PR, his wife at the time of his death; his children by PR, namely, respondents AR, MR, and JR; and his children by a former wife, namely, ADR, JAR, and CR. The appellant/cross-respondent (carrier) has appealed, asserting that the determination that the decedent's death resulted from a compensable injury is against the great weight of the evidence. The carrier also asserts error in the hearing officer's determination that CR is an eligible beneficiary because CR, who is over 18 years of age but under 25, did not attend college classes after graduating from high school. The carrier further asserts error in the hearing officer's determination that JR is an eligible beneficiary because she was not yet born at the time of the decedent's death. In their response, ADR, JAR, and CR urge the sufficiency of the evidence to support the challenged compensability determination. Their response does not address the issues of the beneficiary status of CR and JR. AR, MR, and JR did not file a response to the carrier's appeal. PR has filed a "Request for Review In Part" which first urges the sufficiency of the evidence to support the challenged compensability determination and then asserts error by the hearing officer in failing to decide that the carrier waived the right to dispute compensability. There was no disputed issue before the hearing officer concerning carrier waiver and the Appeals Panel does not consider issues raised for the first time on appeal. See Texas Workers' Compensation Commission Appeal No. 91057, decided December 2, 1991. The Appeals Panel has previously commented on the applicability of the decision in Downs v. Continental Casualty Company, 32 S.W.3d 260 (Civ. Ct. App. - pet. Filed). Texas Workers' Compensation Commission Appeal No. 010335, decided March 29, 2001; Texas Workers' Compensation Commission Appeal No. 010003, decided February 12, 2001. No responses were filed to this appeal.

DECISION

Affirmed.

CAUSE OF DEATH

The essential issue below was whether the decedent's death from pulmonary embolus resulted from an ordinary disease of life, e.g. thrombosis, or from the work-related injury to the claimant's left leg on _____. The parties stipulated that on _____, the decedent sustained a compensable injury and that he died on _____. The evidence concerning

the mechanism of the injury the decedent sustained to his left calf area on _____, in an apparently unwitnessed accident, is not uniform. A clinic record of April 13, 1999, merely identifies the treating physician as Dr. M and the diagnosis as "Sprains And Strains of Knee and Leg," and states certain physical restrictions, including the use of a cane as needed. An Initial Medical Report (TWCC-61) dated April 13, 1999, from Dr. D does not state a diagnosis as such but does state the history as the decedent's having injured his left calf while loading a wheelbarrow on a dock and sustaining "an acute injury to the left calf." This report further states that the decedent denied a previous history of injury to this body part; that there was swelling and ecchymosis of the left calf, and motion and strength were decreased because of pain; that x-rays of the tibia were normal; that the decedent was treated with pain and anti-inflammatory medications, and given Ace wraps and crutches; and that he was taken off work completely until April 20 and released for light duty effective April 21, 1999.

The April 25, 1999, autopsy report of Dr. B states that he found, among other things, massive pulmonary emboli in the right and left pulmonary arteries extending into the segmental arteries, and multiple thrombi in deep saphenous veins of the left lower extremity. The report concluded that the decedent died as a result of massive pulmonary emboli and that the manner of death was "natural." The death certificate signed by Dr. B on April 26, 1999, states the immediate cause of death as "pulmonary emboli" and the manner of death as "natural." It does not state how the injury occurred. An amendment to that certificate signed by Dr. B on August 31, 2000, states the manner of death as "accident" and describes the occurrence of the injury as "collapsed outside after working on vehicle." No evidence was adduced to account for the amendment.

The August 23, 1999, report to the carrier from Dr. A, who reviewed the records for the carrier, states that the obvious diagnosis of deep venous phlebitis was not considered in the decedent's case and that this phlebitis was the probable cause of the originating thrombotic phenomenon which ultimately became the emboli in the pulmonary arteries which resulted in death. Dr. A further stated that in the absence of any further information, he "had to accept the fact that the patient died from a pulmonary embolus related to a deep venous phlebitis that may not have occurred as direct relation to his job, particularly on the basis that the patient did not do anything different from his usual capacity work." The remainder of this report, largely illegible, indicates that Dr. A had little, if any, information about the decedent's work.

Dr. F, a specialist in emergency room medicine who reviewed the decedent's records for the carrier, testified about a number of risk factors for the formation of thrombi and their migration to other areas of the body (becoming embolic), including stasis, infection, injury to a vessel wall from trauma, and obesity, the latter being a strong risk factor in the decedent's case. He stated that while minor injuries such as a sprain/strain or bump would not injure a blood vessel wall and cause a thrombus, a substantial injury or serious trauma which injures a vessel wall, such as a broken bone, a very deep bruise, or motor vehicle accident injuries, could do so. He said he understood that the decedent was "working with a wheel barrow and then said his leg hurt him" and that pushing a wheelbarrow up a ramp, which was the history

in a medical record, could produce pain from existing phlebitis similar to the Homan's Test used to diagnose phlebitis. In Dr. F's opinion, no medical record showed the occurrence of such an injury at work as would cause thrombosis as distinguished from existing thrombosis becoming symptomatic, and that the decedent's existing thrombosis manifested itself on the job but was not caused by the job. Dr. F felt that a thrombus from a deep saphenous blood vessel in the left leg broke off and migrated to the lungs, where it lodged and grew until it plugged up the pulmonary vessels. However, Dr. F agreed on cross-examination that there was not evidence in the medical records that the decedent had thrombi or clots in the left leg prior to April 13, 1999, but said his opinion was an "educated guess" based on the autopsy report. He also stated that it was "possible" that if the decedent sustained an acute injury to his left leg and developed a thrombus, it could result in his death two weeks later.

