

APPEAL NO. 980112

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 December 4, 1997, with hearing officer. The issues at the CCH were:

1. Did the Claimant sustain a compensable injury on or about _____?
2. Is Carrier relieved of liability under Texas Labor Code, Section 409.002, because of the Claimant's failure to timely notify the Employer pursuant to Section 409.001?
3. Did the Claimant timely file a claim for compensation with the Commission within one year of the injury, as required by Texas Labor Code, Section 409.003, and, if not, does good cause exist for failing to timely file a claim?
4. Did the Claimant have disability, and, if so, for what period?
5. What is the Claimant's average weekly wage [AWW]?

The hearing officer determined that claimant had not sustained a compensable injury, that claimant had not timely filed a claim with the Texas Workers' Compensation Commission (Commission) (issue no. 3) and did not have good cause for failing to do so and that claimant did not have disability. The hearing officer also determined that the employer had actual knowledge of the _____, incident and therefore carrier was not relieved of liability under Section 409.002 and that the claimant's AWW was \$571.17. The latter two determinations, being in claimant's favor, have not been appealed and have become final pursuant to Section 410.169.

Claimant states that she is "appealing this decision" and consequently we will review the decision on a sufficiency of the evidence standard. In addition, the claimant provides some "comments," generally decrying the assistance provided by the Commission and ombudsman. Claimant requests that we review her "full file" and consult an independent authority on closed head injuries which we will infer to be a request to reverse the decision of the hearing officer and remand the decision. Carrier responds to the claimant's "comments" and generally urges affirmance.

DECISION

Affirmed in part and reversed and rendered in part.

This case is both somewhat convoluted and unusual. It is undisputed that claimant is also the sole owner of the insured business (a rehabilitation company) and therefore is both the insured employer and the claimant. As such, claimant testified that she has both a business address (office) with apparently other employees and an office at her home, which is an address different than that of her business address. The situation is further complicated by the fact that claimant may have been, or was, suffering from Parkinson's Disease, as well as perhaps depression and tremors prior to _____. Claimant testified that on that date, shortly after speaking on the telephone to a business client, she fell down the stairs leading to her upstairs home office. Claimant was taken to a hospital emergency room.

The hearing officer recites that claimant "has a complicated and detailed medical history that includes numerous psychiatric and neurological evaluations." The history given at the hospital was that claimant "apparently lost her balance and fell down some stairs today with apparent loss of consciousness." The past medical history was "positive for pre-Parkinson's disease." Numerous tests were conducted including a CT scan of the head. (Claimant denies being aware of what tests were performed.) The CT scan revealed an old, probable lacunar infarct, right basal ganglia and was otherwise negative. The "final diagnosis" was right clavicle fracture, closed head injury, and "[f]all secondary to Parkinson's Disease no syncope." Upon discharge, claimant was given discharge instructions for "fainting (syncope); fall with Parkinson's; head injury (concussion) fracture." Claimant said that she believed her fall was due to the Parkinson's Disease and that all of her present deteriorating conditions stem from the closed head injury that she suffered in that fall. Claimant saw numerous doctors for various conditions, including impaired concentration and complaints of memory disorder, over the following three years. In January 1997 claimant was evaluated by (Dr. M), who in a report dated January 16, 1997, stated that claimant "may have some post-traumatic problems with coordination directly related to her prior head trauma," and that problems regarding cognition and organizational skills are suggestive of posttraumatic brain injury. Claimant believes that Dr. M has concluded that her prior head trauma in _____ has caused her impaired concentration and memory disorder and that she is totally unable to function or perform normal activities of daily living. Other stressors may be the loss or sale of her business, moving out-of-state and that her husband has left her. Claimant filed an Employer's First Report of Injury or Illness (TWCC-1) dated May 29, 1997, alleging a date of injury of _____, for a "closed head" injury while "working at home (usual place)." Claimant has to date not filed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41).

The hearing officer made the following pertinent factual determinations:

8. Claimant continued to operate and manage [employer] throughout 1994, and 1995, and the business was formally closed on August 9, 1996.

9. Claimant sustained a trauma injury to her face, head, neck, and back while at home on _____, as a result of a fall to the floor, and the cause of Claimant's fall to the floor remains unknown.
10. Claimant's injuries that were sustained at home on _____, were not the result of work activities, did not arise out of her work activities and were not sustained in the furtherance of her duties as owner/manager of [employer].
12. Claimant, as the Employer and the Employee, had actual knowledge of the _____, trauma incident, and as such, she had no separate duty to notify the Employer not later than 30 days after the incident.
13. Claimant has not filed a written claim for compensation with the Commission.
14. Claimant did not act as a reasonable, prudent person by failing to file a claim for compensation with the Commission.
15. Claimant has had the physical and mental ability to file a claim for compensation with the Commission at all times since _____.

