

APPEAL NO. 110391
FILED JUNE 2, 2011

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 February 22, 2011. The hearing officer determined that: (1) the compensable injury of _____, did not include the death of the deceased on (date); (2) the appellant/cross-respondent (carrier) did not waive the right to contest compensability of the deceased's death by not timely contesting the death in accordance with Sections 409.021 and 409.022; however, the carrier may not raise an issue of compensability or liability for any death benefits that have accrued because it did not timely file notice denying the death claim pursuant to 28 TEX. ADMIN. CODE § 132.17(a) and (b) (Rule 132.17(a) and (b)), and consequently the carrier waived its right to deny liability for death benefits; and (3) (BES) and (MO) are proper legal beneficiaries of deceased, entitling them to death benefits.

The carrier appeals the hearing officer's determination that it may not raise an issue of compensability or liability for any death benefits that have accrued because it did not timely file notice denying the death claim pursuant to Rule 132.17(a) and (b) and consequently has waived its right to deny liability for death benefits. Respondent 1/cross-appellant (claimant beneficiaries) responds, urging affirmance on that issue, but also cross-appeals the hearing officer's determination that the compensable injury of _____, did not include the death of the deceased on (date). The claimant beneficiaries also allege the hearing officer erred in determining the duration of the death benefits to which (MO) is entitled. The appeal file did not contain a response from respondent 2 (Subsequent Injury Fund) to either the carrier's appeal or the claimant beneficiaries' cross-appeal. The appeal file also did not contain a response from the carrier to the claimant beneficiaries' cross-appeal.

The determination that the carrier did not waive the right to contest compensability of the deceased's death by not timely contesting the death in accordance with Sections 409.021 and 409.022, and the determination that (BES) and (MO) are proper legal beneficiaries of the deceased has not been appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

CARRIER WAIVER PURSUANT TO RULE 132.17(a) AND (b)

The carrier argued in its appeal that the Act does not provide a "death penalty" waiver sentence to the carrier when it does not dispute a death which allegedly resulted two years after the compensable injury and was not associated with the compensable injury, and that the Texas Department of Insurance, Division of Workers' Compensation

(Division) acted improperly in passing Rule 132.17. The carrier also contended the Texas Supreme Court pointed out in State Office of Risk Management v. Lawton, 295 S.W.3d 646 (Tex. 2009) that Rule 124.3 does not apply to disputes of the extent of the compensable injury.

We have held that the Appeals Panel does not have the authority to decide the validity of Division rules. See Appeals Panel Decision (APD) 030137, decided February 20, 2003, and APD 022186, decided October 4, 2002. While the carrier is correct that the Lawton case holds Rule 124.3 does not provide a waiver for disputes of the extent of the compensable injury, Rule 132.17 does provide a waiver provision for failure to dispute the compensability or liability of a death. See *Rule 132.17(a) and (b), discussed infra*. The hearing officer's determination that the carrier may not raise an issue of compensability or liability for any death benefits that have accrued because it did not timely file notice denying the death claim pursuant to Rule 132.17(a) and (b) and consequently waived its right to deny liability for death benefits is supported by the evidence and is affirmed.

DEATH OF DECEASED

The evidence reflects that the deceased sustained a compensable injury to his head and neck on _____. The evidence also reflects that the deceased died on (date). The deceased's wife, (BES), testified she believed the cause of death was due to seizures the deceased experienced after the compensable injury; however, the hearing officer found the deceased's death was caused by hypertensive and arteriosclerotic cardiovascular disease. Although the evidence supports the hearing officer's finding, we must also address waiver regarding death benefits under Rule 132.17.

Rule 132.17(a) provides that upon being notified of a death resulting from an injury, the carrier shall investigate whether the death was a result of the injury, and if the carrier has not already done so in compliance with Rule 124.3 due to the injury being reported separately, conduct an investigation relating to the compensability of the death, the carrier's liability for the death, and the accrual of benefits. Rule 132.17(b) provides that if the carrier believes that it is not liable for the death, or that the death was not compensable, the carrier shall file the notice of denial of a claim in the form and manner required by Rule 124.2. Rule 132.17(b) further provides that if the notice of denial is not filed by the 60th day as required, the carrier may not raise an issue of compensability or liability, and is liable for any benefits that accrued and shall initiate benefits in accordance with this section.

In the instant case, the hearing officer found the carrier received notice of the deceased's death on March 25, 2010.¹ This finding was not appealed. The hearing

¹ We note that although the hearing officer stated in her finding of fact that the notice the carrier received of the deceased's death on March 25, 2010, was an extent of injury notice and not a report of injury, the evidence reflects that the carrier received a copy of the Notice of Fatal Injury or Occupational Disease and Claim for Compensation for Death Benefits (DWC-42).

officer also found that the carrier's notice of denial of the claim for death benefits, filed on June 7, 2010, was not timely as it was not filed within 60 days of receiving notice of the death claim pursuant to Rule 132.17(a) and (b). This finding is supported by the evidence. Therefore, although the evidence supports the factual determination that the deceased's death was not the result of the compensable injury sustained on _____, the carrier's failure to timely file a notice of denial of the claim prevents the carrier from disputing an issue of compensability or liability for the deceased's death. Accordingly, we reverse the determination that the compensable injury of _____, did not include the death of the deceased on (date), and render a new decision that by virtue of carrier waiver pursuant to Rule 132.17(a) and (b) the compensable injury of _____, includes the death of the deceased on (date), and the carrier is liable for any benefits that accrued as a result of the deceased's death.

DEATH BENEFITS

The following issue was to be determined by the hearing officer: "[a]re (BES) and (MO) proper legal beneficiaries of [d]eceased entitling them to death benefits?"

The hearing officer noted in the Decision portion of her decision and order the following:

(BES), spouse, is entitled to death benefits for life. She is entitled to 50% of the weekly benefits which will convert to 100% when the weekly benefits to (MO) cease. If (BES) remarries, her entitlement to death benefits ends on that date; however, from that date, she will be paid for 104 weeks of death benefits in a lump sum.

(MO), dependent step daughter of [d]eceased, is entitled to death benefits for 364 weeks. She is entitled to 50% of the weekly benefits.

The parties did not litigate the amounts of death benefits to which the claimant beneficiaries may have been entitled. By adding this language the hearing officer exceeded the scope of the issue. Therefore, we reverse the hearing officer's determination by striking the above-mentioned language in the Decision as surplusage that exceeded the scope of the issue before the hearing officer.

SUMMARY

We affirm the hearing officer's determination that the carrier may not raise an issue of compensability or liability for any death benefits that have accrued because it did not timely file notice denying the death claim pursuant to Rule 132.17(a) and (b) and consequently has waived the right to deny liability for death benefits.

We reverse the hearing officer's determination that the compensable injury of _____, did not include the death of the deceased on (date), and render a new decision that the compensable injury of _____, includes the death of the deceased on (date), by virtue of carrier waiver pursuant to Rule 132.17(a) and (b).

We reverse that portion of the hearing officer's determination discussing the amount and duration of death benefits (BES) and (MO) are entitled to, and render a new decision by striking the following language from the hearing officer's decision:

(BES), spouse, is entitled to death benefits for life. She is entitled to 50% of the weekly benefits which will convert to 100% when the weekly benefits to (MO) cease. If (BES) remarries, her entitlement to death benefits ends on that date; however, from that date, she will be paid for 104 weeks of death benefits in a lump sum.

(MO), dependent step daughter of [d]eceased, is entitled to death benefits for 364 weeks. She is entitled to 50% of the weekly benefits.

The true corporate name of the insurance carrier is **LIBERTY INSURANCE CORPORATION** and the name and address of its registered agent for service of process is

**CORPORATION SERVICES COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701.**

Carisa Space-Beam
Appeals Judge

CONCUR:

Cynthia A. Brown
Appeals Judge

Margaret L. Turner
Appeals Judge