The carrier challenges the findings that the decedent sustained a compensable injury on _____, in the form of thrombosis of the left lower extremity, that the cause of death was a massive pulmonary embolus, and that the development of an embolus is a natural and direct result of the compensable injury, and the conclusion that the decedent's death is a result of his _____, compensable injury. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence, including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

BENEFICIARY STATUS OF CR

Section 408.182, which provides for the distribution of death benefits, defines "eligible child" to include a minor child, a child who is enrolled as a full-time student in an accredited educational institution and is less than 25 years of age, and a child who is a dependent of the deceased and whose parent is not an eligible child. Section 408.183, which addresses the duration of death benefits, provides in Subsection (d) that a child who is eligible for death benefits because, on the date of the employee's death the child is enrolled as a full-time student in an accredited educational institution, is entitled to receive or to continue to receive benefits until the date the child ceases, for a second consecutive semester, to be enrolled as a full-time student in an accredited educational institution. See also Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.4(f) (Rule 132.4(f)) and Rule 132.8.

CR testified that she was born on March 25, 1981; that on the date her father died she was 18 years of age and a junior in high school; and that she graduated from high school on May 24, 2000. She further stated that she "enrolled" at a college as a part-time student for the Fall 2000 and Spring 2001 semesters but failed to complete the second part of a school test

required before she could attend classes and that she had not attended any college classes and has been working as a cashier.

The hearing officer found that on the date of the decedent's death, CR was 18 years of age and was enrolled as a full-time student in an accredited educational institution and that the date she ceased for the second consecutive semester to be enrolled as a full-time student was January 16, 2001. The hearing officer explained the latter date, stating that most classes begin mid-month. The hearing officer's determinations concerning CR's status as a beneficiary are sufficiently supported by the evidence. She was 18 and a full-time high school student when her father died. She "enrolled" as only a part-time student at the college but never attended a class and so the beginning of the Spring 2001 semester was the date she ceased for the second consecutive semester to be enrolled as a full-time student.

BENEFICIARY STATUS OF JR

The birth certificate reflects that JR was born on July 5, 1999, and that the decedent was her father. The hearing officer found that on the date of the decedent's death, JR was "the natural daughter and minor child" of the decedent. In her discussion of the evidence, the hearing officer states that although JR was not yet born on the date of her father's death, she was nonetheless a minor child. The carrier contends that the date of the decedent's death fixes the status of persons as beneficiaries, citing Freeman v. Texas Compensation Insurance Company, 603 S.W.2d 186 (Tex. 1980), and that "[u]nborn children cannot vest in property or rights." The hearing officer's discussion notes that, though not a holding, the decision in Foreman v. Security Insurance Company of Hartford, 15 S.W.3d 214 (Ct. App.-Texarkana 2000), mentioned in the factual recitation that "[a]fter Foreman died, a natural child, _____, was born, who also became eligible for workers' compensation benefits." Foreman concerned the status of step-children of the deceased employee as beneficiaries for workers' compensation death benefits.

While not finding a Texas case on point, research indicates that certain other jurisdictions include unborn, after-born, or posthumous children as beneficiaries for purposes of workers' compensation death benefits, particularly where "child" is defined in the statute to include such. See Annotation, Workmen's Compensation: Posthumous Children and Children Born After Accident as Dependents, 18 A. L. R. 900. *And see* Texas Employees Insurance Association v. Shea, 410 F.2d 56 (5th Cir. 1969), where the court construed the Longshoremen's and Harbor Workers' Compensation Act which includes posthumous child in the definition of child. The 1989 Act defines "child" to mean "a son or daughter" and to include "an adopted child or a stepchild who is a dependent of the employee." Section 401.011(7). As can be seen above, the definition of "eligible child" in Section 408.182 does not specifically include an unborn child nor does it specifically include an adopted child, a stepchild, or an acknowledged illegitimate child. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.4 (Rule 132.4)) does provide for adoptive and stepchildren, however, but is silent regarding unborn children. Rule 132.4(a) states that a child eligible for death benefits is the

son or daughter of a deceased employee, including an adoptive child, and including a dependent stepchild, who meets any of the qualifications set out in the 1989 Act.

We are satisfied that the hearing officer has not committed legal error in determining that JR is a legal beneficiary of the decedent for the purpose of receiving death benefits under the 1989 Act. We are mindful of the following well-settled doctrine concerning the construction of workers' compensation legislation recently iterated by the Texas Supreme Court in Albertson's, Inc. v. Sinclair, 984 S.W.2d 958, 959 (Tex. 1999), as follows: "We liberally construe workers' compensation legislation to carry out its evident purpose of compensating injured workers and their dependents. [Emphasis Supplied.]"

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge