APPEAL NO. 970753

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 March 19, 1997. The issues at the CCH were the proper legal beneficiaries of the deceased worker, whether the deceased worker died in the course and scope of employment, the amount of his average weekly wage (AWW), and whether the claimants/beneficiaries, who are the appellants and the surviving parents of the deceased employee, timely filed a claim for workers' compensation benefits within one year after the death of their son, and, if not, whether they had good cause for failing to file a claim. The issue of "course and scope" was resolved by stipulation, with the parties agreeing that the death was compensable. The amount of AWW was likewise resolved. There remained only a decision as to whether the claimants or the Subsequent Injury Fund (SIF) were to receive payment of death benefits from the carrier, including consideration of the late claim filing matter.

The hearing officer determined that the claimants received "substantial economic assistance" from their son, but nevertheless held that there was no proof that it was regular or recurring, and consequently held that the parents had not proven they were eligible beneficiaries. The hearing officer further held that the claim was barred because a timely claim for compensation had not been filed and no good cause was demonstrated. He issued an order awarding payment of the death benefits to the SIF.

The claimants have appealed. They argue that they had good cause for not timely filing a claim because it would have forced an election of remedies in violation of the Open Courts provision of the Texas Constitution, and that they were induced by the representations of the attorney for the carrier to forestall filing of a claim, which they argue were unethical. The claimants argue that a finding made from conversations at the prehearing conference constitutes an abuse of discretion by the hearing officer. The claimants also argue that the hearing officer abused his discretion in not finding that the support they received from their deceased son was "regular and recurring." Finally, the claimants argue that the benefits should not have been awarded to the SIF because it did not appear at the CCH. The carrier argues that the decision should be affirmed, and questions whether the appeal was timely filed.

DECISION

Affirmed in part, reversed and rendered in part.

We have ascertained that the appeal was timely filed within 15 days of the deemed date of receipt of the hearing officer's decision.

This case involved the death of the deceased, in an automobile accident that occurred when he was driving his employer's truck. On February 28, 1997, the hearing officer called the parties for a telephonic prehearing conference. The entire tape of that conference was entered into evidence in the CCH here, and we will therefore consider it in

its entirety, noting that the first part of the conference involved the attorney for the beneficiaries of the passenger in the deceased's vehicle who apparently also was set for a CCH. The hearing officer opened the conference by explaining that he had set it on his own motion to clarify what the issues were. He stated that the only document he had in his file was a setting of a CCH to consider payment of death benefits to the SIF, and there was no indication that any claimants had come forward.

The attorney who participated in this prehearing conference for the carrier was Mr. K. Mr. K stated that it was the carrier's position that the death of the deceased occurred in the course and scope of employment, and the carrier just wanted to know who to pay. Mr. K raised no other issues, but the hearing officer raised the possibility that potential claims could be barred due to the failure to file a claim with the Texas Workers' Compensation Commission (Commission) within one year after the date of death.

The attorney for the claimants in this case was Mr. Y. Mr. Y said that his clients, the parents of the deceased, resided in Mexico. In response to questions from the hearing officer, Mr. Y agreed that his clients had not filed a claim for death benefits with the Commission. Mr. Y pointed out that the death certificate raised questions about whether the death had in fact occurred within the course and scope of employment, and gave rise to a claim for negligence against the employer. Mr. Y stated that it was his understanding that filing a workers' compensation claim could act as an election of remedies that would foreclose any negligence suit. However, Mr. Y also stated that course and scope could well be in issue at the CCH. Mr. Y emphasized that he had been directed early on to confer only with an attorney named Mr. M, whom he understood was authorized to represent both the workers' compensation insurance carrier and the business automobile carrier in sorting out liability. He stated that he and Mr. M had been working to resolve all claims by settlement, equivalent to death benefits, and he repeated his desire to resolve this matter without the necessity of litigation. When the hearing officer asked Mr. K about Mr. M's role, Mr. K affirmed that Mr. M had been the attorney for the workers' compensation insurance carrier, and although he had not talked to Mr. M, it was nevertheless his understanding that Mr. M had been hired for the "limited role" of investigating and identifying deceased's beneficiaries. Mr. K did not directly answer the hearing officer's question as to whether Mr. M represented the liability insurer as well, repeating only his understanding of Mr. M's "limited role." Mr. Y explained that he had been sending requested documents to Mr. M for several months, including an affidavit from his clients in Mexico stating their financial dependency and requesting payment of benefits in a lump sum.

