APPEAL NO. 020323-s
FILED MARCH 27, 2002

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 January 22, 2002. On the three issues before him, the hearing officer held that the deceased wife (deceased) of the appellant (claimant/spouse) was "specifically excluded" from coverage; that the respondent's (carrier) defense on compensability is not limited to the "specific exclusion from coverage" defense listed on the Payment of Compensation or Notice of Refused or Disputed Claim (TWCC-21) that was filed with the Texas Workers' Compensation Commission (Commission) on June 6, 1996; and that the carrier is relieved from liability because of the claimant/spouse's failure to timely file a claim for compensation with the Commission within one year of the injury. The claimant/spouse has appealed all adverse determinations. The carrier files a response urging affirmance.

DECISION

Reversed and rendered.

This case is a claim for death benefits; the claimant present at the CCH was the claimant/spouse. The case was styled incorrectly in the hearing officer's decision and order in that the deceased was listed as the "claimant." It was stipulated that the deceased died on _____, while furthering the business of (the insured employer).

Although there is a reference in the record to a surviving minor child, this child's status as a potential or actual "claimant" in this case was left undeveloped. While we note that no issue was raised disputing the status of any beneficiaries, it is incumbent on the hearing officer, most especially when minor beneficiaries may exist, to clarify through stipulation the identity of those who would have beneficiary status in the event a death is found to be compensable. This is especially true when one of the issues has to do with whether a timely claim for death benefits was filed.

In view of the complexity of the issues presented and the fact that each party in this hearing had a burden of proof, the record is remarkably scant. The claimant/spouse testified that he was the sole proprietor of the insured employer. He testified that it was not a corporation or partnership. The insured employer was formed in December 1995, to perform services for a single client company. The client company required workers' compensation insurance. The claimant/spouse testified that the insured employer moved onto the premises of the client company at the end of January 1996.

The claimant/spouse testified that the deceased was the company's "Gal Friday" and was paid a salary of $350.00 a week. When she was killed in an automobile accident on _____, she was on her way to pick up a part for equipment used by the insured employer.

The claimant/spouse said he was not paid a salary but took draws from the insured employer as needed and then only if the insured employer was profitable. According to three premium checks in evidence, the bank account for the insured employer was initially in the claimant/spouse's name, although the deceased was also authorized to sign checks off this account. She also did the tax filings for the insured employer, and was tasked with obtaining workers' compensation insurance. To carry out this task, the deceased contacted the same carrier that insured a family member's business and served as the primary contact with the insurance salesman.

The insurance application. The application for combined workers' compensation and general liability coverage is in evidence. "Applicant" is shown as claimant/spouse and the deceased is shown as "d/b/a" the insured employer; however, the business risk is checked as "individual" rather than the other provided alternatives of partnership or corporation. The number of employees shown is six. Although six "crew members" are indicated, including two truck drivers, the application also states that one of the truck drivers is a contractor.

The application for insurance is dated December 4, 1995, and shows a policy period of "12/11/95 to 12/11/95 (sic)." Premium is to be based on payroll. The application queries whether "sole prop/partners/exec" officers are to be excluded or included, but neither alternative is checked. The claimant/spouse and the deceased are listed in an area below this question. The classification number assigned to the deceased is "clerical." The claimant/spouse was assigned a "mech logging" number. To the side of the names, where method of computing premium is indicated, the alternative "excl." is checked.

In the application's premium calculation section, all premiums are shown as calculated for the "mech logging" category. On the policy itself, no specific number of covered employees is listed and the premium is calculated for "logging or lumbering-mechanized felling machines & delimbing equipment" that the claimant/spouse said was the business of the insured employer. The claimant/spouse said it was his understanding that he would be excluded from coverage under the policy because he was the insured employer's owner, and he did not understand that the deceased would be excluded. As shown by an endorsement schedule entitled "Partners, Officer and Others Exclusion Endorsement" to the workers' compensation policy, only his name was listed as an excluded "other." Although a transcribed statement from the insurance salesman said that both the claimant/spouse and the deceased were intended to be excluded from coverage, there was no explanation as to why the endorsement only listed the claimant/spouse. The claimant/spouse said that there were five other employees who worked for the insured employer as employees. The insured employer also worked with independent contractors, at least one of whom was a truck driver.

