APPEAL NO. 971434

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 June 16, 1997. With regard to the issues at the CCH, he determined that the appellant (claimant) sustained a compensable injury on _____, and did not have disability, and that the respondent (carrier) is relieved of liability due to the claimant's failure to timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) and failure to show good cause for failing to timely file a claim for compensation. The claimant appeals the disability and filing of notice of claim issues, seeking a reversal of the decision, and the carrier responds, seeking its affirmance. The compensability determination is not appealed and, therefore, became final by operation of law. Section 410.169.

DECISION

We affirm, as reformed.

The facts of this case are largely undisputed. The parties stipulated that license holder maintained a staff leasing services agreement with client company, whereby it assigned employees to the client company, and that the license holder and the client company were coemployers. Texas Staff Leasing Services Act, TEX. LAB. CODE ANN. § 91.001 *et seq*. (SLS Act). The claimant testified that he was an employee assigned to the client company and paid by the license holder. He provided the client company with notice of his injury on the day it occurred, _____. The client company filed an Industrial Accident Board (IAB) Employer's First Report of Injury or Illness form IAB E-1 with the Commission on August 10, 1994. The claimant testified that shortly after the injury, the client company notified him that it was a nonsubscriber to the 1989 Act. On August 22, 1994, the claimant completed a disability claim form with the client company's group occupational accident plan and received weekly benefits pursuant to the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C.§§ 1001-1461 (1988) (amended 1989). He stated that he subsequently filed a negligence action in Texas District Court. The claimant said that on approximately August 3, 1995, the ERISA plan administrator informed him he may be covered by the license holder's workers' compensation insurance. He completed an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) on September 4, 1996, and it bears the carrier's December 16, 1996, "received" date stamp. The license holder's representative, Ms. C, testified that it first received notice of the claimant's injury in December 1996.

The claimant maintains that the carrier is not relieved of liability for his failure to timely file a claim for compensation because the one year filing provision was tolled by either the client company's failure to file an Employer's First Report of Injury or Illness (TWCC-1) or the license holder's failure to file a TWCC-1. He argues that either the client company's use of an IAB E-1 instead of a TWCC-1 tolled the claim filing provision or the client company's receipt of notice of injury is "legally imputed" to the license holder and the

license holder's failure to file a TWCC-1 tolled the claim filing provision. The carrier responds that the IAB E-1 was a sufficient report of injury, that the claim filing provision was not tolled since the client company's report of injury to the Commission was effective for both it and the license holder as coemployers, and that the claimant did not timely file a claim for compensation and did not show good cause for his failure to do so.

An employee, or one acting on his behalf, must notify his employer of a compensable injury on or before the 30th day after the injury. Section 409.001(a); Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.1(a) (Rule 122.1(a)). "An employee or a person acting on the employee's behalf shall file with the Commission a claim for compensation for an injury not later than one year after the date on which the injury occurred." Section 409.003(1); Rule 122.2(a). The failure to file a claim for compensation within one year of the injury "relieves the employer and employer's insurance carrier of liability . . . . unless good cause exists for failure to file a claim in a timely manner." Section 409.004; Rule 122.2(f). However, the employee's duty to file a claim is tolled "[i]f 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 the insurance carrier fails, neglects or refuses to file the report under Section 409.005 [Employer Report of Injury]." Section 409.008.

Both parties agreed throughout the proceeding that the SLS Act applies to this case. Under its provisions, license holders and their client companies are considered "coemployers." SLS Act § 91.042(c). "A contract between a license holder and a client company must provide that the license holder: . . . retains the right of direction and control over the adoption of employment and safety policies and the management of workers' compensation claims, claim filings, and related procedures." SLS Act § 91.032(5). "Each license holder is responsible for the license holder's contractual duties and responsibilities to manage, maintain, collect, and make timely payments for: (1) insurance premiums; (2) benefits and welfare plans; (3) other employee withholding; and (4) any other expressed responsibility within the scope of the contract for fulfilling the duties imposed under this section and Sections 91.032, 91.0147, and 91.048." SLS Act § 91.046.

The IAB E-1 was utilized by employers to report injuries to the IAB. TEX. REV. CIV. STAT. ANN. Art. 8307 § 4a (Vernon Pamph 1992), *now repealed*. With regard to employers' reports of injury to the Commission, the "Commission shall prescribe the form, format, and manner of the report." Rule 120.2(b). The hearing officer determined that the IAB E-1 filed by the client company contained the requisite information per Rule 120.1(a). We have noted no distinction between the IAB E-1 and the TWCC-1. *See* Texas Workers' Compensation Commission Appeal No. 94224, decided April 1, 1994; Texas Workers' Compensation Commission Appeal No. 92122, decided May 4, 1992. Therefore, we reject the claimant's argument that the hearing officer erred in determining that the client company's IAB E-1 filing satisfied Section 409.005.