The hearing officer stated his opinion that there would also be an issue of good cause for late filing of a claim to consider at the upcoming CCH (scheduled for March 19th). Mr. Y indicated again his desire to resolve the matter without a formal hearing, and that he would forward documentation to Mr. K. Mr. Y said that if the affidavit from claimants was not sufficient, he would supply additional required information or seek to have his clients brought from Mexico. Mr. Y said that there would be considerable expense in bringing the parents from Mexico and he would rather avail himself of summary procedures.

The CCH was convened as scheduled. There was no benefit review conference (BRC) report put into evidence, nor is the occurrence of one recited in the hearing officer's decision. There was no explanation for the lack of a BRC, but Mr. Y and Mr. K were asked at the beginning of the CCH if they agreed to the issues to be heard and both did. The only objection raised at that point was Mr. Y's objection to the failure of the SIF to appear. The course and scope of employment issue was resolved at the beginning of the CCH by stipulation, as was an issue on AWW. Both sides waived opening statement. The remaining issues were those clarified for the first time at the prehearing conference as to the identity of, and period of, entitlement for beneficiaries of the deceased, and whether a timely claim for death benefits had been filed and, if not, whether there was good cause for same.

Documents in the file indicate that the deceased, who was a herbicide sprayer for (employer), was driving a truck owned by the employer in which his cousin was a passenger and, on Alleged injury, at 7:05 p.m., the vehicle failed to negotiate a turn and left the road, overturning in a ditch and ejecting both occupants. Deceased died from his injuries on _____.

Mr. Y was the only testifying witness. Carrier did not cross-examination or present conflicting testimony. Mr. Y stated that he had correspondence "available" for the hearing officer to review, but none was marked and put into evidence. Mr. Y did, however, read letters into the record and these will be repeated here.

Mr. Y said he undertook representation in January 1996, and, at that time, wrote a demand letter to the employer, setting forth remedies that his clients deemed available under negligence, gross negligence, and workers' compensation. He received a response on February 1st, from Employers' Claims Adjustment Services (adjusting services), signed by Mr. H. The letter stated:

> "This letter acknowledges receipt of the January 29, 1996, letter regarding wrongful death and representation of [deceased]. [Adjusting services] is handling the workers' compensation claim for [carrier group] regarding the date of accident and death of [deceased]. Please direct any future correspondence regarding this claim through [Mr. M]. . . ."

Mr. Y said that on that same day, Mr. H sent a letter to the attorney for the passenger's family, who was Mr. A, in response to Mr. A's demand letter; this letter to Mr. A also identified the business liability carrier as another company for which adjusting services would also be acting, and referred Mr. A to Mr. M. Mr. Y said that he concluded from the letters sent to Mr. A that Mr. M could negotiate the entire array of potential claims against all carriers.

Mr. Y subsequently received a letter from Mr. M, on March 23, 1996, which stated:

> I've been retained by [carrier group or adjusting services] to represent the interest of [employer] regarding the claims being made on behalf of [both], resulting out of the above-referenced accident. From this date forward, please make no further contact with [employer] or [adjusting services]. Your future correspondence and contact should be with me at the firm address shown above.

Mr. Y said that he talked with Mr. M over the ensuing months on several occasions and was given the impression that Mr. M was empowered to settle all claims. He provided all requested information to Mr. M, including deceased's birth certificate and an affidavit from the claimants. He talked about taking the a lower percentage (25%) as his attorney fee.

