

APPEAL NO. 071277-s  
FILED OCTOBER 18, 2007

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on May 14, 2007. The disputed issues were:

- (1) Does the compensable injury of \_\_\_\_\_, include the progressive dementia that resulted in the Employee's death on January 16, 2006?;
- (2) Is VP entitled to reimbursement of burial benefits from the carrier, and if so, what is the amount?; and
- (3) Does the approval of the Benefit Dispute Settlement (DWC-25) preclude the claimant from pursuing death benefits?

For good cause, the following issue was added by the hearing officer:

- (4) Does the Texas Department of Insurance, Division of Workers' Compensation (Division) have jurisdiction to render a decision on the merits concerning the above listed disputed issues?

The hearing officer resolved the disputed issues by deciding that: (1) the Division has jurisdiction to resolve the disputed issue concerning the extent of injury; (2) the compensable injury of \_\_\_\_\_, included progressive dementia which resulted in the death of the deceased on January 16, 2006; and (3) due to the execution and approval of a DWC-25 the Division does not have jurisdiction to resolve the disputed issues concerning death benefits including burial benefits.

The appellant/cross-respondent (claimant) appealed, disputing the hearing officer's determination that the Division does not have jurisdiction to resolve the disputed issues concerning death and burial benefits. The claimant argues that both parties agreed that the Division has jurisdiction over the disputed issues. The respondent 1/cross-appellant (self-insured) also appealed, contending that the hearing officer added the issue of whether the Division has jurisdiction to resolve the disputed issues without notice to the parties and without opportunity for the parties to present position statements and arguments on this issue. The self-insured additionally appealed the determinations that the Division did not have jurisdiction to resolve the disputed issues concerning death and burial benefits and that the compensable injury included progressive dementia. The self-insured contends that the determination regarding the extent of injury and cause of death were precluded by the express terms and legal effect of the approved DWC-25. Although properly notified of the CCH, the respondent 2 (Subsequent Injury Fund (SIF)) did not appear. The SIF did not respond to either the appeal of the claimant or self-insured.

## DECISION

Affirmed in part and reversed and rendered in part.

### FACTUAL SUMMARY

The parties stipulated that the deceased sustained a compensable injury on \_\_\_\_\_; that the deceased died on January 16, 2006; and that the claimant is the widow of the deceased. The death certificate of the deceased was in evidence and listed the cause of death as progressive dementia since a closed head injury on \_\_\_\_\_. At issue was whether the compensable injury included the progressive dementia that resulted in the decedent's death; whether the claimant was entitled to reimbursement of burial benefits from the self-insured; and whether the approval of the DWC-25 precluded the claimant from pursuing death benefits.

### JURISDICTION

A court must notice, even sua sponte, the matter of its own jurisdiction, for jurisdiction is fundamental in nature and may not be ignored. Lamka v. Townes, 465 S.W.2d 386 (Tex.Civ.App.-Amarillo 1971, writ ref'd n.r.e.) The hearing officer found good cause for adding the jurisdiction issue. We have reviewed the record and we perceive no abuse of discretion on the part of the hearing officer adding the issue of whether the Division has jurisdiction to render a decision on the merits of the disputed issues on her own motion. Morrow v. H.E.B. Inc., 714 S.W.2d 297 (Tex. 1986).

The hearing officer noted that the disputed issues concerning death benefits, including burial benefits, do not involve the resolution of a medical benefit dispute or seek enforcement of the terms of the DWC-25 and therefore found she had no jurisdiction to decide the disputed issue regarding death benefits, including burial benefits. Section 401.011(40) defines "settlement" as a final resolution of all the issues in a workers' compensation claim that are permitted to be resolved under the terms of this subtitle. Section 401.011(11) defines "compensation" as payment of a benefit. Section 401.011(5) defines "benefit" as a medical benefit, an income benefit, a death benefit, or a burial benefit based on a compensable injury. The determination of "benefit disputes" are adjudicated by the Division's Hearings Division.

