APPEAL NO. 971099

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 claims 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 claims. 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.

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 claims were barred because timely claims 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. The claimants also argue that the hearing officer abused his discretion in not finding 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.

DECISION

Affirmed.

Documents in the file indicate that the deceased, who was an herbicide sprayer for (employer), was riding in a truck owned by the employer in which his cousin was the driver and, on _____, at 7:05 pm. the vehicle failed to negotiate a turn and left the road, overturning in a ditch and ejecting both occupants. Deceased died from his injuries that same day.

We note that the hearing officer referred to the fact that this CCH was held immediately after a connected case, involving the death of the decedent's cousin from the same accident. The record in this case was less than in the connected case, considered by the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 970753, decided June 9, 1997, and focused primarily on the election of remedies argument as good cause for not filing a timely claim.

The attorney for the claimants in this case was Mr. A. Mr. A said that he represented the parents of the deceased, who were not personally present at the CCH, nor was their absence explained in terms of either unavailability or expense. At the start of the CCH, Mr. A referred to his clients as "Mr. and Mrs. H" and then corrected himself, calling them "Mr. H" and "Mrs. M." Mr. A filed claims on behalf of his clients on the day of the CCH. Neither claim in evidence contains an address for either person. While Mr. A testified generally that there had been settlement negotiations going on to resolve various tort claims arising from the death, he indicated that he did not have extensive discussion with the attorney purporting to represent the insurance carrier, Mr. Mc, as did the attorney for the family of the other decedent, who was Mr. Y. Mr. A said he primarily talked with Mr. Y to monitor progress of negotiations. Aside from stating that he furnished requested birth and death certificates and the affidavit, and talked several times with Mr. Y, there was scant evidence concerning the efforts that were undertaken by the claimants in the ensuing year after their son's death. When Mr. A began representation of the claimants was not made clear. Mr. A indicated that he produced the January 1997 affidavit from his clients, asserting dependency, at the request of Mr. Mc, although it is not clear if he spoke to Mr. Mc directly or received a relayed request through Mr. Y. Mr. A referred to the request for the affidavit as the "last message" he received. Mr. A said he went through an uncle to get the affidavit. Mr. Y was in attendance at this CCH, but did not testify. Mr. A did not assert that he was specifically misled by anyone acting for the carrier, although he stated that a prehearing conference in February 1997 was the first notice he had that Mr. Mc was no longer involved. He said he had only one or two conversations with Mr. Mc shortly before the holidays.

The Employer's First Report of Injury or Illness (TWCC-1) was filed with the Texas Workers' Compensation Commission (Commission) on October 2, 1995. The copy in evidence indicates the employer's belief that the deceased was single and that it was unknown if he had surviving children.

The January 1997 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 relied 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.

No addresses are contained in the affidavit for either claimant and most of the affidavit is concerned with the payment of benefits in a lump sum through Mr. A, due to mail problems in Mexico. The deceased's birth certificate refers to the claimant's mother as Ms. MZF. According to the birth and death certificates presented, the claimants were

around 39 and 41 years old when their son died. Mr. A indicated that one available remedy would be a negligent entrustment case against the employer and an action against the driver of the car, whom he asserted was an unlicensed driver, which made his situation different from that of Mr. Y's clients.

The carrier presented no evidence and, in closing argument, very briefly argued the claim filing issue.

We have dealt with the arguments on election of remedies in Appeal No. 970753, *supra*. 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 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 other actions that the claimants here indicated were available were ordinary negligence and gross negligence and an action against the driver of the car. 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 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. Because expressly contemplated by the section, election of workers' compensation would not pose an entire bar of any gross negligence cause of action that the claimants may have been able to assert. We further note that the Medina case did not bar an action against a coworker for his part in the injuries because of acceptance of workers' compensation.

We cannot agree, therefore, that good cause may be found in the argument that filing a claim would have caused an election of remedies precluding other available remedies. In any case, the fact that a knowing election was made for one remedy over another does not, in our opinion, amount to good cause when a party decides to return to the originally abandoned remedy. Concerning the argument that filing a timely claim for compensation would have violated the open courts provision of the Texas Constitution, we do not consider constitutional challenges to statutes. Texas Workers' Compensation Commission Appeal No. 92124, decided May 11, 1992; Texas State Board of Pharmacy v. Walgreen Texas Co., et al., 520 S.W.2d 845 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.). Therefore, we affirm the determination that a late claim was filed and no good cause was shown therefore.

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.

We will not 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 but also notes there must be evidence that it was regular on receiving. The carrier at this CCH made no comment, one way or the other, on the status of claimants as dependents. However, Mr. A indicated that the parents of the deceased were not married to each other at the time of decedent's death and therefore did not share a common household because he referred to the deceased's mother as "Mrs. M" after having first referred to her as "Mrs. H." The lack of any addresses in the documents in question does nothing to counter this inference and the claimants were not personally present to furnish additional or clarifying evidence. Furthermore, it is proven in this case that the claimants were comparatively young when deceased was killed, and common experience would not guide the finder of fact as to why regular and recurring financial support would be required from a son who was barely out of minority. Finally, we note that the hearing officer held this CCH immediately after a companion case and he could not fail to note that the language of the affidavit, executed several months after that in the companion case, is nevertheless identical. All of these things are factors which can be used to weigh the credibility of the document on the issue of dependence, most especially when there has not been strict compliance with applicable rules. Establishing dependence is not simply a matter of using "magic words" in an affidavit.

While we realize that we reached a different result in Appeal No. 970753, *supra*, with an identically worded affidavit, the facts in each record surrounding each affidavit were not the same and, thus, where the prospect of two households is raised in this case by the claimants' attorney, where the claimants were quite evidently young survivors, and where no clarification of the facts can be made due to the absence of the claimants, we cannot agree that there is enough evidence in this case to reverse the hearing officer on his determination that there was insufficient proof of financial support on a regular or recurring basis. There is more in the record than in the other case to support the hearing officer's decision and it cannot be said that it is so against the great weight and preponderance of the evidence as to be manifestly unfair or unjust.

We affirm the hearing officer's decision and order.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Christopher L. Rhodes
Appeals Judge