Mr. Y said that around August 7, 1996, he began to have problems getting through to Mr. M or eliciting a response from him. According to Mr. Y, he wrote a letter which included a statement that "it is my understanding that you will forward the necessary papers relating to payment of attorneys' fees in this matter" and also "it is my understanding that you are attempting to co-ordinate all of the paper in this matter through your office on behalf of (employer)." He asked Mr. M to correct any misunderstanding he had, immediately. Mr. Y said he received no response until sometime after October 1, 1996, but before mid-January 1997, when a phone call reported that a CCH had been set for January 14, 1997, on the issue of payment to the SIF. Mr. Y said he was surprised because he thought settlement of the case in favor of claimants was imminent. Mr. Y said he "faxed" a memo to Mr. M asking if he was permitted to contact the carrier directly at this point, if Mr. M needed additional information, and if it were still possible to resolve the case without judicial intervention. There was no response to this. Mr. Y said that he first learned from Mr. H sometime in early January 1997 that Mr. M never had represented the automobile insurance carrier or the employer, but only the workers' compensation carrier. Mr. Y remembered Mr. H telling him, in a hushed tone, that Mr. M had only been hired by the carrier "to gather documents." Mr. Y said that he had regretfully come to feel that he had been intentionally misled.

The hearing officer took official notice that an Employer's First Report of Injury or Illness (TWCC-1) was electronically filed with the Texas Workers' Compensation Commission (Commission) on October 5, 1995. The copy in evidence indicates the employer's apparent belief that the deceased may have had surviving children and was married. The claimant's were not mentioned on this report.

Mr. Y filed a claim for compensation on behalf of the claimants the day of the CCH. There is no evidence that, prior to the February 28, 1997, prehearing conference, that a defense of failure to file a claim was raised. However, there was also no evidence that any benefits were being paid to the claimants during the pendency of negotiations.

The affidavit filed by the claimants was sworn in Mexico before a notary public. In this affidavit, the claimants state that deceased was never married and had no children, and further:

> [Deceased] has several brothers and sister, none of which relied on him for support of any kind. However, we relied heavily upon the financial support that our son [deceased's name] provided for us from the work he was performing for [employer]. [Deceased] sent money home to us so we could survive financially. Without [deceased], we have had severe struggles to simply survive. We relief almost exclusively upon [deceased's] support for our livelihood until he was taken from us by the accident . . . we are financially devastated as a result of the loss of our son.

The carrier presented no evidence, and, in closing argument, largely argued the claim filing issue. He deferred the issue of beneficiary status to the hearing officer. No arguments were made raising any insufficiency of the affidavit. The carrier's attorney acknowledged that Mr. Y's "miscommunication" with Mr. M presented a "potential problem" but asserted that notwithstanding this, the statutory claims filing deadline was clear.

Section 409.007(b) states that a claim for death benefits is barred when not filed within the date of the first anniversary of the death unless:

> (1) the person is a minor or incompetent; or
>
> (2) good cause exists for the failure to file a claim under this section.

There is no provision in this statute, as there is in the claim filing deadline for other benefits under Section 409.004, for an exception where the employer or carrier does not contest the claim. Thus, the fact that the compensability of the death is accepted by the carrier does not absolve persons claiming beneficiary status from filing claims for benefits.

We believe that the record establishes that Mr. M acted as the attorney for the carrier in his dealings with Mr. Y, without qualification. We do not agree that the correspondence to Mr. Y reflects a broader authority on the part of Mr. M, and do not agree that the claimants could rely on letters written to Mr. A. The question remains, however, as to whether the claimant's acted with prudence and diligence to establish a workers' compensation claim, even given the conduct of Mr. M in this case. Claimants argue that there is case law to the effect that good cause may be found in the representations of an employer or a carrier that necessary paperwork is being filed. *See* Moronko v. Consolidated Mutual Insurance Company, 435 S.W.2d 846 (Tex. 1968). However, a review of case law along this line indicates that such determinations have generally been made when a claimant is unrepresented, and has already received workers' compensation benefits. We have not found a case where the claimant is represented by an attorney who is presumed to know all available remedies, and claimants have not cited any such authority.

