

APPEAL NO. 941246

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On February 15, 1994, a contested case hearing was held. The record was held open to permit the parties to present additional evidence; however, none was submitted and the record was closed on August 31, 1994. With respect to the issues before him, the hearing officer determined that appellant/cross-respondents (claimants) established good cause to excuse their failure to file a claim for death benefits within one year of _____; that Mrs. R, decedent's widow, and DR, decedent's son, are the legal beneficiaries of (decedent); and, that BH, CH, and JS, decedent's stepchildren, failed to establish, by a preponderance of the evidence, that they were legal beneficiaries of decedent at the time of his death. Claimants' appeal challenges the hearing officer's determination that the stepchildren failed to establish their eligibility to death benefits in this case. Respondent/cross-appellant's (carrier) appeal challenges the hearing officer's determination that good cause existed for claimants' failure to file a claim within a year of decedent's death. In addition, the carrier asserts error in the hearing officer's admission of evidence which claimants did not exchange prior to the hearing and in the hearing officer's failure to make findings on the issue of whether two of decedent's stepchildren are "individual[s] with a physical or mental disability" within the meaning of Section 408.183(e)(2)(a), such that their eligibility to death benefits would continue either until the date of their death or until they no longer had such disability.

DECISION

We affirm the hearing officer's decision and order.

It is undisputed that decedent sustained a fatal accident in the course and scope of his employment with (employer), on _____, and that carrier was the workers' compensation insurance carrier for the employer on that date. Carrier does not contest DR's entitlement to death benefits in this case. However, it contests Mrs. R's claim for the failure to timely file a claim and it challenges the stepchildren's claims, arguing that they failed to carry their burden of proving their dependency status.

Mrs. R testified that a few days after her husband's death, she had a meeting with Mr. F, an adjuster with carrier, at the office of an attorney she had retained to pursue a gross negligence action and a third party claim, but not the workers' compensation claim. Carrier argued that the attorney also represented claimants' in the workers' compensation action. In so arguing, carrier relied on a letter from the attorney to Mr. F dated July 19, 1991, stating that he represents Mrs. R and her children "in all matter's pertaining to the death of her husband" Mrs. R testified that at that meeting with Mr. F, he assured her that he "would take care of all the legal aspects" of her workers' compensation claim. In addition, Mrs. R stated that throughout the meeting, Mr. F indicated that "they [the carrier] would look after me and the children, we wouldn't need an attorney." Finally, Mrs. R testified that she began to receive benefit checks in August 1991, shortly after her meeting with Mr. F, and that they continued through the date of the hearing. The claim for death

benefits was received by the Texas Workers' Compensation Commission (Commission) on October 23, 1992.

With respect to the entitlement of decedent's stepchildren, BH, CH, and JS, to death benefits, claimants submitted evidence from the Social Security Administration that BH and CH receive monthly social security benefits on the basis of their mental retardation. In addition, Mrs. R testified that all of the stepchildren lived with her and the decedent at the time of his death and that decedent's income was the only income that the family received, except for the social security benefits of BH and CH. No evidence as to decedent's actual earnings or the portion thereof that he contributed to his stepchildren was submitted. However, on cross-examination, Mrs. R testified that decedent had not made very much money in 1991 and he had switched to the construction job where he was killed because of his low wages. Finally, no evidence was submitted relating to the monthly expenses incurred on behalf of the stepchildren.

Initially, we address carrier's assertion that the hearing officer incorrectly determined that claimants had established good cause for the failure to file a claim within a year of the date of decedent's death. Carrier maintains that claimants cannot establish good cause because Mrs. R received advice and counsel from an attorney. Carrier cited Texas Employers Ins. Ass'n v. Tobias, 614 S.W.2d 901 (Tex. Civ. App.-Eastland 1981, writ dismissed); St. Paul Fire & Marine Ins. Co. v. Lake Livingston Properties, Inc., 546 S.W.2d 404 (Tex. Civ. App.-Beaumont 1977, writ refused n.r.e.); and Nunnery v. Texas Cas. Ins. Co., 362 S.W.2d 865 (Tex. Civ. App.-Austin 1962, no writ), for the proposition that where a claimant is assisted by an attorney, there can be no good cause as a matter of law for the failure to timely file a claim for compensation. We do not find carrier's argument persuasive, because the cases cited simply do not stand for the proposition that a party who is represented by an attorney can never establish good cause for delay in filing a claim. Rather, they stand for the proposition that under the principles of agency, the action or inaction of an attorney employed to prosecute a workers' compensation claim is attributable to the claimant. Thus, if claimants were attempting to establish good cause based upon their reliance on an attorney's assurances that he had filed the claim, then the cases cited by the carrier would be dispositive. However, that is not the case here. Rather, Mrs. R testified, and the hearing officer believed, that carrier's adjuster assured her that he would take care of all of the legal aspects of her claim and that she would not need an attorney for the workers' compensation claim. In addition, there was evidence that carrier initiated benefits in August 1991, shortly after Mrs. R's meeting with Mr. F, and that those benefits continued through the date of the hearing.

In Pan American Fire & Casualty Co. v. Hill, 586 S.W.2d 187 (Tex. Civ. App.-El Paso 1979, writ refused n.r.e.), the court affirmed a jury's determination of good cause for late filing of a claim based on claimant's belief that his claim had been filed, premised upon the assurances of an adjuster that everything had been taken care of in conjunction with the initiation and continuation of benefit payments. Under the guidance of Hill, we believe that

the hearing officer correctly determined that claimants established good cause for their failure to timely file a claim, namely their good faith reliance on the representations of carrier's adjuster that he would take care of the legal aspects of the claim for death benefits and the prompt initiation of benefit payments by the carrier as another indication that a claim had been filed. See *also* Texas Workers' Compensation Commission Appeal No. 93871, decided November 12, 1993 (Appeals Panel affirmed hearing officer's determination of good cause for late filing premised upon assurances of employer everything had been and was being done to take care of his claim for workers' compensation.) and Texas Workers' Compensation Commission Appeal No. 93604, decided September 2, 1993 (Appeals Panel affirmed good cause for late filing of claim on the basis of claimant's good faith belief that claim had already been filed.). We specifically reject carrier's argument that because Mrs. R may have received some advice on this matter by an attorney, she was no longer permitted to rely on Mr. F's assurances that he would take care of everything in this case. To accept this argument would have the anomalous result of permitting a situation where a carrier could mislead a claimant into believing that a claim had been filed, and then defeat claimant's entitlement to death benefits upon the expiration of the one year deadline for filing a claim, by raising the failure to timely file a claim. Such a result is not supported by the cases cited by carrier and we find no other sound basis for accepting that argument.

Next we turn to claimants' challenge to the hearing officer's determination that BH, CH, and JS failed to prove, by a preponderance of the evidence, that they are eligible for death benefits under the 1989 Act. It is undisputed that BH, CH, and JS are stepchildren of decedent. Pursuant to Section 401.011(7), the term child includes "an adopted child or stepchild who is a dependent of the employee." Thus, if BH, CH, and JS can establish that they were dependents of decedent at the time of his death they can establish their entitlement to death benefits. The term dependent is defined in Section 401.011(14) as "an individual who receives a regular or recurring economic benefit that contributes substantially to the individual's welfare and livelihood" Claimants have the burden of proving that they are legal beneficiaries. Texas Workers' Compensation Commission Appeal No. 92721, decided February 18, 1993. The determination of what may constitute dependency status is developed in Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 132.2 (Rule 132.2). Specifically, subsection (e) states:

The person claiming to be a dependent shall furnish sufficient information to enable the commission to accurately identify the net resources and to establish the existence of the economic benefit claimed. This information may include, but is not limited to, tax returns, a financial statement of the individual, and check stubs.

To meet their burden in this instance, claimants rely on Mrs. R's testimony that decedent's salary was the only source of income for BH, CH, and JS, with the exception of BH's and CH's social security benefits. However, there was no evidence quantifying

decedent's monetary contribution to the stepchildren. In addition, no evidence was offered regarding their expenses. Rule 132.2 specifically provides that the claimants must submit sufficient evidence to enable the hearing officer to accurately determine dependency status. Given the dearth of evidence related to either the economic benefit that decedent provided to his stepchildren or their net resources, we cannot say that the hearing officer erred in determining that BH, CH, and JS did not sustain their burden of proving dependency under the 1989 Act and accordingly, are not entitled to death benefits. See Texas Workers' Compensation Commission Appeal No. 931114, decided January 21, 1994 and Appeal No. 92721, *supra*, where the Appeals Panel upheld hearing officer's determination that claimants had not presented sufficient evidence to establish their dependency status.

Carrier also asserts error in the hearing officer's failure to make findings on the issue of whether BH and CH are individuals with a mental disability for purposes of Section 408.183, which concerns the duration of death benefits. Specifically, Section 408.183(e)(2)(a) provides that a dependent child with a mental disability is entitled to receive benefits until the earlier of the date the child dies or the date the child no longer has the disability. We find no error in the hearing officer's not reaching this issue. We affirmed the determination that BH and CH had not carried their burden of proving dependency, and thus, that they had not satisfied the threshold requirement for establishing entitlement to death benefits. Therefore, the hearing officer was not required to resolve the question of the duration of BH's and CH's entitlement to benefits, in that they have no entitlement to any death benefits under the statute.

Finally, we address carrier's argument that the hearing officer erred in admitting records from the Social Security Administration relating to BH and CH. Carrier maintains that claimants failed to exchange those documents before the hearing and that they did not establish good cause for their failure to exchange. Therefore, carrier argues that the hearing officer should have excluded those exhibits. As we stated above, the hearing officer was not required to reach the issue of whether BH and CH had a "mental disability" within the meaning of 408.183. Accordingly, any error in the admission of the Social Security records was harmless, in that they related solely to an issue that the hearing officer properly did not decide.

For the foregoing reasons, the decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Robert W. Potts
Appeals Judge