

APPEAL NO. 990208

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). On November 16, 1998, a hearing was held. She determined that AV, AEV, and EAV are minors, are legal beneficiaries, and will receive death benefits; the Statement of Evidence shows that these three beneficiaries were born of the marriage between appellant (claimant) and deceased. The hearing officer also concluded that claimant did not file a claim within one year of the death of deceased and did not have good cause for late filing; therefore she concluded that claimant "is not entitled to receive death benefits and, therefore, is not a legal beneficiary." Claimant asserts that she is a legal beneficiary, that she did have good cause for late filing of the claim, and that respondent (carrier) waived claimant's failure to timely file a claim by not initiating payments to the Subsequent Injury Fund (SIF). Carrier replied that the decision should be upheld.

DECISION

We affirm.

Deceased died on _____, from a forklift accident while working for (employer). The claimant was not at the hearing. Claimant's brother, ED testified that he worked in the United States with the deceased and that deceased sent money home to claimant. ED was at the marriage between his sister and deceased. He also testified that claimant and deceased had three children, as documents show. (The documents label all children as "son," while the testimony was that claimant and deceased had two sons and one daughter.) While the issues at the hearing included the identity of the beneficiaries and whether a claim was timely filed, there is no appeal in regard to the status of any children or the determination that all three children are beneficiaries and will receive death benefits. See Section 409.007(b)(1).

The evidence in this case shows, and is not disputed, that claimant signed a Notice of Fatal Injury or Occupational Disease/Claim for Compensation for Death Benefits (TWCC-42) on March 11, 1998. Another document shows that claimant signed a contract with Mr. B, attorney, on September 1, 1996. An affidavit from claimant, also dated in March 1998, says that she was married to deceased and she and deceased have three children (as named previously). She also stated that she received no notification from the Texas Workers' Compensation Commission (Commission) of the need to file a claim.

Carrier provided testimony of Mr. L, who said that he is a benefits administrator for carrier. He talked by phone to claimant on October 14, 1996, and told her of documents needed, including a claim. He told her he would send a blank copy of a claim. He said he sent such a blank copy, on the same day he talked to claimant, to the address she gave. He said that claimant spoke Spanish so he had a translator help him. Ms. S also testified. She is an adjuster for carrier who speaks "fluent" Spanish. She said that she did not adjust claimant's claim but assisted in translating. She agreed that requirements were discussed

including the need to file a claim. The record contains a copy of a letter dated October 14, 1996, in Spanish to claimant in (country) from carrier.

Mr. B did not testify but provided an affidavit which says that he was hired by claimant, through her brother, on August 26, 1996. He states that he sent a "notice of claim letter" to employer on August 26, 1996. While his affidavit says a copy of that letter is attached, it is not, and no such letter is in evidence; in addition, there is no assertion on appeal that this letter constitutes a timely claim or that any timely claim was made in this case. Mr. B indicated that he got the "impression" that employer had no workers' compensation insurance. He also had the "impression," mentioning a completed claim which ED provided him "later," that a claim had been filed. (This affidavit contains no assertion that any completed claim was seen prior to the passing of the limitation period.) Mr. B states that he considered whether there was third party liability. He then states that he learned on January 29, 1998, that claimant was receiving no benefits and sent a letter to carrier on the same date. (No explanation is provided as to why claimant's receiving no benefits would have this effect since it was earlier stated that he had the "impression" employer had no workers' compensation insurance.)

The hearing officer is the sole judge of the weight and credibility of the evidence. See Section 410.165. She determined that claimant was the surviving spouse of deceased and had not abandoned deceased. This finding of fact is not appealed. The hearing officer also found that claimant failed to timely file a claim. (There was no appeal concerning a finding of fact that addressed whether the claim was timely-nevertheless, we note that Finding of Fact No. 5 may be read to indicate a two-year period of limitation regarding filing of a claim; we point out that in a conclusion of law and in the decision part of the hearing officer's opinion at the end of the opinion the time limit that claimant did not meet in filing a claim is accurately stated to be one year. See Section 409.007(a).)

The hearing officer also found that no good cause was shown. Claimant states that the pertinent finding of fact, Finding of Fact No. 6, states that her attorney did not act prudently, but Finding of Fact No. 6 states that claimant did not act as a reasonably prudent person by failing to file a timely claim. While the hearing officer did not discuss the evidence considered to make that determination, the evidence of record does support that determination. The Commission has no duty to contact a potential claimant to tell that claimant of a possible claim, and no requirement to do so is cited. In addition, the hearing officer could consider the evidence of carrier that indicated some information about claim requirements was communicated to claimant in October 1996. Mr. B's impressions do not constitute good cause and his affidavit may be read as possibly contradictory in regard to his belief about workers' compensation insurance, and it may be read as never stating a date of his impression that a claim had been filed. The appeal itself states that there was confusion because of communication problems and Mr. B's having received a copy of a completed claim form; again with no assertion as to a date. The hearing officer did not abuse her discretion in failing to find good cause. She did not act arbitrarily in failing to find good cause. The evidence sufficiently supports her determination that claimant did not have good cause for untimely filing of the claim.

While no argument is made on appeal that claimant's attorney's failure to file a claim should not be imputed to claimant, Texas Employer's Insurance Association v. Tobias, 614 S.W. 2d 901 (Tex. Civ. App.-Eastland 1981, writ dismissed), states that an attorney's action is attributable to his client. In addition, the assertion that a mistake was made about whether a claim had been filed does not rise to the level of good cause either. See Texas Workers' Compensation Commission Appeal No. 94489, decided June 7, 1994.

Claimant also appears to say on appeal that since a finding of fact was made that claimant is the surviving spouse and had not abandoned the deceased, she should receive benefits. Those are the criteria for eligibility but to consider only those factors in determining death benefits would ignore the plain language of Section 409.007 which provides that failure to file a timely claim "bars the claim," unless good cause is shown, which was not found to be present, and no error was found in that determination on appeal. Effect must be given to Section 409.007, and in doing so the hearing officer considered facts including a death on _____, and a claim dated March 11, 1998; she then found no good cause for late filing of that claim.

Finally, claimant says that carrier waived claimant's failure to timely file a claim by not making payments to the SIF. There was no evidence that carrier did not dispute payment of death benefits to claimant on the basis of the late claim, and no citation or evidence (this point was not mentioned at the hearing) indicating that carrier failed to pay the SIF or that if it did, that would affect claimant's failure to file a claim in any way. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §132.10 (Rule 132.10) provides that if there are no beneficiaries or if a claim is not timely made, the carrier will pay a certain amount to the SIF. As shown by Section 409.007(b)(1), failure to file a timely claim does not bar a minor from receiving benefits. In addition, Rule 132.10(g) provides that there is no presumption against minors that a claim has not been filed. In addition, neither Section 409.007 nor Rule 132.10 provide for any waiver on the part of carrier to assert an untimely claim if it fails to pay money to the SIF.

The appeals file in this case contained four audiotapes. One, apparently from a hearing convened in June 1998, indicated that a continuance would be granted to get a translator. Another tape was blank except for the words "testing 1, 2, 3." The November hearing was contained in the two remaining tapes, which provided a complete record of that hearing.

The decision that deceased's three children will receive death benefits and that claimant is not entitled to death benefits is sufficiently supported by the evidence.

The order found at the end of the hearing officer's opinion is sufficiently supported by the evidence and is affirmed. See In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge