

APPEAL NO. 121315
FILED OCTOBER 29, 2012

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 May 22, 2012, with the record closing on June 11, 2012, in [City], Texas, with [hearing officer] presiding as hearing officer.

With regard to the first issue before him, the hearing officer determined that: (1) respondent 3 (claimant beneficiary 3) is the proper legal beneficiary of (deceased) and she is entitled to death benefits; and (2) appellant/cross-respondent (claimant beneficiary 1); respondent 4 (minor claimant beneficiary 4); respondent 5 (claimant beneficiary 5); respondent 7 (claimant beneficiary 7); respondent 8 (claimant beneficiary 8); respondent 9 (claimant beneficiary 9); respondent 10 (claimant beneficiary 10); respondent 11 (claimant beneficiary 11); respondent 12 (claimant beneficiary 12); and respondent 13 (claimant beneficiary 13) are not proper legal beneficiaries of the deceased and they are not entitled to death benefits.

With regard to the second issue before him, the hearing officer determined that respondent 1/cross-appellant 1 (carrier) is not relieved from liability for death benefits to the claimant beneficiaries 1, 3, 4 (minor), 5, 7, 8, 9, 10, 11, 12, and 13 because of their failure to file a claim for death benefits with the Texas Department of Insurance, Division of Workers' Compensation (Division) pursuant to Section 409.007(b).

We note that the two disputed issues certified out of the benefit review conference (BRC) listed respondent 6 (claimant beneficiary 6) and that the hearing officer failed to make any finding of fact or conclusion of law as to whether claimant beneficiary 6 is a proper legal beneficiary entitled to death benefits or whether the carrier is relieved of liability for death benefits to claimant beneficiary 6 because of his failure to file a claim for death benefits with the Division pursuant to Section 409.007(b).

Claimant beneficiary 1 appealed the hearing officer's determinations that she was not a proper legal beneficiary entitled to death benefits. The appeal file does not contain any response to her appeal.

Respondent 2/cross-appellant 2 (claimant beneficiary 2) cross-appealed, contending that she was a necessary party to the issue of who is the proper legal beneficiary entitled to death benefits. Attached to her cross-appeal is evidence of a marriage certificate between claimant beneficiary 2 and the deceased, a Beneficiary Claim for Death Benefits (DWC-42) completed by claimant beneficiary 2 on March 7, 2012, with a claim number of "[docket no. 1]" rather than this case's claim number of

“[docket no. 2],” and Dispute Resolution Information System (DRIS) notes under claim number “[docket no. 2]” regarding potential claims for death benefits, identifying claimant beneficiary 2 as a potential claimant beneficiary and the second wife of deceased. The appeal file does not contain any response to claimant beneficiary 2’s cross-appeal.

The carrier cross-appealed the hearing officer’s determination on who is the proper legal beneficiary entitled to death benefits and that the carrier is not relieved from liability for death benefits to the claimant beneficiaries as previously listed because of the claimant beneficiaries’ failure to file a claim for death benefits with the Division pursuant to Section 409.007(b). The appeal file does not contain any response to the carrier’s cross-appeal.

DECISION

Reversed and remanded.

It is undisputed that the deceased was killed on [date of injury], when he was struck by a log at work. The carrier does not dispute that the death was the result of a compensable injury.

Although duly notified of the time, date, and place of the CCH, the claimant beneficiaries 6, 7, 8, 9, 10, 11, 12, and 13 failed to appear and failed to respond to a 10-day letter sent to them advising them of an opportunity to contact the Division so that the CCH could be reconvened to permit them to present evidence on the disputed issues and to show good cause why they failed to appear at the May 22, 2012, CCH setting. The record was held open until June 11, 2012, but these claimant beneficiaries did not contact the Division. None of these claimant beneficiaries appealed the decision and order of the hearing officer or responded to the appeal and two cross-appeals filed in this case.

Although duly notified of the time, date, and place of the CCH, [PM], as next friend of minor claimant beneficiary 4, was not sent a 10-day letter subsequent to her failure to appear at the CCH. A review of Division records reflect the 10-day letter and decision and order was only sent to minor claimant beneficiary 4. We note that the next friend of a minor claimant beneficiary should be duly notified of the time, date, place of any hearings in the claim as well as should be mailed any 10-day letters and be served with any decisions and orders and appellate documents in the claim.

Division records reflect that claimant beneficiary 2 was not duly notified of the BRC held on January 10, 2012, or of the CCH held May 22, 2012. Further, a copy of the decision and order was not sent to claimant beneficiary 2 by the Division. However,

claimant beneficiary 2 was served with copies of claimant beneficiary 1's appeal and the carrier's cross-appeal. Claimant beneficiary 2 filed a cross-appeal, contending she was the sole proper legal beneficiary of the deceased and entitled to death benefits.

We further note that in the section entitled "PARTIES PRESENT" of the decision, the hearing officer makes a material misstatement of fact. The hearing officer states that "[c]laimant [b]eneficiary [5], appeared and was assisted by [CM], ombudsman. [Claimant beneficiary 1] appeared but gave notice that she was not pursuing a claim for benefits."

Upon review of the recording of the CCH and the evidence, the hearing officer materially erred in these statements. Claimant beneficiary 5 appeared at the CCH and she was not assisted by an ombudsman or represented by an attorney. On the record, the hearing officer inquired of claimant beneficiary 5, who had filed a DWC-42, whether she was pursuing a claim for death benefits. Claimant beneficiary 5 stated to the hearing officer that she was not pursuing benefits at that time. We note that the hearing officer listed claimant beneficiary 5 as a witness for her case-in-chief; however, claimant beneficiary 5 was called to testify for the carrier's case-in-chief. We also note that the hearing officer sent a 10-day letter to claimant beneficiary 5, although she appeared at the CCH.

It is also reflected upon review that claimant beneficiary 1 appeared at the CCH and pursued a claim as a proper legal beneficiary entitled to death benefits. Claimant beneficiary 1 was assisted at the CCH by CM, ombudsman. We note that she was a witness at the CCH but the hearing officer failed to list claimant beneficiary 1 as a witness for her case-in-chief. Claimant beneficiary 1 has filed an appeal in this claim, appealing the hearing officer's determination of who is the proper legal beneficiary entitled to death benefits.

BACKGROUND INFORMATION

The evidence at the May 22, 2012, CCH reflects that the deceased participated in two formal "marriage ceremonies." The first was in 1972 in Mexico with claimant beneficiary 3, and the second was in 1983 in Texas with claimant beneficiary 2.

The evidence at the May 22, 2012, CCH further reflects that the deceased and claimant beneficiary 3 had four children and that none of the four children were minors or enrolled as a full-time students in an accredited educational institution or less than 25 years of age on the deceased's date of death, [date of injury].

The evidence at the May 22, 2012, CCH reflects that the deceased and claimant beneficiary 2 had two children and that neither of these two children were minors or

enrolled as a full-time students in an accredited educational institution or less than 25 years of age on the deceased's date of death, [date of injury]. The deceased was the grandfather of minor claimant beneficiary 4, whose mother was one of these children and who is now deceased.

The evidence at the May 22, 2012, CCH reflects that sometime in the late 1970s, the deceased left claimant beneficiary 3 and their children at his parent's house in Mexico, and moved to Texas to work and live. The evidence also reflects that there were periods of time that the deceased lived in Texas with claimant beneficiary 1, his sister, and paid her money for those time periods.

The evidence at the May 22, 2012, CCH reflects that the claimant beneficiaries 1, 5, 7, 9, 10, 11, 12, and 13 were the sisters of the deceased; claimant beneficiaries 6 and 8 were the brothers of the deceased.

The evidence further reflects that the claimant beneficiaries 1, 2, 3, 4 (minor), 5, 6, 7, 8, 9, 10, 11, 12, and 13 at various times have alleged that they were potential proper legal beneficiaries of the deceased entitled to death benefits. However, in the Background Information section of his decision, the hearing officer stated that although the claimant beneficiaries 1, 3, 4 (minor), 5, 7, 8, 9, 10, 11, 12, and 13 presented their claims for death benefits to the carrier on specific dates, "[t]he evidence presented failed to establish when or if any of the claims for death benefits were filed with the Division."

NEWLY DISCOVERED EVIDENCE

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. See *generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See APD 051405, decided August 9, 2005.

Upon review of the new evidence attached to the cross-appeal of claimant beneficiary 2, we agree that the marriage certificate between the deceased and claimant beneficiary 2, the DWC-42 completed by claimant beneficiary 2 on March 7, 2012, with a claim number of "[docket no. 1]" rather than this case's claim number of "[docket no. 2]," and the DRIS notes under claim number "[docket no. 2]" regarding potential claims for death benefits, identifying claimant beneficiary 2 as a potential claimant beneficiary and the second wife of deceased meets the requirements of newly

discovered evidence and the documents were considered. We note a portion of the DRIS notes under claim number “[docket no. 2]” were admitted into evidence at the CCH held on May 22, 2012.

NECESSARY PARTIES TO CLAIM

28 TEX. ADMIN. CODE § 140.1(4) (Rule 140.1(4)) states that a “[p]arty to a proceeding” is defined as “[a] person entitled to take part in a proceeding because of a direct legal interest in the outcome.”

Section 408.182 provides in pertinent part:

- (a) If there is an eligible child or grandchild and an eligible spouse, half of the death benefits shall be paid to the eligible spouse and half shall be paid in equal shares to the eligible children. If an eligible child has predeceased the employee, death benefits that would have been paid to that child shall be paid in equal shares per stirpes to the children of the deceased child.
- (b) If there is an eligible spouse and no eligible child or grandchild, all the death benefits shall be paid to the eligible spouse.
- (c) If there is an eligible child or grandchild and no eligible spouse, the death benefits shall be paid to the eligible children or grandchildren.
- (d) If there is no eligible spouse, no eligible child, and no eligible grandchild, the death benefits shall be paid in equal shares to surviving dependents of the deceased employee who are parents, stepparents, siblings, or grandparents of the deceased.
- (e) If an employee is not survived by legal beneficiaries or eligible parents, the death benefits shall be paid to the subsequent injury fund under Section 403.007.
- (f) In this section:
 - (1) “Eligible child” means a child of a deceased employee if the child is:
 - (A) a minor;
 - (B) enrolled as a full-time student in an accredited educational institution and is less than 25 years of age; or

(C) a dependent of the deceased employee at the time of the employee's death.

(2) "Eligible grandchild" means a grandchild of a deceased employee who is a dependent of the deceased employee and whose parent is not an eligible child.

(3) "Eligible spouse" means the surviving spouse of a deceased employee unless the spouse abandoned the employee for longer than the year immediately preceding the death without good cause, as determined by the [D]ivision.

Rule 132.2(b) provides in pertinent part that:

A benefit which flowed from a deceased employee, at the time of death, on an established basis in at least monthly intervals to the person claiming to be dependent, is presumed to be a regular or recurring economic benefit. This presumption may be overcome by credible evidence. The burden is on the claimant [beneficiary] to prove that benefits, which flowed less frequently than once a month, were regular or recurring at the time of the employee's death.

Rule 132.3(b) provides that:

A surviving spouse who abandoned the employee, without good cause for more than one year immediately preceding the death, shall be ineligible to receive death benefits. The surviving spouse shall be deemed to have abandoned the employee if the surviving spouse and the employee had not been living in the same household for more than one year preceding the employee's death unless the spouse is:

(1) hospitalized;

(2) in a nursing home; or

(3) living apart due to career choices, military duty, or other reasons where it is established their separation is not due to the pending breakup of the marriage. The burden is on a person who opposes the claim of a surviving spouse to prove the spouse abandoned the deceased employee.

Rule 132.3(c) provides that:

If more than one person claims to be the surviving spouse of the deceased employee, the [Division] shall presume the most recent spouse is the surviving spouse. This presumption may be rebutted by an individual who presents proof of a prior valid marriage to the deceased employee.

Section 409.007 provides in pertinent part that:

- (a) A person must file a claim for death benefits [DWC-42] with the [D]ivision not later than the first anniversary of the date of the employee's death.
- (b) Failure to file in the time required by Section (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.

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, 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.

We cannot address the hearing officer's determinations in this case because it is apparent that claimant beneficiary 2, claimant beneficiary 6, and PM, the next friend of minor claimant beneficiary 4 were necessary parties to this proceeding. Necessary parties have been defined as those persons who have such an interest in the controversy that a final judgment or decree cannot be made without affecting their interests. McDonald v. Alvis, 281 S.W.2d 330 (Tex. 1955). Rule 39(a) of the Texas Rules of Civil Procedure requires a person who is subject to service of process to be joined as a party in an action if: (1) in his absence complete relief cannot be accorded among those already parties; or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (i) as a practical matter impair or impede his ability to protect that interest; or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. Rule 39(b) provides if such person cannot be made a party, the court shall determine whether in

equity and good conscience the action should proceed among the parties before it, or be dismissed, listing factors to be considered by the court. See also Rule 140.1 which defines "party to a proceeding."

The Rules of Civil Procedure have not been held applicable to CCHs and service of process is not issued to compel a party's attendance at a hearing. By analogy, though, the same concepts of fairness and judicial economy that underlie Rule 39 and case law concerning necessary parties should be applied in these proceedings, especially where the beneficiary status of a minor child is concerned. That the outcome of this proceeding affects that minor claimant beneficiary 4's interest as well as the beneficiary status of claimant beneficiary 2, "married" to the deceased in 1983 is certain, as the hearing officer's decision, if affirmed, will determine that all death benefits be paid to claimant beneficiary 3.

Further, the hearing officer's decision and order is incomplete because there are no findings of fact or conclusions of law regarding claimant beneficiary 6.

Accordingly, we reverse the hearing officer's decision and remand this case. Because of lack of notice to and joinder of all necessary parties and because of the decision being incomplete as to all necessary parties, we do not reach the merits of claimant beneficiary 1's appeal or claimant beneficiary's 2 cross-appeal regarding whether or not either is a proper legal beneficiary; we do not reach the merits of the carrier's cross-appeal whether claimant beneficiary 3 is a proper legal beneficiary or whether the carrier is relieved for liability to any of the claimant beneficiaries because of their failure to file a claim for death benefits with the Division pursuant to Section 409.007(b). We remand this case to the hearing officer for further action consistent with this decision.

DEATH BENEFIT CLAIMS

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.

The plain language of Section 409.007 provides in pertinent part that a claimant beneficiary must file a DWC-42 with the Division not later than the first anniversary of the date of the employee's death unless the person is a minor or good cause exists for the failure to file a claim.

In the Background Information section of his decision, the hearing officer stated that the claimant beneficiaries 1, 3, 4 (minor), 5, 7, 8, 9, 10, 11, 12, and 13 “presented their respective claims for death benefits resulting from [the deceased’s] death to [the] [c]arrier . . .” on specified dates. The hearing officer further stated that “[t]he evidence presented failed to establish when or if any of the claims for death benefits were filed with the Division.” The hearing officer also stated that “[u]nder the circumstances presented, the hearing officer finds that the one year limitation period for filing a claim with the Division was tolled until [the] [c]arrier complied with its responsibility to give notice of [the deceased’s] death to the Division and, by pursuing their respective claims for death benefits, the claimant beneficiaries complied with their responsibility to file their claims with the Division within one year of the date the Report of Injury was filed with the Division.”

We do not agree with the hearing officer’s analysis that pursuing a claim for death benefits with a carrier without filing a DWC-42 with the Division complies with the requirements under Section 409.007(b). Section 409.007(b) provides that a claim for death benefits not timely filed with the Division is barred unless: (1) the person is a minor or incompetent; or (2) good cause exists for the failure to file a claim under this section.

Because we are remanding this case regarding the issue of notice and joinder of all necessary parties and the incomplete decision, we do not reach the merits of the second disputed issue of whether the carrier is relieved of liability because of a claimant beneficiary’s failure to file a claim for death benefits with the Division under Section 409.007(b).

In order to resolve the disputed issues, the hearing officer must have in evidence, either through the parties or through the hearing officer’s official notice of the Division’s records, what claimant beneficiaries have filed a DWC-42 with the Division and the date of the filing of the various DWC-42s. The DRIS notes attached to the claimant beneficiary’s appeal and that portion of the DRIS notes admitted at the CCH, indicate that various DWC-42s have been filed in this case either under the claim number of “[docket no. 1]” or claim number of “[docket no. 2].”

REMAND INSTRUCTIONS

On remand, the hearing officer is to consolidate/link the two claims, “[docket no. 1]” and “[docket no. 2].” The hearing officer is to ensure that proper service and notice of hearings is sent to all necessary and proper parties, to-wit: (1) claimant beneficiaries 1, 2, 3, 4 (minor through next of friend PM), 5, 6, 7, 8, 9, 10, 11, 12, and 13; (2) the carrier; and (3) the Subsequent Injury Fund, in order to allow for due process and fairness of these proceedings for those persons who have such an interest in the

controversy that a final judgment or decree cannot be made without affecting their interests.

On remand, the hearing officer is to amend the two disputed issues to include all necessary parties, the 13 claimant beneficiaries.

All parties are to be allowed an opportunity to present evidence on the disputed issues and to respond to evidence admitted by official notice of the hearing officer, which must include but is not specifically limited to the filing of the DWC-42s with the Division.

On remand, the hearing officer must consider the evidence and make necessary findings of fact and conclusions of law as required by the 1989 Act and Rules as to who is the proper legal beneficiary entitled to death benefits and is the carrier relieved of liability for death benefits because of any claimant beneficiary's failure to file a claim for death benefits with the Division pursuant to Section 409.007(b).

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

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

**C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Cynthia A. Brown
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge