APPEAL NO. 92007
FILED FEBRUARY 21, 1992

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act) TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On December 5 and 6, 1991, a hearing was held in San Antonio, Texas with (hearing officer) presiding. He found claimant, (respondent herein), was the common-law wife of decedent, deceased, and was entitled to benefits under the 1989 Act. Appellant asserts that respondent failed to prove by a preponderance of the evidence that respondent was the common-law wife of decedent and that the hearing officer abused his discretion in refusing to grant a continuance.

DECISION

Upon consideration of all the evidence, the hearing officer's findings of fact and conclusions of law are found to be sufficiently supported by the evidence, and his decision and order are affirmed.

On July 3, 1991, (decedent) was killed by a grinding wheel that struck him in the torso. Fidelity and Casualty Company of New York (respondent carrier) does not contest compensability but seeks to pay benefits to the correct party(s). Decedent was divorced from appellant in 1984 but had two children, age 13, and age 14, of that marriage. The only issue at hearing was whether respondent was the common-law wife of decedent and therefore entitled to certain death benefits under the 1989 Act. We note that decedent's surviving minor children are eligible for benefits under Article 8308-4.42(d) of the 1989 Act.

Appellant offered 22 exhibits, all of which were admitted; respondent offered 49 exhibits, 46 of which were admitted; and carrier offered 7 exhibits, all of which were admitted. Respondent called nine witnesses to testify including respondent and appellant; appellant called three; the respondent carrier, none.

Respondent produced five witnesses, in addition to respondent, who testified that they had either been introduced to decedent and respondent as husband and wife or had introduced them to others as husband and wife. At least one testified that decedent had introduced respondent as his wife. In addition, one signed statement by () said decedent had introduced himself and respondent as () and (). Another signed statement by () said decedent had several times referred to respondent as his wife. Some witnesses testified they had introduced decedent and respondent as husband and wife and that decedent never objected. A life and health insurance form, filled out by respondent but signed by decedent on December 31, 1990, listed respondent as "common law spouse" and beneficiary on the policy. Respondent testified that they did

everything together, had a joint checking account together, and that decedent gave her a ring in July 1990. She added that they had a present intent to be married after the ring was given to her. She also said that she and decedent had lived together since 1986 in California and Texas and had bought a home together in January 1990 but their signatures on the Deed of Trust reflected single status at that time. There was no dispute that decedent and respondent lived together.

The governing statute, Vernon's Texas Codes Annotated, Family Code § 1.91, provides three criteria for a common-law marriage that is not registered in compliance with that code. The parties must:

Agree to be married
After the agreement, they must live together in Texas as husband and wife, and
Represent to others that they are married

We note that at the time decedent and respondent lived together in California, and thereafter from May to September 1989 in Texas, § 1.91(b) allowed an inference of the agreement based on their living together and representing the marriage to others. Since September 1989, that provision has been changed by eliminating any reference to inferring the agreement and now provides for a limitation period for inception of actions. We note that counsel for respondent in written argument to this panel quotes from the subsection of the statute regarding inference as it appeared prior to amendment in 1989.

We also observe that counsel for respondent contends that the hearing officer erred in placing a burden of proof on respondent. Counsel states "To hold that the Claimant who wins at the benefit review conference still has the burden of proof flies in the face of appellate procedure." We refer counsel for respondent to Article 8308-6.11 of the 1989 Act which provides that a benefit review conference (BRC) "is a non-adversarial, informal dispute resolution proceeding." The benefit review officer cannot make a determination from which to appeal - the parties can only be bound by agreement(s) they make at the BRC. The only exception to this is the benefit review officer's ability to issue an interlocutory order to pay benefits. The hearing officer's declaration as to burden of proof was correct and is consistent with case law under the prior Workmen's Compensation Law (repealed 1989). Gonzales v. Gonzales, 466 S.W.2d 839 (Tex. Civ. App.-Dallas 1971, writ ref'd n.r.e.).

Appellant complains of the hearing officer's decision not to grant a request for a continuance of the hearing for eight weeks to receive requested Internal Revenue Service records in regard to respondent. Such records were referred to as "1040s" and were said to be important to show how respondent held herself out as either married or

single. No showing was made, however, that a continuance would not prejudice the respondent's rights. Respondent argued a delay would be an imposition to all the witnesses assembled. Most importantly, in cross-examination, respondent admitted that she (and decedent) filed 1990 tax returns (in 1991), and 1989 returns as single, not married. Tex. W.C. Comm'n, TEX. ADMIN. CODE § 142.10(c)(3) (Rule 142.10(c)(3)) provides that a party may orally request a continuance during a hearing and that in addition to showing good cause, the party must show that a continuance will not prejudice the rights of other parties. It has been held that the movant has the burden of proof on the motion for continuance, and rulings on motions for continuance are within the discretion of the hearing officer and will only be overturned for abuse of discretion. Gibraltar Savings Association v. Franklin Savings Association, 617 S.W.2d 322 (Tex. Civ. App.-Austin 1981, writ ref'd n.r.e.). In view of appellant's apparent failure to address respondent's rights in his request and respondent's testimony that provided the information for which a continuance was requested, we do not find this hearing officer's decision to be unreasonable. There was no abuse of discretion in the hearing officer's decision to proceed in this case. *See*, Texas Workers' Compensation Commission Appeal No. 91041 (Docket No. LR-91-058678-01-CC-CC41) decided December 17, 1991.

Appellant introduced extensive evidence that decedent considered himself to be single. Decedent's relatives and ex-wife, by testimony and written statements (some of which were sworn), consistently indicated there was no evidence that decedent was married at common law. Tax documents, in addition to respondent's admission, consistently showed decedent as "single," not "married filing separately." As stated earlier, a Deed and Deed of Trust executed in January 1990 show respondent and decedent as single. Job applications and related documents - insurance and health, for instance - show decedent as single as late as August 1990. A loan application in 1989 also shows each to be single. Appellant also showed through cross-examination that many credit cards were in decedent's name only, that two cars were in decedent's name, that respondent's driver's license and social security card were in the name of (), and that no wedding band was given by decedent to respondent. Respondent also admitted in cross-examination that she had introduced a friend, (), as "her cousin" (which was not true) to decedent's relatives.

Credibility, along with weight to be given to evidence, is for the hearing officer to decide. Article 8308-6.34(e) of the 1989 Act. The trier of fact is to judge credibility, assign weight and resolve conflicts and inconsistencies. Bullard v. Universal Underwriters Ins. Co., 609 S.W.2d 621 (Tex. App.-Amarillo 1980, no writ). The fact finder may believe all, part, or none of any witness' testimony. Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). The fact finder may draw reasonable inferences and deductions from the evidence. Harrison v. Harrison, 597

S.W.2d 477 (Tex. Civ. App.-Tyler 1980, writ ref'd n.r.e.). The fact finder may take into account a witness' relationship to a party. Lindley v. Transamerica Ins. Co., 437 S.W.2d 371 (Tex. Civ. App.-Fort Worth 1969, no writ). The question of existence of a common-law marriage is one of fact. In Re Glasco, 619 S.W.2d 567 (Tex. App.-San Antonio 1981, no writ), and Roach v. Roach, 672 S.W.2d 524 (Tex. App.-Amarillo 1984, no writ). Matter of Estate of Giessel, 734 S.W.2d 27 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.) said that tax returns, driver's licenses, and bank and pay records are factors to weigh but do not negate an existing common-law marriage. Estate of Claveria v. Claveria, 615 S.W.2d 164 (Tex. 1981) had earlier stated that once a common-law marriage exists, denial of it means nothing. While later cases cite the Family Code § 1.91(b) (pre-1989 amendment) for inferring an agreement to marry from other criteria that are present, Shelton v. Belknap, 155 Tex. 37, 282 S.W.2d 682 (1955) shows a history of authority to infer agreement from other criteria present based strictly on case law.

Respondent's counsel also asserts harassment in this appeal and asks that appellant be sanctioned and ordered to reimburse respondent for the expense related to this appeal. While not granting appellant's request for reversal of the hearing officer's decision, we do not consider the appeal frivolous. Article 8308-10.05 of the 1989 Act.

The hearing officer had before him evidence as to each of the three criteria for determining common-law marriage. His findings of fact were thorough and sufficiently supported by the evidence. In addition he showed admirable patience during the hearing; his questions clarified matters not adequately developed. His decision and order meet the standard this panel has applied in order to affirm. *See, e.g.,* Texas Workers' Compensation Commission Appeal No. 91002 (Docket No. TY-00003-91-CC-01) decided August 7, 1991; Texas Workers' Compensation Commission Appeal No. 91066 (Docket No. AM-A121175-01-CC-LB41) decided December 4, 1991. The decision and order are not so against the great weight and preponderance of the evidence as to be manifestly unjust. In Re King's Estate, 150 Tex. 662, 244 s.w.2D 660 (1952). We affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Phillip F. O'neill
Appeals Judge