28 TEX. ADMIN. CODE § 140.1 (Rule 140.1) provides that:

1. Benefit dispute--A disputed issue arising under the Texas Workers' Compensation Act (the Act) in a workers' compensation claim regarding compensability or eligibility for, or the amount of, income or death benefits.
2. Benefit proceeding--A proceeding pursuant to the Act, Chapter 410, conducted by a presiding officer to resolve one or more benefit disputes. Benefit proceedings include benefit review conferences, benefit contested case hearings, appeals, and, after January 1, 1992, arbitration.

The issue of whether or not the compensable injury of \_\_\_\_\_, included the progressive dementia that resulted in the death of the deceased was not an issue that was previously determined by the Division, nor was the entitlement to burial benefits or the right of the claimant to pursue death benefits. The Division has been given statutory authority to determine the liability of an insurance carrier for compensation for an injury or death. See Section 410.002 and Section 410.251. We reverse the hearing officer's determination that due to the execution and approval of a DWC-25, the Division does not have jurisdiction to resolve the disputed issues concerning death benefits including burial benefits. We render a new decision that the Division does have jurisdiction to resolve the disputed issues concerning death benefits including burial benefits.

### **EXTENT OF INJURY**

The hearing officer's decision that the compensable injury of \_\_\_\_\_, includes the progressive dementia that resulted in the claimant's death on January 16, 2006, is supported by sufficient evidence and is affirmed.

### **SETTLEMENT**

In evidence was a DWC-25, which was executed by the legal representatives of the self-insured and the deceased, on December 9 and December 10, 2004, respectively. The claimant signed the DWC-25 on behalf of the deceased, under the authority of a Statutory Durable Power of Attorney that had previously been executed by the deceased. The DWC-25 was approved by the Division on December 29, 2004. The claimant signed the DWC-25 as follows: [decedent's name] by [claimant name] attorney in fact.

The DWC-25 provides in part:

- “1. The compensable injury of \_\_\_\_\_, includes a traumatic brain injury with cognitive impairment and cortical atrophy with effects on memory, cognitive functions and activities of daily living.
2. The need for assisted living care is related to the compensable injury and [s]elf-insured will bear the fair and reasonable cost of that care....
5. All income benefits will end on March 23, 2005, a date 401 weeks from the date of the injury. Except as provided in this agreement, [c]laimant and his beneficiaries are not entitled to any additional income benefits including lifetime income benefits and death benefits....

THIS SETTLEMENT IS THE FINAL RESOLUTION OF ALL ISSUES IN THIS CLAIM AND THE PARTIES WAIVE THEIR RIGHTS TO SUBSEQUENT [DIVISION] PROCEEDINGS, OTHER THAN THOSE NECESSARY TO RESOLVE

MEDICAL BENEFIT DISPUTES OR TO ENFORCE COMPLIANCE WITH THE TERMS OF THIS SETTLEMENT.”

The self-insured contends that the terms of the approved DWC-25 and its legal effect preclude consideration of whether the compensable injury extended to include progressive dementia and whether the decedent’s death was a direct and natural result of the compensable injury. Further, the self-insured argues that the DWC-25 on its face indicates the intent of the parties by the settlement to preclude payment of death benefits.

Death benefits do not vest until the death of an employee which results from a compensable injury. See Freeman v. Texas Compensation Insurance Co., 603 S.W.2d 186, 190 (Tex. 1980); and Garrett v. Texas Employers Ins. Ass’n, 226 S.W.2d 663 (Tex.Civ.App.-San Antonio 1949, writ ref’d). There is no evidence that the claimant signed the DWC-25 on her own behalf. She signed the DWC-25 on behalf of the deceased pursuant to a Statutory Durable Power of Attorney. In Elizondo v. Tex. Natural Res. Conservation Comm’n, 974 S.W.2d 928, 931 (Tex.App.-Austin 1998, no pet.) the Court noted that an individual acting in an official or representative capacity is, in law, a distinctly separate individual from the same person acting as an individual.

The Eastland Court of Appeals stated in Maryland Casualty Co. v. Stevens, 55 S.W.2d 149 (Tex.Civ.App.-Eastland 1932, writ ref’d):

The Workmen’s Compensation Law, in no uncertain terms, creates a cause of action for compensation insurance in favor of the legal beneficiaries of a deceased employee for the death of the employee. That cause of action, for all practical purposes, is separate and distinct from the cause of action for compensation which the same statute just as certainly creates in favor of the injured employee [citations omitted]. These causes of action consist largely of common elements. They are each dependent upon the existence of the same accident, the same resulting injury, sustained in the course of employment. The only practical difference is that the employee’s individual cause of action covers the full extent of the injury except his death, and the cause of action of the beneficiaries is for the death only. Notwithstanding the near approach to identity of these two causes of action, they are so distinct that *the employee can, by no act or deed, release or affect the cause of action belonging to the legal beneficiaries.* [Emphasis added.],

In American Motorists Ins. Co. v. Villagomez, 398 S.W.2d 742 (Tex. 1966), the Texas Supreme Court stated that:

It has long been settled in Texas that where death results from a compensable injury, a new cause of action for death benefits arises and vests in the legal beneficiaries of the decedent. This cause of action is

separate and distinct from the cause of action for compensation belonging to the injured employee during his life and which will, upon his death, vest in his legal beneficiaries the right to claim all compensation payments which had accrued at the time of his death but had not been paid.

The Court went on to state “the obvious intent is that no action can be taken by the employee during the period between the injury and the resulting death that would influence in any way, either positively or negatively, the rights of his beneficiaries to collect benefits by reason of his death.”

The courts have recognized that the legal beneficiaries have an independent cause of action separate from the injured employee and have stated that the injured employee can take no action that would negatively effect the rights of his beneficiaries to collect benefits by reason of his death. The rights of the legal beneficiary are not derivative but rather are created directly by statute. Section 408.181(a). We hold that the settlement by the decedent does not bar the claim of the decedent’s legal beneficiaries. See Swain v. Standard Acc. Ins. Co., 81 S.W.2d 258, affirmed by the Texas Supreme Court 109 S.W.2d 750. We reverse the hearing officer’s determination that due to the execution and approval of a DWC-25, the Division does not have jurisdiction to resolve the disputed issues concerning death benefits including burial benefits. We render a new decision that the approval of the DWC-25 does not preclude the claimant from pursuing death benefits.

### **BURIAL BENEFITS**

As explained above, the hearing officer erred by finding that the Division lacked jurisdiction to resolve the claimant’s claim for death benefits including burial benefits. The Funeral Purchase Agreement for the burial of the decedent was in evidence and reflected that the claimant paid \$7,238.00 for the burial of the decedent.

If the death of an employee results from a compensable injury that occurred before September 1, 1999, the carrier shall pay the lesser of the actual costs incurred for reasonable burial expenses or \$2,500.00. Section 408.186; Rule 132.13(b). We render a new decision that the claimant is entitled to reimbursement of burial benefits from the self-insured in the amount of \$2,500.00.

### **SUMMARY**

We affirm the hearing officer’s determinations that the Division has jurisdiction to resolve the disputed issue concerning extent of injury and that the compensable injury extends to include progressive dementia that resulted in the employee’s death on January 16, 2006. We reverse the hearing officer’s decision that due to the execution and approval of a DWC-25, the Division does not have jurisdiction to resolve the disputed issues concerning death benefits including burial benefits and render a new decision that the Division does have jurisdiction to resolve the disputed issues concerning death benefits including burial benefits. We render a new decision that the

approval of the DWC-25 does not preclude the claimant from pursuing death benefits. We render a new decision that the claimant is entitled to reimbursement of burial benefits from the self-insured in the amount of \$2,500.00.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**AW  
(ADDRESS)  
(CITY), TEXAS (ZIP CODE).**

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Margaret L. Turner  
Appeals Judge

CONCUR:

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Thomas A. Knapp  
Appeals Judge

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Veronica L. Ruberto  
Appeals Judge