Neither party introduced a copy of the agreement between the license holder and the client company, so we turn to the SLS Act and the Texas Department of Licensing and

Regulation's (TDLR) rules. *See* 16 TEX. ADMIN. CODE § 72.1 *et seq*. But neither the SLS Act, the TDLR rules, the 1989 Act or the Commission's rules lend any guidance regarding client companies' duties regarding the reporting of assigned employees' injuries. The claimant complains on appeal that the hearing officer ignored his tolling argument. We disagree. The hearing officer determined that the claimant's notice of injury to one coemployer is notice to the other coemployer and one coemployer's report of injury to the Commission is a report of an injury on behalf of both coemployers. In the absence of any facts in the record contrary to the hearing officer's interpretation of the relationship between the license holder and the client company, we affirm his determinations that the "employer," as defined by the 1989 Act, reported the claimant's injury to the Commission on August 10, 1994, that the claim for compensation filing provision was not tolled and that the claimant did not timely file a claim for compensation.

The claimant also argues on appeal that the hearing officer erred in not adding an issue regarding whether he had good cause for failing to timely file a claim for compensation with the Commission. The record reflects that the claimant requested that the issue be added to the disputed issues under consideration at the CCH. The hearing officer responded that it was not necessary to add a specific issue on good cause because good cause was subsumed in the consideration of timely claim for compensation filing. The decision contains a specific finding of fact that the claimant did not show good cause and, therefore, we do not find error in the hearing officer's refusal to list good cause as a separate issue. The record includes a March 31, 1997, letter from the license holder's client services manager, Ms. H, to the carrier indicating that in June 1994, when the claimant applied for his job at the client company, he was informed that the client company was a nonsubscriber under the 1989 Act. On December 13, 1996, the claimant's attorney sent a copy of the client company's IAB E-1 to the carrier. The "fax transmission" cover letter accompanying it states that "[t]he claimant and his representative have been misinformed several times by the [Commission] as to which carrier had coverage for [the license holder] at the time of the incident."

In determining whether an employee had good cause for failing to timely file a claim for compensation, the test is whether he "prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances." Texas Workers' Compensation Commission Appeal No. 961562, decided September 11, 1996. Our review of a decision that the claimant did not have good cause is one of an abuse of discretion. *Id*.

It is apparent that the client company did inform the assigned employee that it was a nonsubscriber. We note again that the parties agreed that the SLS Act applies and that it confers workers' compensation insurance for assigned employees through coverage by the license holder's carrier. SLS Act § 91.042(C). A license holder must provide each assigned employee written notice of the agreement between the license holder and the client company. SLS Act § 91.031(b); TDLR Rule 72.70(b). However, the record is not developed as to whether the claimant received the required SLS Act notices. Neither he nor Ms. C were questioned as to whether he received notice of the SLS Act and the

agreement. The claimant provides no explanation as to why he waited 13 months after being informed that he might be covered by workers' compensation to file a claim for compensation. Even were we to assume the Commission provided the claimant with erroneous information as to whether he was employed by a workers' compensation subscriber and even if the information formed good cause for his failure to timely file a claim, he did not testify as to when he received the information. Either the Commission file on the claimant, the Commission's coverage files for the license holder and the client company or the Commission's Dispute Resolution Information System (DRIS) notes may have provided evidence as to the unresolved coverage issues, but none of those documents are in evidence. We do not find that the determination that the claimant did not show good cause for failing to timely file a claim for compensation was an abuse of discretion. Texas Workers' Compensation Commission Appeal No. 950678, decided June 8, 1995; Texas Workers' Compensation Commission Appeal No. 951702, decided November 27, 1995.

Disability means the "inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Disability, by definition, depends upon there being a compensable injury. *Id*. Since the carrier is relieved of liability for any compensable injury, we affirm the determination that the claimant did not have disability.

The decision does not reflect that Ms. C testified at the CCH and the record reflects that she did. Therefore, we reform the decision to reflect that Ms. C testified at the CCH. Finding that the hearing officer correctly applied the law to the facts and did not abuse his discretion, we affirm the decision that the carrier is relieved of liability.

_____
Christopher L. Rhodes
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley

Appeals Judge