

APPEAL NO. 071960
FILED FEBRUARY 7, 2008

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 September 20, 2007, with the record closing on October 5, 2007. The hearing officer decided that: (1) the employee (deceased) did not suffer a compensable injury on _____, resulting in his death; (2) the appellants (claimant and minor claimants) are proper legal beneficiaries of the deceased, rendering them eligible to receive death benefits; (3) the claimant and minor claimants did not timely file claims for death benefits; and (4) although the minor claimants had good cause, the claimant had no good cause for failure to timely file a claim for death benefits. The claimant and minor claimants appealed, disputing the determination on compensability. The claimant also appealed the determination regarding the untimely filing of her claim for death benefits. The respondent (carrier) responded, urging affirmance. The determinations that the claimant and the minor claimants are proper legal beneficiaries of the deceased, rendering them eligible to receive death benefits (had the deceased sustained a compensable injury resulting in his death), and that the minor claimants have good cause for their failure to timely file their claims for death benefits were not appealed and have become final pursuant to Section 410.169.

DECISION

Affirmed in part and reversed and rendered in part.

COMPENSABLE INJURY

The hearing officer's decision that the decedent did not suffer a compensable injury on _____, resulting in his death is supported by sufficient evidence and is affirmed.

TIMELY FILING OF A CLAIM

Section 409.008 provides that if an employer or the employer's insurance carrier has been given notice or has knowledge of an injury to or the death of an employee and the employer or insurance carrier fails, neglects, or refuses to file the report under Section 409.005 (Employer's First Report of Injury or Illness (DWC-1)), 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 or a legal beneficiary until the day on which the report required under Section 409.005 has been furnished.

Section 409.007(a) provides that a person must file a claim for death benefits with the Texas Department of Insurance, Division of Workers' Compensation (Division) not later than the first anniversary of the date of the employee's death. Subsection (b) provides that failure to file in the time required by Subsection (a) bars the claim unless:

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

It was undisputed that the claimant filed her claim for death benefits more than one year after the first anniversary of the date of the decedent's death. The hearing officer was not persuaded that the claimant had good cause for her failure to timely file her claim for death benefits. However, the claimant contends on appeal that the evidence presented at the CCH conclusively proved the employer did not file the required report of injury until more than one year after the decedent's death. The carrier responded that at best, there was a fact issue regarding whether the employer had notice of the decedent's injury at any time during the one-year filing period.

In evidence was a copy of a lawsuit, filed November 8, 2006, in which the claimant filed suit against the employer and the dealership which had performed repairs on the motor vehicle the decedent was driving at the time of his death. The lawsuit specifically states that the decedent was driving the motor vehicle "while acting in the course and scope of his employment." The evidence further establishes that the employer had knowledge of this allegation because the employer filed an answer to the lawsuit on or about December 21, 2006, as reflected in the certificate of service attached to the answer. The DWC-1 was filed with the Division on February 12, 2007. Whether the injury was timely reported to the employer was not an issue at the CCH. The claimant filed her claim for death benefits on March 23, 2007.

For dates of injury on or after September 1, 1995, an employer shall report to the employer's insurance carrier if an injury results in the absence of an employee from work for more than one day. Section 409.005(a)(1). The report must be made not later than the eighth day after the employee's absence from work for more than one day due to an injury. Section 409.005(b). The insurance carrier shall file the report of the injury on behalf of the policyholder with the Division not later than the seventh day after the date on which the carrier receives the report from the employer. Section 409.005(d). The tolling provision in Section 409.008 does not apply unless there is first the duty to file the first report of injury. Camarillo v. Highlands Underwriters Insurance Co., 625 S.W.2d 11 (Tex. Civ. App.-Beaumont 1981, no writ). This law has been applied to the tolling provisions under the 1989 Act. See Appeals Panel Decision (APD) 000444, decided April 13, 2000, and APD 93225, decided May 12, 1993.

The evidence establishes that the employer had knowledge prior to the first anniversary of the decedent's death that the claimant was alleging that the decedent's death arose out of the course and scope of employment; that the employer was required to file a report of injury with the carrier under Section 409.005; that the employer or the insurance carrier failed to timely file its report; and that the claimant filed her claim within the extended limitations period. Therefore, we reverse the hearing officer's determination that the claimant did not timely file her claim for death benefits and render a new decision that the claimant did timely file her claim for death benefits.

SUMMARY

We affirm the hearing officer's determination that the employee (deceased) did not suffer a compensable injury on _____, resulting in his death. We reverse the hearing officer's determination that the claimant did not timely file a claim for death benefits and render a new decision that the claimant did timely file a claim for death benefits.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL R. OLIVER, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge