In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00087-CV

TEXAS MUTUAL INSURANCE COMPANY, APPELLANT

V.

ROSA MENDEZ, APPELLEE

On Appeal from the 237th District Court
Lubbock County, Texas
Trial Court No. 2017-525,948, Honorable Les Hatch, Presiding

May 26, 2020

MEMORANDUM OPINION

Before PIRTLE and PARKER and DOSS, JJ.

Rosa Mendez, appellee, brought a claim for death benefits against the insurance carrier, Texas Mutual Insurance Company, appellant, that provided workers' compensation insurance to her son's employer. A hearing was held before a contested case hearing officer of the Texas Department of Insurance Division of Workers' Compensation (DWC). The hearing officer ruled in favor of Texas Mutual on the basis that Mendez's son was intoxicated at the time of the accident. After the DWC's Appeals Panel affirmed the hearing officer's determination, Mendez sought judicial review.

Following trial, a jury found that Mendez proved that her son was not intoxicated at the time of his injury. The trial court entered judgment in Mendez's favor, and Texas Mutual timely appealed. We reverse and remand the issue of attorney's fees to the trial court, but affirm the remainder of the judgment.

Factual and Procedural Background

Matthew Mendez worked for Venture Chemicals in Seagraves, Texas. While dumping some material into a mixing machine on November 14, 2014, Matthew's foot slipped and went into the machine, which then pulled him into the mixer causing his death. Following his death, a toxicology screen was performed that indicated that Matthew had marijuana metabolites in his blood at the time of his death.

Following Matthew's death, his mother, Mendez, brought a claim for death benefits against Venture's workers' compensation insurer, Texas Mutual. Texas Mutual denied Mendez's claim on the basis that Matthew was intoxicated at the time of the accident. A hearing was held before a DWC hearing officer who found that Matthew was intoxicated at the time of the accident. Mendez appealed the hearing officer's decision to the DWC Appeals Panel, which agreed with the hearing officer's determination that Matthew was intoxicated at the time of the accident. Mendez then filed her claim for judicial review, which included a claim for attorney's fees. Her death benefits claim was heard by a jury. Mendez presented the testimony of Daniel Miller, a coworker of Matthew's who witnessed the accident, and expert testimony from Dr. Sarah Kerrigan. Texas Mutual presented expert testimony from Dr. Nelson Avery. After hearing the evidence, the jury returned a unanimous verdict that Matthew was not intoxicated at the time of his death. After the trial, Mendez's attorney submitted written evidence to the trial court regarding the

attorney's fees he had charged to represent her in the case. In addition, Mendez's attorney requested that his future attorney's fees be commuted and paid in a lump sum based on the present value of 25 percent of the death benefits Mendez is to receive. Texas Mutual objected to Mendez's request to commute future attorney's fees. The trial court approved Mendez's claim for past attorney's fees and commuted her future attorney's fees to a lump sum based on the statutory limit on death benefits being payable to Mendez for 364 weeks.[1] Texas Mutual filed motions for judgment notwithstanding the verdict and new trial, which were overruled by operation of law. Texas Mutual then timely filed the instant appeal.

Texas Mutual presents five issues by its appeal. Its first issue contends that the jury's determination that Matthew was not intoxicated at the time of the accident was legally and factually insufficient. Texas Mutual's remaining four issues each address the award of attorney's fees to Mendez. Its second issue challenges the sufficiency of the evidence to support the award of attorney's fees when the only evidence of the fees was submitted to the trial court for an in camera inspection. Its third and fourth issues challenge the trial court's commutation of Mendez's attorney's fees. Texas Mutual's fifth issue is presented in the alternative and contends that the trial court erred in failing to grant Texas Mutual's request for a jury trial on the amount of attorney's fees.

Standard of Review

A challenge to the legal sufficiency of the evidence on an issue over which appellant did not have the burden of proof at trial, requires a demonstration that no

[1] Mendez is eligible for 364 weeks of death benefit payments as a dependent beneficiary of Matthew. *See* TEX. LABOR CODE ANN. § 408.183(g) (West Supp. 2019). We note that Texas Mutual has not brought forth a challenge regarding whether Mendez was a dependent of Matthew.

evidence supports the finding. *Lone Star Engine Installation Ctr., Inc. v. Gonzales*, No. 05-14-01616-CV, 2016 Tex. App. LEXIS 5006, at *15 (Tex. App.—Dallas May 11, 2016, pet. denied) (mem. op.) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)). In performing a legal sufficiency review, we are to review all of the evidence in the light most favorable to the verdict and indulge all reasonable inferences in the verdict's favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). The court must credit favorable evidence if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Id*. at 827. Ultimately, we must determine whether the evidence at trial was such that it would enable reasonable and fair-minded people to reach the verdict under review. *Id*.

When a party challenges the factual sufficiency of a finding on which he bore the burden of proof, he must "demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Saldana v. Williams*, No. 07-19-00001-CV, 2020 Tex. App. LEXIS 3171, at *5 (Tex. App.—Amarillo Apr. 15, 2020, no pet. h.) (mem. op.) (citing *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001)). In conducting a factual sufficiency review, a reviewing court must consider and weigh all the record evidence. *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406-07 (Tex. 1998). We may set aside the verdict only when it is so contrary to the great weight of the evidence as to be clearly wrong and unjust. *Id*. at 407. We may not substitute our own judgment for that of the jury, even if we would reach a different conclusion based on the evidence. *Id*.

Construing a statute, such as the Labor Code provisions relevant to the trial court's award of attorney's fees, presents issues of law that are reviewed de novo. *State Office*

of Risk Mgmt. v. Olivas, 509 S.W.3d 499, 503 (Tex. App.—El Paso 2016, no pet.). When construing a statutory provision, our primary focus is to give effect to legislative intent, which we determine based on the language of the statute, its legislative history, the objective sought, and the consequences that would flow from alternative constructions. *Id*. (citing *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000)). We look first and foremost to the language used in the statute. *Id*. (citing *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex. 2006)). We do not look to sources beyond the text of a statute unless the plain language of the statute would lead to absurd results. *Id*. (citing *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009)).

Intoxication

By its first issue, Texas Mutual contends that the evidence is legally and factually insufficient to support the jury's determination that Matthew was not intoxicated at the time of the accident resulting in his death. We disagree.

A workers' compensation insurance carrier is not liable for compensation if an injury occurs while the employee was in a state of intoxication at the time of the injury. TEX. LABOR CODE ANN. § 406.032(1)(A) (West 2015). Intoxication is statutorily defined as "not having the normal use of mental or physical faculties resulting from the voluntary introduction into the body of . . . a controlled substance . . . as defined by [s]ection 481.002, Health and Safety Code . . . ." *Id*. § 401.013(a)(2)(B) (West 2015). Unlike with alcohol, there is no test defined by statute that establishes per se whether a person has lost the use of his physical or mental faculties due to the ingestion of a controlled substance. *Am. Interstate Ins. Co. v. Hinson*, 172 S.W.3d 108, 115 (Tex. App.—Beaumont 2005, pet. denied). The standard for marijuana is relatively subjective. *Id*.

The issue in a compensation case involving an allegation of intoxication by a controlled substance is not whether the substance was, to some degree, in the claimant's body at the time of the accident, but rather the issue is whether the claimant was physically or mentally impaired at the time of the accident due to ingestion of the controlled substance. *Id*.

When the insurance carrier shows the voluntary ingestion of a controlled substance based on a blood or urine test, there arises "a rebuttable presumption that a person is intoxicated and does not have the normal use of mental or physical faculties." *Tex. Mut. Ins. Co. v. Havard*, No. 01-07-00268-CV, 2008 Tex. App. LEXIS 1614, at *7 (Tex. App.—Houston [1st Dist.] Mar. 6, 2008, no pet.) (mem. op.) (quoting TEX. LABOR CODE ANN. § 401.013(c)). An employee is generally presumed to be sober but, when the carrier rebuts the presumption of sobriety with probative evidence of intoxication, the burden shifts to the employee to prove that he was not intoxicated at the time of the accident. *Bituminous Fire & Marine Ins. Co. v. Ruel*, No. 07-12-00507-CV, 2014 Tex. App. LEXIS 6093, at *11 (Tex. App.—Amarillo June 4, 2014, pet. denied) (mem. op.). As applicable to the present case, because Matthew's blood tested positive for marijuana, Mendez bore the burden to prove Matthew was not intoxicated by a preponderance of the evidence at trial.

There is no dispute that Matthew's post-mortem blood tested positive for marijuana metabolites. At trial, Texas Mutual offered the testimony of Dr. Avery. Dr. Avery testified that Matthew's post-mortem blood test indicated a high level of marijuana in his system, leading him to conclude that Matthew was likely legally intoxicated at the time the accident occurred. Mendez called Dr. Kerrigan, who testified that, due to the nature of Matthew's

injuries, the results of the blood test are unreliable and should not be considered in determining whether Matthew was intoxicated at the time of the accident. While the experts disagreed in a mutually exclusive manner, we are not to invade the province of the jury to determine the credibility of witnesses, the weight to be given their testimony, and whether to accept or reject all or part of their testimony. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

Mendez also offered the testimony of Daniel Miller, a coworker of Matthew who witnessed the accident. Miller, who was incarcerated at the time of the trial, testified by video that Matthew's shift started at 6:00 a.m. on the day of the accident, which occurred around 11:00 a.m. He testified that he and Matthew had climbed the ladder to the top of the industrial blender where they were standing about two feet apart so that they could dump lint into the blender. Miller's testimony regarding Matthew's condition was as follows:

> Q. But were you allowed to use drugs or drink alcohol on the job?
>
> A. No.
>
> Q. As you were putting the product into the blender, did Matthew Mendez smell like he had been smoking marijuana?
>
> A. No, sir.
>
> Q. Pretty much anybody who has ever been to a rock concert probably has smelled marijuana. Would you agree with that?
>
> A. Yes.
>
> Q. Are you familiar with the smell of marijuana?
>
> A. Yes, sir.
>
> Q. Marijuana has a distinct smell. Would that be fair to say?
>
> A. Yes, sir.
>
> Q. All right. As Matthew Mendez was putting the product into the blender, did he seem to be high on drugs to you?
>
> A. Not that I am aware of, no.

Q. Did he appear to be high?

A. No.

Q. Was he slurring his words?

A. No, sir.

Q. Did he -- was he very slow such that -- that people were upset with the speed he was doing his job?

A. No, sir.

Q. As Matthew Mendez was putting the product into the blender, did he appear to have the normal use of his mental faculties?

A. Yes, sir.

Q. Let me ask again. As Matthew Mendez was putting the product into the blender, did he appear to have the normal use of his physical faculties?

A. Yes, sir.

Q. At any time that morning at work, did you observe Matthew Mendez smoking pot?

A. No, sir.

Q. Did you observe Matthew Mendez ingesting pot or marijuana in any form?

A. No, sir.

Texas Mutual did not call any witnesses to directly controvert Miller's testimony.

Looking at all the evidence in the light most favorable to the verdict and indulging all reasonable inferences in the verdict's favor, *see Wilson*, 168 S.W.3d at 822, we conclude that a reasonable factfinder could conclude that Matthew was not intoxicated at the time of the accident. The expert testimony presented in this case did not conclusively establish whether Matthew was intoxicated at the time of his injury. However, the jury concluded that Miller's testimony sufficiently rebutted the presumption of intoxication and established by a preponderance of the evidence that Matthew was not intoxicated at the time of the accident. We conclude that Miller's testimony was sufficient to allow a reasonable jury to conclude that Matthew was not physically or mentally impaired at the

time of the accident due to ingestion of a controlled substance. Accordingly, the evidence in this case is legally sufficient to support the jury's finding that Matthew was not intoxicated at the time of his injury. *See Hinson*, 172 S.W.3d at 115.

Considering all the evidence, we conclude that the jury's verdict is not so contrary to the great weight of the evidence as to be clearly wrong and unjust. *See Ellis*, 971 S.W.2d at 407. As above, we conclude that Dr. Kerrigan's testimony would allow a rational jury to disbelieve the conclusions reached by Dr. Avery. Likewise, Miller's testimony was such that the jury could conclude that Matthew was not intoxicated at the time of the accident. A lay person is competent to testify to whether a person was acting normally at the time of an injury. *Unique Staff Leasing, Ltd. v. Cates*, 500 S.W.3d 587, 593 (Tex. App.—Eastland 2016, pet. denied) (citing *Hinson*, 172 S.W.3d at 117). As the sole judge of the credibility of the witnesses, the jury was free to accept Miller's testimony that Matthew had the normal use of his mental and physical faculties at the time of the accident and it was free to disbelieve Dr. Avery's contrary testimony. *See Robinson*, 923 S.W.2d at 558. As such, we conclude that the jury's verdict was not against the great weight and preponderance of the evidence.

Texas Mutual contends that Miller's testimony was not sufficient evidence because it was conclusory as to the issue of whether Matthew was intoxicated at the time of the accident. It argues that Miller simply responded to leading questions with "yes" and "no" responses without providing any explanation or elaboration for his conclusions. We note that Texas Mutual did not object to the questioning of Miller on the basis that it was leading and, therefore, it has failed to preserve this argument for appellate review. *See* TEX. R. APP. P. 33.1(a). While Miller did not elaborate on the basis for his belief, he unequivocally

testified that, at the time of the accident, Matthew appeared to have the normal use of his mental and physical faculties.[2] His testimony was based on his observations of Matthew on the day of the accident. Texas Mutual was afforded the opportunity to cross-examine Miller to address the basis for his belief but did not do so.[3] Consequently, we do not find Miller's testimony so conclusory as to constitute no evidence. As such, it was reasonable for the jury to afford his testimony sufficient weight to allow it to conclude that Matthew was not intoxicated at the time of the accident causing his death.

For the foregoing reasons, we overrule Texas Mutual's first issue.

Attorney's Fees

Texas Mutual's remaining issues each address the trial court's award of attorney's fees in favor of Mendez. Texas Mutual's second issue contends that the evidence was insufficient to support the trial court's award of attorney's fees. Its third and fourth issues challenge the commutation of attorney's fees on the basis that the commuted fee award could exceed the statutory cap of 25 percent of workers' compensation benefits and is not based on a sum certain, respectively. Texas Mutual's fifth issue is an alternative

[2] When asked whether Matthew seemed to be high on drugs, Miller responded, "[n]ot that I am aware of." Texas Mutual contends that this "qualification" falls "materially short of affirmatively proving that [Matthew] was not intoxicated . . . ." We emphasize that Mendez's burden of proof was whether Matthew had the normal use of his mental and physical faculties and, on this issue, Miller was unequivocal. That Miller was less adamant in his response to the question of whether Matthew seemed high on drugs does not render his testimony so conclusory as to amount to no evidence.

[3] Texas Mutual's entire cross-examination of Miller consisted of the following:

> Q. Mr. Miller, your testimony is you did not see him ingest any kind of marijuana, correct?
>
> A. Yes, sir.
>
> Q. But you are not saying that he didn't. You are just saying that you didn't see him do it?
>
> A. Yes, sir.

argument that, if commutation was appropriate, the trial court erred in not granting Texas Mutual's request for a jury trial on the appropriate amount of attorney's fees. Mendez responds contending that Texas Mutual lacks standing to challenge the award of attorney's fees entered in this case. We will address each of these issues in a logical rather than sequential manner.

Standing

Standing is a prerequisite to subject matter jurisdiction, which is essential to a court's power to decide a case. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). When a party lacks standing, a court lacks subject matter jurisdiction to hear the case. *Blue,* 34 S.W.3d at 553-54. Standing is never presumed, cannot be waived, and may be raised for the first time on appeal. *Tex. Ass'n of Bus*., 852 S.W.2d at 443-44.

Standing considers whether a party has a sufficient relationship with the lawsuit to have a justiciable interest in its outcome. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). Generally, the test for standing requires there to be a real controversy between the parties that will actually be resolved by the judicial declaration sought. *Tex. Ass'n of Bus*., 852 S.W.2d at 446; *Lovato*, 171 S.W.3d at 849. In other words, litigants must be "properly situated to be entitled to [a] judicial determination." *Lovato*, 171 S.W.3d at 849.