Although the claimants argue that filing a workers' compensation claim would have constituted an election of remedies that could jeopardize other claims, we do not agree. We note that the case of Medina v. Herrera, 927 S.W.2d 597 (Tex. 1996), cited by the

claimants as the basis for this argument, considers only whether a claim for, and receipt of, workers' compensation benefits constitutes an election against an intentional tort action against the employer. The case under consideration here does not raise this issue. The only other actions that the claimants here indicated were available were ordinarly negligence and gross negligence. In the instance of ordinary negligence, absent any proof that the deceased had retained his common law rights, there would be no cause of action for personal injuries or death. Section 406.034. In addition, Section 408.001(a) similarly provides that workers' compensation is the exclusive remedy against an employer for personal injury or death. However, Section 408.001(b) expressly allows recovery of exemplary damages by heirs of a deceased employee when the death is caused by an intentional act or omission of the employer or the employer's gross negligence. Filing for workers' compensation would not thus pose an election or a bar of a gross negligence cause of action that the claimants may have been able to assert, by express language of the statute, except as to actual damage. We cannot agree, therefore, that good cause may be found in the argument that filing of a claim would have caused an election of remedies precluding other available remedies. Likewise, we find no merit in the argument posed by the claimants that filing a timely claim for compensation would have violated the Open Courts provision of the Texas Constitution. Therefore, we affirm the determination that a late claim was filed and no good cause was shown therefore. While we agree that the statements made at a prehearing conference are not strictly "evidence," we do not agree that the statements of counsel to a tribunal concerning procedural matters cannot be given effect simply because they are unsworn, and we note that the sworn testimony of Mr. Y was not inconsistent with a desire to preserve his claimants' rights to all claims as a factor in delayed filing of the claim.

As the hearing officer pointed out at the CCH when objection was raised to the absence of the SIF, payment to the SIF is provided for in the 1989 Act as a "default" recipient of death benefits where no eligible beneficiaries are found and compensability is admitted. Section 408.182(e). The cited provision leaves no discretion to a hearing officer not to order payment to the SIF in the event that there are no eligible beneficiaries.

However, we reverse the determination that the claimants have not proven dependency on the deceased. Under the 1989 Act, surviving parents are required to prove that they were also dependent upon the deceased. Section 408.182(d). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.2 (Rule 132.2) promulgates this provision. Most of the rule discusses the type of evidence that must be submitted to prove that there was substantial economic support, which was determined favorably to the claimants. There was no dispute raised at all prior to, or at, the CCH by the carrier disputing the dependent status of the claimants on the deceased. (We note that it would typically be through a BRC, not held in this case, that concerns about the evidence about dependency in light of applicable rules would be brought forward.) Nor is it incumbent upon hearing officers to independently investigate whether such potential disputes exist. There was evidence that the affidavit was acquired to respond to Mr. M's request for a statement from claimants, and that no further information was sought, although offered by Mr. Y numerous times, including at the prehearing conference. Although the hearing officer indicated that the language which he deemed sufficient proof of "substantial" economic assistance to the

claimants would require "speculation" as to the regularity of such payments, we believe that the sworn assertion of exclusive reliance on the deceased for claimant's livelihood did not call for "speculation" so much as reasonable inference. The additional statement that cessation of support from the deceased has caused financial devastation to the claimants leads to the inference, absent other evidence, that substantial financial support was made on a regular basis. A finding that such payments were not regular or recurring is consequently against the great weight and preponderance of the evidence, and we therefore reverse and render a decision that, under the facts of this case, the claimants sufficiently proved that they were the eligible beneficiaries who received regular and substantial financial support from the decedent. Although the ultimate outcome of the hearing officer's decision is not changed, due to our affirmance of the late claim/no good cause finding, we reverse and render a determination that the claimants proved that they were the eligible beneficiaries of the deceased.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Tommy W. Lueders
Appeals Judge