Regarding the first appealed issue that claimant had not sustained a compensable injury, we note that claimant was at home (although the employer had an office in the home) at the time of the fall, and although she had been talking to a client, claimant had apparently hung up and it is not at all clear what claimant was doing at the time of her fall, or what caused her to fall. The medical records certainly support claimant's initial belief that her Parkinson's condition caused her to fall. In any event, the burden is on the claimant to prove that an injury occurred within the course and scope of employment. Service Lloyds Insurance Company v. Martin, 855 S.W.2d 816 (Tex. App.-Dallas 1993, no writ); Texas Employers Insurance Association v. Page, 553 S.W.2d 98 (Tex. 1977). In this case, even assuming as true everything claimant said, it is unclear what claimant was doing when she fell. Just because she had earlier been talking with a business client does not automatically bring all her subsequent activities within the ambit of course and scope of the employment. Consequently, we affirm the hearing officer's determinations on this issue as being supported by sufficient evidence and being not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

On the issue of timely notice to the employer, the hearing officer determined that the employer and claimant being the same person, the employer had actual knowledge of the

1994 fall and as such "had no separate duty to notify the Employer not later than 30 days after the incident." Finding of Fact No. 12. That determination, not having been appealed, has become final. We observe that there is no authority in the 1989 Act for the proposition that where the employer and the claimant are the same person a report must be filed with the carrier within 30 days of the injury, as the carrier contends.

Having a final determination that the employer, in this case, had actual knowledge of the fall, an employer has a duty to file a written report of the injury with both the Commission and the carrier within eight days of the employee's absence from work for more than one day or be guilty of a Class D administrative violation. Section 409.005. Claimant, as the employer, failed to file the report of injury and potentially is liable for a Class D administrative violation. Section 409.008 provides that "[i]f an employer . . . has knowledge of an injury to . . . an employee and the employer . . . fails, neglects or refuses to file the report under Section 409.005, the period for filing a claim for compensation under Sections 409.003 and 409.007 does not begin to run against the claim of an injured employee . . . until the day on which the report required under Section 409.005 has been furnished." Simply put, the employee's duty to file a claim is tolled - until such a time as the employer, in this case, also the claimant, has filed the report of injury TWCC-1, in accordance with Section 409.008. See Texas Workers' Compensation Commission Appeal No. 971434, decided September 5, 1997. Although in this case the result seems somewhat ludicrous, we find that requirement in Section 409.003 to file a claim within one year of the date of injury has been tolled by the failure to file the report of injury and did not begin until May 29, 1997. Accordingly, we find that the hearing officer's determination in Finding of Fact No. 12 to be at odds with the conclusion that claimant had not timely filed a claim for compensation with the Commission within one year of the injury as required by Section 409.003. The requirement to file within one year was tolled by Section 409.008 and has not yet expired. Consequently, we reverse the hearing officer's determinations that claimant had not timely filed her claim within one year and render a new decision that the requirement to file a claim has been tolled pursuant to Section 409.008 until on or about May 29, 1998.

Regarding claimant's specific comments, we have reviewed the entire record and we find that claimant's case was adequately presented (with the possible exception of not addressing Section 409.008). As carrier notes, claimant offered and had admitted all or parts of 21 exhibits, and was able to present her position. We must note that the ombudsman is not an attorney and as such only assists (and does not represent) the claimant in the presentation of the evidence and making appropriate objections. While our record review only consisted of a review of the exhibits and listening to the audiotape, there was no indication on the tape that the ombudsman was overly emotional or crying or failed to provide adequate assistance. In fact it appeared that claimant, in her own closing, was crying and emotional. Claimant suggests, in a postscript, that employees with closed head injuries should be held to a different standard, particularly as to filing requirements, than other injured employees. We note there is no provision in the 1989 Act for such dual

standards and consequently, we are jurisdictionally precluded from applying such a different standard even if we were inclined to do so, which we are not.

Upon review of the record submitted, the hearing officer's determinations on actual knowledge by the employer and AWW have become final as not having been appealed, we affirm the hearing officer's determination that claimant did not sustain an injury in the course and scope of employment and that since claimant did not have a compensable injury claimant cannot, by definition (401.011(16)) have disability. We reverse the hearing officer's determination that claimant had not timely filed her claim within one year of the date of injury because the one year filing time was tolled pursuant to Section 409.008 until May 29, 1998, for failure of the employer to file a report of injury, and we render a new decision on that issue that the one year time for filing a claim has not yet passed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Christopher L. Rhodes
Appeals Judge