A party has standing to sue if it has been personally aggrieved by an alleged wrong. *Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d 659, 661 (Tex. 1996). More specifically, "a party has standing if they (1) have sustained, or is immediately in danger of sustaining, some direct injury as a result of the wrongful act complained of; (2)

have a direct relationship between the alleged injury and claim sought to be adjudicated; (3) have a personal stake in the controversy; (4) have suffered some injury in fact, either economic, recreational, environmental, or otherwise; or (5) are an appropriate party to assert the public's interest in the matter, as well as their own." *Tex. Mut. Ins. Co. v. DeJaynes*, 590 S.W.3d 654, 662 (Tex. App.—El Paso 2019, pet. filed).

Here, Mendez contends that Texas Mutual does not have standing to challenge the trial court's award of attorney's fees because it is a "stranger" to the attorney's fee contract and is not aggrieved by the trial court's award. However, we conclude that the trial court's decision to commute Mendez's attoney's fees, which requires Texas Mutual to pay those fees up front, creates a sufficient interest in Texas Mutual to establish its standing to challenge the award. If Mendez's attorney's fees were not commuted, Texas Mutual would pay those fees out of Mendez's weekly benefits as those benefits are paid. The trial court's determination that Mendez is entitled to death benefits for 364 weeks is based on actuarial tables that may not accurately reflect Mendez's actual life span. Consequently, by paying a commuted fee, Texas Mutual is required to accept the risk that Mendez will live long enough to recover all of the benefits to which she is entitled. "Acceptance of that risk gives [Texas Mutual] a personal stake in the controversy, and at least some potential injury in fact." *Id*. at 663 (citing *CenterPoint Energy Entex v. R.R. Comm'n of Tex.*, 213 S.W.3d 364, 368 (Tex. App.—Austin 2006, no pet.), for proposition that utility's possibility of not recovering its outlay over time affords it standing). While we recognize that Texas Mutual will pay the fees out of Mendez's benefits, it is only obligated to pay those fees for 364 weeks or until Mendez dies. TEX. LABOR CODE ANN. § 408.183(g). Because Texas Mutual is statutorily relieved of its obligation to pay Mendez death benefits in the event her death, its payment of a commuted attorney fee award that

is premised on Mendez receiving 364 weeks of payment exposes Texas Mutual to loss sufficient to establish its standing to challenge the award.

Statutory 25 Percent Cap

Texas Mutual's third issue contends that the trial court's commutation of Mendez's attorney's fees could violate the 25 percent cap on attorney's fees established in section 408.221 of the Labor Code. That section provides, in relevant part,

> (e) The commissioner by rule or the court may provide for the commutation of an attorney's fee, except that the attorney's fee shall be paid in periodic payments in a claim involving death benefits if the only dispute is as to the proper beneficiary or beneficiaries.
>
> * * *
>
> (i) Except as provided by Subsection (c) or Section 408.147(c), an attorney's fee may not exceed 25 percent of the claimant's recovery.

Id. § 408.221(e), (i) (West 2015). Texas Mutual contends that, if Mendez's attorney's fees are commuted, it is possible that the fee could exceed the 25 percent cap. As an example, Mendez could pass away soon after she begins receiving death benefits, which would cause her benefits to stop, but Texas Mutual would have already paid out Mendez's attorney's fees in an amount that would exceed the cap.

Texas Mutual has not cited to any case law that directly addresses its argument. Under the prior workers' compensation statute, commutation of attorney's fees was allowed regardless of whether the future payments had been fixed, including payments that were contingent on the non-occurrence of a future event, such as a spouse remarrying. *DeJaynes*, 590 S.W.3d at 664 (citing *Tex. Emp'rs' Ins. Ass'n v. Motley*, 491 S.W.2d 395, 396 (Tex. 1973); *Tex. Emp'rs' Ins. Ass'n v. Clapper*, 605 S.W.2d 938, 943

(Tex. App.—Houston [1st Dist.] 1980, no writ); *Tex. Emp'rs' Ins. Ass'n v. Flores*, 564 S.W.2d 831, 833 (Tex. App.—Fort Worth 1978, writ ref'd n.r.e.); *Liberty Mut. Ins. Co. v. Ramos*, 543 S.W.2d 392, 393 (Tex. App.—El Paso 1976, writ ref'd n.r.e.)).

In *Olivas*, the carrier argued that, if the attorney's fees are being paid out of the claimant's benefits, the attorney's fee must be paid over time in the same manner as the claimant's weekly benefits. *Olivas*, 509 S.W.3d at 511. The court noted that section 408.221(e) specifically allows for commutation of attorney's fees in all but uncontested death benefit cases. *Id*. at 512; *see* TEX. LABOR CODE ANN. § 408.221(e). The legislature is presumed to know the existing law when it enacts a statute. *See* TEX. GOV'T CODE ANN. § 311.023(4) (West 2013); *Olivas*, 509 S.W.3d at 512. The legislature could have disallowed commutation of attorney's fees in the new Act but, instead, it specifically permitted them. TEX. LABOR CODE ANN. § 408.221(e); *Olivas*, 509 S.W.3d at 512. Because it did not do so, we must presume that the legislature intended to continue to permit the commutation of attorney fee awards.

In *DeJaynes*, the court rejected the carrier's argument that the award of commuted attorney's fees should be disallowed because such an award could violate the statutory 25 percent cap. *DeJaynes*, 590 S.W.3d at 665. The *DeJaynes* court explained that, according to the carrier's argument, attorney's fees could never be commuted without potentially exceeding the 25 percent cap. *Id*. However, since the legislature expressly authorized the commutation of attorney's fees, the only express restriction on an award of attorney's fees is that it must be supported by evidence of the actual time and expenses of the attorney. TEX. LAB. CODE ANN. § 408.221(a), (b). We do not find authority that would justify construing the 25 percent cap in such a way that would vitiate the

legislature's express authorization of the commutation of attorney's fees. We conclude that the requirements are met when the commission or court has approved the attorney fee award and the award is within 25 percent of the expected benefit stream. *See DeJaynes*, 590 S.W.3d at 665. We overrule Texas Mutual's third issue.

Sum Certain Requirement

Texas Mutual's fourth issue contends that Mendez's attorney's fees could not be commuted because the trial court's compensability determination did not establish a "sum certain award or order to pay benefits."

Under the applicable administrative rule, commutation is allowed only from a sum certain award or order to pay benefits. 28 TEX. ADMIN. CODE § 152.1(d) (2019) (Tex. Dep't of Ins., Attorney Fees: General Provisions). The full text of the relevant portions of the rule provides as follows:

> An attorney's fee for representing a claimant may upon request by the attorney or carrier and approval by the commission be commuted to a lump sum only out of a sum certain award or order to pay benefits. This commuted fee may be discounted for present payment at the rate provided under the Act, [section] 401.023, and shall not exceed 25 [percent] of the unpaid sum certain. A commuted fee shall be recouped by the carrier out of the future income benefits paid to the represented claimant, not to exceed more than 25 [percent] out of any single payment. The fee for representing a claimant for death benefits cannot be commuted where the only dispute involves identification of the proper beneficiaries.

Id. Texas Mutual cites *Sharp v. Caterpillar, Inc.*, 932 S.W.2d 230, 234 (Tex. App.—Austin 1996, writ denied), for the proposition that liability is not a sum certain when based on actuarial projections.

We reject Texas Mutual's contention for several reasons. The language of the rule quoted above expressly applies to the DWC's approval of commuted fees. 28 TEX. ADMIN. CODE § 152.1(d). By its terms, it does not address a district court's commutation of fees. *See id*.; *DeJaynes*, 590 S.W.3d at 666. Second, while the trial court's judgment did not include a specific order to pay benefits, that is the natural result of its reversal of the DWC's previous orders. *See DeJaynes*, 590 S.W.3d at 666. Third, the language of the rule expressly allows for the commutation of attorney's fees in all cases other than in death cases where the only issue is the proper beneficiary. *See* 28 TEX. ADMIN. CODE § 152.1(d). Consequently, the rule implies that commutation of benefits is allowed in death benefit cases where compensability is the issue. *DeJaynes*, 590 S.W.3d at 666. Fourth, most death beneficiaries receive some portion of their benefits paid out in the future but these benefits may be cut off by the occurrence of some future event. *See id*. (citing TEX. LABOR CODE ANN. § 408.183, as including many instances where death beneficiaries' future benefits terminate following the occurrence of a future event). As such, none of these claims would produce a "sum certain" that would qualify for commutation under Texas Mutual's reading of the rule. But, applying Texas Mutual's interpretation "would effectively read the last sentence of [r]ule 152.1(d) out of the rule, and violate the presumption that every word in a statute has been used for a purpose." *Id*. at 666-67 (citing *City of Richardson v. Oncor Elec. Delivery Co.*, 539 S.W.3d 252, 260 (Tex. 2018)). For the foregoing reasons, we overrule Texas Mutual's fourth issue.