The dispute of compensability. After the deceased's death, it was undisputed that death benefits were initiated by the carrier after the claimant/spouse hired an attorney to handle a claim relating to the death. The claimant/spouse said that he concluded that his attorney had filed all required forms as he was hired to do. A TWCC-21 dated June 5,

1996, states that written notice of injury was first received on April 9, 1996, and given by the claimant/spouse's attorney. The injury is described as a "death," the employee's name is that of the deceased, and the reason shown for terminating benefits is "[c]laimant[/spouse] is a sole proprietor and/or partner, and as such, is specifically excluded from coverage." There was no evidence about when, or if, a dispute was filed by the carrier also asserting that the claimant/spouse failed to timely file a claim for death benefits in accordance with Section 409.007.

In a statement given to the adjuster on June 5, 1996, the claimant/spouse said that he did not discuss the coverage with the deceased much prior to her death, and that the insurance salesman told him that the insured employer would be covered the next day after payment of a deposit but that he recalled no discussion specifically relating to coverage for the deceased or him.

The claimant/spouse said that the salesman's visit to the insured employer was sometime in December 1995, but that the first payment was made for the policy in January. In evidence is a check dated January 9, 1996, for a total of $2,296.00, comprised of $2,060.00 deposit for workers' compensation insurance plus another $236.00 for general liability. Checks for combined workers' compensation and general liability payments are also in evidence for February 9 and March 8, 1996. The first two checks are in the name of the claimant/spouse and shown as a business account; the third check is in the name of the insured employer. All show the same post office box as the address and all are signed by the deceased.

The insurance policy is entitled "workers compensation and employers liability insurance policy" and is shown as produced by the servicing office on December 15, 1995. The policy period on this document is shown as December 14, 1995, through December 14, 1996, 12:01 A.M. standard time and gives the insured's mailing address.

A request for a benefit review conference (BRC) was made by the attorney for the claimant/spouse on October 31, 2001. The request form asserted that "claimant" died in an accident and that "claimant's" widower and child sought "LIBS" (lifetime income benefits, sic). The BRC report is dated December 13, 2001, and is the first written indication that an issue relating to failure to file a death benefits claim was raised.

WHETHER THE CARRIER WAS LIMITED TO THE DEFENSE RAISED IN ITS TWCC-21

Because this issue potentially makes a threshold disposition of the case, we will discuss it first.

Section 409.022(a) states that a carrier's refusal to pay benefits must "specify" the grounds for refusal. Section 409.022(b) states that the grounds specified in the notice constitute the only basis for the defense in a further proceeding unless based upon newly discovered evidence that could not reasonably have been discovered at an earlier date.

Although there was no explanation of the lapse of time between the June 1996 TWCC-21 and the October 31, 2001, request for a BRC, there was no contention that there were new grounds that could not have been discovered in the intervening five plus years nor was any amended TWCC-21 urged or produced. The BRC was held on December 6, 2001, and the BRC report is the only document in the case raising a defense relating to a claim for compensation.

The sole ground, therefore, in the TWCC-21, or any disputing document before the hearing officer was: **"Claimant is a sole proprietor and/or partner, and as such, is specifically excluded from coverage**." The hearing officer found that a fair reading of the document as a whole made it clear that the deceased's "status as an owner is the gravamen of the carrier's dispute."