Contingency Fee Award

By its second issue, Texas Mutual contends that the trial court erred in approving a 25 percent contingent fee award rather than requiring any fee award to be based on the

attorney's time and expenses, as established by adequate evidence. We agree with Texas Mutual's contention regarding the inadequacy of the evidence to support the trial court's fee award and will limit our discussion to that aspect of the issue.[4]

The Labor Code requires that all attorney fee awards, including contingency fee agreements, be based on the attorney's time and expenses. TEX. LABOR CODE ANN. § 408.221(a), (b). In other words, even when the claimant's attorney has a percentage-based contingency fee agreement with the claimant, the court must review the time and expenses the attorney spent on the case before approving the fee. *Id*. § 408.221(b); *Olivas*, 509 S.W.3d at 508. In the present case, this Court cannot determine whether the trial court approved Mendez's attorney's fees based solely on the contingency fee agreement or based on the agreement coupled with consideration of the time and expenses incurred by the attorney in presenting the case. Our uncertainty is due to the trial court allowing Mendez's attorney to submit billing records only for in camera inspection by the trial court. This results in the appellate record not containing the information the trial court considered in approving Mendez's attorney's fees. Because the in camera inspection process prevented the billing records from becoming part of the appellate record, we are unable to confirm that the trial court made its award of attorney's fees on the basis of the factors expressly identified by section 408.221(d), and not solely on the basis of the contingency fee agreement between Mendez and her attorney.[5] *See*

[4] We refer the trial court and the parties to the *DeJaynes* discussion of the appropriateness of a contingency fee award and the appropriate method for calculating a fee award in a case such as the present one. *DeJaynes*, 590 S.W.3d at 667-671.

[5] We are aware of and have reviewed Mendez's counsel's affidavit in support of his Motion for Approval of Attorney Fees. Other than citing the contingency fee agreement, this affidavit speaks in generalities and does not amount to a written identification of the attorney's time and expenses. *See* TEX. LABOR CODE ANN. § 408.221(b).

TEX. LABOR CODE ANN. § 408.221(d); *Olivas*, 509 S.W.3d at 508 ("DWC . . . rules make no allowance for approving a fee based only on a contingency agreement."). Consequently, we sustain Texas Mutual's second issue.

Jury Trial on Attorney's Fees

By its fifth issue, Texas Mutual contends that, if we determine that commutation of Mendez's attorney's fees was appropriate, it should have been allowed to present its argument concerning the amount of attorney's fees to the jury. Certainly, when a carrier is required to pay a claimant's attorney's fees out of its own funds, it is entitled to have a jury determine the amount of those fees. *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 232 (Tex. 2010). However, it would be improper for attorney's fees awarded from the claimant's benefits to be determined by a jury. *Id*. at 229-30 ("In reviewing fees awarded in this situation, we have 'held that the amount of the attorney's fees to be allowed in compensation cases is a matter for the trial court to determine without the aid of a jury, and the amount of the recovery is within its discretion."); *DeJaynes*, 590 S.W.3d at 671. This is so because section 408.221(b), which governs attorney fee awards paid from a claimant's benefits, expressly provides that, "an attorney's fee under this section is based on the attorney's time and expenses according to written evidence presented *to the division or court*." TEX. LABOR CODE ANN. § 408.221(b) (emphasis added). As we have discussed, the attorney's fees being awarded in the present case are being paid from Mendez's benefits. We conclude that having a jury determine the amount of attorney's fees in this case is disallowed by both statute and case law. We overrule Texas Mutual's fifth issue.

Conclusion

Having sustained Texas Mutual's second issue on the basis that the appellate record does not reflect that the trial court's award of attorney's fees was based on adequate evidence, we reverse the order of the trial court awarding attorney's fees and remand for consideration of the issue of attorney's fees in accordance with this opinion. In all other respects, the judgment of the trial court is affirmed.

Judy C. Parker
Justice