Even given the hearing officer's interpretation, it is immediately clear that an issue relating to whether the carrier was discharged from liability for a claim was not asserted as a ground and therefore should not have been considered by the hearing officer absent a finding of newly discovered evidence. We will not remand, however, as it is clear from the record that a finding of newly discovered evidence would not be supportable. Although it would not be possible to raise this defense within 60 days after a death, the issue of late or nonfiling of a claim for compensation must be raised within a reasonable time after discovery of facts indicating that defense. Texas Workers' Compensation Commission Appeal No. 962230, decided December 23, 1996. The carrier's failure to raise this as an issue until the BRC was not reasonable. Therefore, the issue relating to the claimant/spouse's failure to file a claim for death benefits was not properly before the hearing officer and had been waived. The hearing officer's determination to the contrary was error and we reverse that determination.

We now consider the stated issue on the TWCC-21. The Appeals Panel has said that "magic words are not necessary" to contest the compensability of an injury under the statute and rule, and that the Commission will look to "a fair reading of the reasoning listed" to determine if the notice of refusal or denial is sufficient. Texas Workers' Compensation Commission Appeal No. 93326, decided June 10, 1993. And, as was stated in Texas Workers' Compensation Commission Appeal No. 93533, decided August 9, 1993, "[t]he key point to be determined is whether, read as a whole, any of the reasons listed by carrier would be a defense to compensability that could prevail in a subsequent proceeding." For example, disputing a right leg injury would be found to not be a waiver of a disputed left leg injury. Texas Workers' Compensation Commission Appeal No. 982654, decided December 30, 1998.

Given that the parties and the hearing officer all incorrectly referred to the deceased at some time or other as the "claimant" and there was no actual confusion as to the party for whom exclusion was argued by the carrier, we will not hold in this case that lack of the proper terminology was fatal to the defense. We also believe that it may be "fairly read" as raising the prospect that the deceased was excluded from coverage specifically under the policy or the law in effect at the time coverage was extended. In summary, while the

TWCC-21 grounds may not be fairly read to include a dispute over failure to file a claim, they may be read to join an issue over the coverage of the deceased.

WHETHER THE DECEASED WAS EXCLUDED FROM COVERAGE

The hearing officer found that at the time of her death, the "[deceased] had the powers and authority of a co-owner of the [insured] employer." His conclusion of law is that the deceased was a co-owner and "specifically excluded from coverage." In our opinion, excluding the deceased from coverage for this stated reason alone was error on the part of the hearing officer for several reasons. As noted in Texas Workers' Compensation Commission Appeal No. 94401, decided March 19, 1994, there is no provision of the 1989 Act that specifically excludes from coverage a company owner, partner, or corporate officer from coverage, as there was under the "old law."

Whether the deceased was "an owner." Although the parties and hearing officer tended to blur the terms "partner" and "sole proprietor," those terms are not equivalent business relationships. BLACK'S LAW DICTIONARY (6th Ed. 1990) defines sole proprietorship as:

> A form of business in which one person owns all the assets of the business in contrast to a partnership, trust, or corporation. The sole proprietor is solely liable for all the debts of the business.

A sole proprietor is clearly an owner, but the only owner, of a business. There was no evidence that the deceased was a "sole proprietor." There is, however, evidence that the claimant/spouse was a sole proprietor, in which case the deceased could not, as a matter of law, be a "co-owner."

A "co-owner" relationship would be a form of partnership. A partnership consists of an express or implied agreement containing four required elements: (1) community of interest in the venture; (2) an agreement to share profits; (3) an agreement to share losses; and (4) mutual right of control or management of the enterprise. Schlumberger Technology Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997). The Supreme Court stated in this case that if there is no evidence of any one of these elements, a jury-finding of partnership cannot be sustained. The burden of proof of the existence of a partnership is upon the person seeking to establish its existence. State v. Houston Lighting & Power Co., 609 S.W.2d 263, 267 (Tex. Civ. App.-Corpus Christi 1980, writ ref'd n.r.e.)

Section 203 of the Texas Uniform Partnership Act, Tex. Rev. Civ. Stat. Ann. Art. 6132b-2.03 (Vernon's 1999), is entitled "Rules for Determining if Partnership is Created," and lists factors that indicate creation of a partnership, which include, under subsection (a):

a. receipt or right to receive a share of profits of the business;

b. expression of an intent to be partners in the business;

c. participation or right to participate in control, of the business;

d. sharing or agreeing to share:

i. losses of the business; or

(B) liability for claims by third parties against the business; and

(5) contributing or agreeing to contribute money or property to the business.

However, Art. 6132b-2.03(b) states that any one of several circumstances, by itself, does not indicate that a person is a partner, one of which is receipt of business profits as wages paid to an employee, Art. 6132b-2.03(b)(1)(B), or co-ownership of property (including community property), Art. 6132b-2.03(b)(2). An agreement to share losses by business owners is no longer necessary to create a partnership. Art. 6132b-2.03(c) (reversing previous court decisions holding such to be critical[1]).

There was no evidence offered to show many of the elements set out in Art. 6132b-2.03. Essentially, only one element was advanced by the carrier; that there was an expression of intent in the application for insurance made by the deceased that a partnership existed.

While reasonable minds could certainly differ as to whether a partnership existed or whether the carrier met its burden of proof, the evidence is marginally sufficient to uphold the hearing officer's conclusion of law that the deceased was a co-owner of the insured employer. However, as will be discussed below, this is not dispositive of coverage in this case for various reasons, because the determination that the deceased was "specifically excluded from coverage" is erroneous as a matter of law and also against the great weight and preponderance of the evidence.

Dual capacity. Even under old law, an executive officer injured while serving as an employee of the company could be covered under the doctrine of "dual capacity." Under this doctrine, as applied in Harris v. Casualty Reciprocal Exchange, 632 S.W.2d 714 (Tex. 1982), a corporate officer who was also performing the duties of an employee, was held to be covered by the employer's workers' compensation policy and the statute then in existence that made coverage of partners, sole proprietors, and corporate executive officers elective did not preclude coverage in this case. *See also* Pennsylvania National Mutual Cas. Ins. Co. v. Hannah, 701 S.W.2d 67 (Tex. App.-Beaumont 1985, writ ref'd

[1] *See, for example,* Grimmett v. Higginbotham, 907 S.W.2d 1 (Tex. App.-Tyler 1994, writ den'd).

n.r.e.); Appeal No. 94401, *supra*. As the Hannah case notes, the test is whether the individual was hired to perform both executive and employee-related duties, and does not focus on only the tasks performed at the time of the injury. These cases have not been dealt with or applied by the hearing officer in this case in his attempt to distinguish Appeal No. 94401 solely on its facts. The stipulation and the undisputed evidence were that the deceased was hired to perform employee-like clerical functions and was compensated for her work in the form of a salary. Consistent with this was that she was not, at the time of her death, performing an executive function. Therefore, we reverse and render that even if the deceased had been a "co-owner" as found by the hearing officer, she was injured while acting in the course and scope of employment under the "dual capacity" doctrine.

The Insurance Policy as a Contract. The claimant/spouse argued that Section 406.097 of the 1989 Act controlled because the policy was not delivered and paid for until after January 1, 1996. Insofar as it might be applicable to the facts of this case, this provision states:

> (a) A sole proprietor, partner, or corporate executive officer of a business entity that elects to provide workers' compensation insurance coverage is entitled to benefits under that coverage as an employee unless the sole proprietor, partner, or corporate executive officer is specifically excluded from coverage through an endorsement to the insurance policy or certificate of authority to self-insure.

This statute is to be effective for an insurance policy or certificate of authority to self-insure that is delivered, issued for delivery, or renewed on or after January 1, 1996, and the Texas Labor Code annotation further states that a policy delivered, issued for delivery, or renewed before January 1, 1996, is governed by the law as it existed immediately before September 1, 1995.

While there is no specific issuance date mentioned in the policy, there is the date of December 15, 1995, below the servicing agent's name and address. The attached endorsements, including the specific exclusion for the claimant/spouse are listed as effective December 14, 1995. Although the only checks in evidence for payment of premium are dated in January 1996 and the evidence points toward payment then, we cannot agree that the hearing officer's decision that the policy was issued for delivery on or about December 14, 1995, is against the great weight and preponderance of the evidence. However, the fact that Section 406.097 may not apply does not mean, as the hearing officer has then held, that the deceased was therefore excluded from coverage. In our opinion, the hearing officer has erred as a matter of law in determining that the deceased was not covered by the workers' compensation insurance policy in evidence in this record.

An insurance policy is a contract. The information page of the policy in issue, like the application, included check-mark options for indicating whether the business is individual, a partnership, or a corporation; only the "individual" block is checked. The policy

states that the only agreements relating to insurance are those stated in the policy and may only be changed by endorsement issued to be part of the policy. General Section, subsection A. Subsection B of the General Section states that if an insured is a partnership and the reader is a partner, the reader is insured only in the capacity as an employer of the partnership's employees. However, the specific endorsement governing the exclusion of partners, officers, and "others" lists only the claimant/spouse as an "other."

If an insurance contract is subject to more than one reasonable interpretation, the court will adopt the construction most favorable to the insured. State Farm Fire & Cas. Co. v. Reed, 873 S.W.2d 698, 699 (Tex. 1993). An implication cannot be allowed to override an express provision of an insurance contract. Fruhman v. Nawcas Benevolent Auxiliary, 436 S.W.2d 912, 915 (Tex. Civ. App.-Dallas 1969, writ ref'd n.r.e). Words of exception and limitation are construed strictly against the insurer. Fort Worth Lloyds Ins. Co. v. Willham, 406 S.W.2d 76, 79 (Tex. Civ. App.-Amarillo 1966, writ ref'd n.r.e). When construing an exclusionary clause, the court will adopt the insured's construction as long as it is not unreasonable, even if the insurer's construction appears to be more reasonable or more accurately reflect the parties' intent. Pro-Tech Coating Inc. v. Union Standard Ins. Co., 897 S.W.2d 885, 890 (Tex. App.-Dallas 1995, no writ). An intent to exclude coverage must be expressed in clear and unambiguous language. National Union Fire Ins. Co. v. Hudson Energy Co., 811 S.W.2d 552, 555 (Tex. 1991).

It is when a policy term is ambiguous that a construction affording coverage will be adopted. Gonzales v. Mission American Ins. Co., 795 S.W.2d 734, 737 (Tex. 1990). Where language is plain and unambiguous, courts must enforce the contract as made by the parties. Travelers Ins. Co. v. Newsom, 352 S.W.2d 888 (Tex. Civ. App.-Amarillo 1961, writ ref'd n.r.e.).

In our opinion, any general provisions that could indicate that the deceased was not covered by workers' compensation were modified and superceded by the specific endorsement excluding only the claimant/spouse.[2] To the extent that an ambiguity is created by including the deceased's name as part of the "dba," we are guided by the rules of construction cited above, and the policy must be interpreted in favor of coverage for the insured employer and the deceased who, when injured, was furthering the interests of the insured employer. Accordingly, we reverse the conclusion that the deceased was "specifically excluded" from coverage and render a decision that the deceased was a covered employee under the contract of insurance with the insured employer.

FAILURE TO FILE A TIMELY CLAIM FOR DEATH BENEFITS

Our previously discussed determination that the matter of timely filing of a claim was not raised within a reasonable time after the defense arose is dispositive, but we shall also

[2] It can be argued that the endorsement appears to anticipate the Section 406.097 exclusion that had been enacted by the legislature.

discuss the hearing officer's findings on this issue, as a means of instructing against repeating the obvious and substantive errors on this issue.

As a cursory reading of the 1989 Act shows, the requirement for filing a claim for death benefits with the Commission is found in Section 409.007(a). We would observe that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 122.100 (Rule 122.100) also provides that a written claim for compensation be filed by each beneficiary with the Commission and that it "should" be on a Notice of Fatal Injury or Occupational Disease/Claim for Compensation for Death Benefits (TWCC-42) form. Another writing containing the information in Rule 122.100(b) could be considered as a claim. Although the "broad brush" appears to have been used by everyone at the CCH, the issue at the CCH could not include more than the surviving husband's claim, as the failure of a surviving minor child to file a claim within one year of the deceased's death would not bar payment of that child's benefits. Section 409.007(b)(1).

No evidence was offered on the claim-filing issue during the CCH, except perhaps the claimant/spouse's testimony that he believed his attorney had filed required paperwork on his claim.[3] Not until the carrier's closing argument was the matter even directly mentioned, and then claimant/spouse's attorney responded in rebuttal by equating the claim filing requirement with "written notice of injury".[4]

In spite of the lack of evidence (as opposed to argument) about when any written claim was filed, the hearing officer nevertheless found as fact that the claimant/spouse "did not file a [TWCC-41] with the Commission prior to October 31, 2001." The significance of this date (corresponding to the date that the request for the BRC was made) is not explained by the hearing officer.

The hearing officer erred in holding that the carrier was "relieved from liability" for death benefits. The stated issue, the conclusion of law, and counterpart decision paragraph are inapplicable to a death benefits case on their face, because each provision relieves the carrier of liability under "§ 409.004" of the 1989 Act. That provision of the 1989 Act does not apply in death benefits cases. The provision that **would** apply, which is Section 409.007(b), provides that an untimely claim is only barred for the errant beneficiary; a carrier could not be relieved of "liability" for a death benefits claim under this provision without compromising the statutory rights of the (SIF). *See* Sections 403.007 and 408.182(e). The SIF is not required to file a claim. Rule 122.100(a). However, the duties

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[3] We have made clear in Texas Workers' Compensation Commission Appeal No. 941698, decided February 2, 1995, that an Employee's Notice of Injury or Occupational Disease & Claim for Compensation (TWCC-41) form is one of those documents that should be included in the record by the hearing officer as part of his or her responsibility to make a complete record, where timely filing of a claim with the Commission is an issue. *See also* Texas Workers' Compensation Commission Appeal No. 941171, decided October 17, 1994. It would seem that any TWCC-42 on file should be officially noticed as well. Because of our disposition on this issue, we will not remand for official notice.

[4] On appeal, the claimant/spouse's attorney argues that the "tolling" provision under Section 409.008 applies because of the failure of the insured employer or insurance carrier to file an Employer's First Report of Injury or Illness (TWCC-1). No facts exist one way or the other in the record upon which to evaluate this new argument.

and remedies under the proper statutory provisions were not brought forward as an issue in either the BRC or this CCH; what the decision amounts to is, at best, an advisory opinion on a statutory provision that does not apply.

In response to any assertion that this issue could be fairly read to include Section 409.007, we observe that "fair reading" has its limits. The carrier was represented by counsel. We are disinclined on appeal to treat invocation of the inapplicable statutes and remedies as a mere typographical error. Consequently, we reverse Finding of Fact No. 5, Conclusion of Law No. 5, and that part of the decision paragraph which purport to hold that a claim for death benefits was not filed and that the carrier is therefore "relieved from liability," and we render a decision without such finding of fact and conclusion of law.

For the reasons set forth above, we reverse and render a new decision that the deceased was covered by the carrier's workers' compensation policy as an employee of the insured employer, even if she also was a co-owner of the insured employer. We further hold that the issue of filing a claim for death benefits was neither timely, nor properly, raised by the carrier, and therefore the carrier is not discharged from liability for payment of death benefits. The carrier is, therefore, ordered to pay death benefits (including accrued benefits) to the beneficiary or beneficiaries of the deceased in accordance with the 1989 Act.

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

MR. STEVE ROPER
1616 S. CHESTNUT STREET
LUFKIN, TEXAS 75902.

Susan M. Kelley
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Edward Vilano
Appeals Judge