

On September 20, 1991, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer determined that appellant, (appellant), the surviving wife of (deceased), deceased, is not an eligible spouse entitled to receive death benefits for the death of her husband under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act), and that (respondent 2), the deceased's mother, is not a dependent parent entitled to receive death benefits for the death of her son under the 1989 Act.

Appellant contends that the overwhelming preponderance of the evidence proves that she, after several months of suffering mental and physical abuse, with mounting threats of death by her husband, did in fact have good cause to separate from her husband on January 16, 1990. Appellant requests that we review the hearing officer's decision that she is not an eligible spouse entitled to receive death benefits. (Respondent 2) did not appeal the hearing officer's decision nor did she file a response to appellant's request for review. Employer's Casualty Company filed a response to appellant's request for review stating it agrees with the hearing officer's decision. The Texas Workers' Compensation Commission Subsequent Injury Fund ("SIF") was not a party at the hearing, but filed a Motion to Intervene in this appeal on February 13, 1992. SIF's motion is hereby granted. SIF requests that we review the record to determine whether the evidence demonstrates that (appellant) abandoned her husband and, if so, whether good cause existed for the abandonment.

DECISION

The decision of the hearing officer is affirmed.

For convenience, (deceased), (appellant), and (respondent 2) will sometimes be called herein by their first names.

On (date of injury), at the age of 19, (deceased) died in a work-related accident. The carrier for his employer accepted liability for death benefits for his death. (deceased) had no children, adopted children, or grandchildren. (Appellant) claimed the death benefits as the "eligible spouse" of (deceased) under Article 8308-4.42(b) and (g)(1). (respondent 2) claimed the death benefits for herself as a surviving dependent parent under Article 8308-4.42(e), and sought to exclude (appellant) from the death benefits, alleging that (appellant) was not an eligible spouse under Article 8308-4.42(g)(1).

The hearing officer concluded that (appellant) was a surviving spouse, but that she was deemed to have abandoned the marriage within the meaning of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.3 and Article 8308-4.42(g)(1), and therefore, was not an eligible spouse, nor a legal beneficiary, and was not eligible to receive death benefits under Article 8308-4.41. The hearing officer also concluded that (respondent 2) was a parent of (deceased)'s, but that she failed to establish she was dependent on him at the time of his death within the meaning of Articles 8308-4.42(e) and 8308-1.03(14), and Rule 132.2, and therefore, was not a legal beneficiary under Article 8308-4.41. We are here concerned only with the hearing officer's determination on (appellant)'s claim that she is an eligible spouse.

Article 8308-4.42(b) provides: "If there is no eligible child or grandchild, all death benefits shall be paid to the eligible spouse." Article 8308-4.42(g)(1) provides that "eligible spouse" means "the surviving spouse of the deceased employee unless the spouse abandoned the employee for more than one year immediately preceding the death without good cause, as determined by the Commission." Rule 132.3 (Eligibility of Spouse to

Receive Death Benefits), which was effective January 1, 1991, provides in pertinent part in subsection (a) that "the surviving spouse is entitled to receive death benefits, unless subsection (b) of this section applies. Subsection (b) of that rule provides as follows:

(b)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 break-up 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.

We believe that the following is a fair summary of those portions of the evidence on which the parties did not have a sharp conflict.

(deceased) and (appellant) married in September 1989 when both were 18 years of age. They were never divorced from one another. (deceased) had been engaged to (T.C.) before he married (appellant). (deceased) was between 5 feet 2 inches and 5 feet 4 inches tall, and weighed between 145 and 170 pounds. (appellant) was about 4 feet 8 inches tall and weighed about 80 to 85 pounds when she married (deceased). For the first few weeks of their marriage, (deceased) and (appellant) lived in a trailer owned by (respondent 2) which was located in the driveway to (respondent 2)'s house in (city), Texas. They then moved to (city), Texas, for about a month when (deceased)'s father found him work. After that they moved back to (city), Texas, and lived in an old house which had been vacated by (appellant)'s mother. That house had no electricity and their meals were cooked on a camp stove. On January 16, 1990, (appellant) left (deceased) and went to live with her sister. About three weeks after that, (deceased) and (Ms. T) began living together. About a month later, (deceased) began living with a woman named (Ms. C) in (city), Texas, and continued to live with her for about one year, part of the time in (city), Texas. Some four or five months after she left (deceased), (appellant) began dating (Mr. P), lived with him for six or seven months, and was pregnant with (Mr. P's) child at the time of the hearing in September 1991. (deceased) and (appellant) did not live together after January 16, 1990. (deceased) died more than a year after that date on (date of injury), in a work-related accident. (deceased) and (appellant) had no children of their marriage.

According to (appellant), (deceased) verbally and physically abused her, and threatened her life during their four and one-half months living together. She testified that although she did not want to leave him and wanted to make their marriage work, she had no choice but to leave (deceased) because she was in fear of her life. She said he first physically abused her by slapping her face one or two weeks after they were married, and

that he broke out windows in the trailer at that time. The next incident occurred around October 10, 1989, when she said he used a shotgun to shoot a cat that lived with them and then threatened her with the gun saying he would kill her if she left. On Halloween 1989, she said he beat her up, and that he also beat her up on November 4, 1989, at which time he put a pillow over her face, started to smother her, and then threatened her. She stated that on November 12, 1989, she told (respondent 2), (deceased)'s mother, that (deceased) had hit her, showed her a bruise on her chest, and that (respondent 2) then yelled at (deceased). On December 6, 1989, (appellant) testified that (deceased) put the shotgun to her head when she refused to take the dog outside, that he then took the dog out and pretended to shoot it, and then told her if she didn't like it, he would kill her too. On December 25, 1989, Christmas, she said (deceased) slapped her around when she wanted to go visit her mother, and that he then drove her to a forest, got out of his truck with his gun, told her to get out of the truck, and asked her if she still wanted to go visit her mom. She said no. She said the final beating occurred on January 15, 1990, when he beat her up real bad. On January 16, 1990, she said she went to (Ms .K. Ds') house and called her mom to come get her and take her to her sister's house, which her mom did. (appellant) said she left a note for (deceased) which said she couldn't handle him beating on her anymore, but that she did love him.

(appellant) further testified that on January 16, 1990, (deceased) looked for her at her sister's house and that she got scared and hid under a bed. She said (deceased) threatened to kill her sister if her sister stood in his way. She said she did not see (deceased) after that but talked to him on the telephone twice when he called her. She testified she hoped to get back together but was scared to do so. (appellant) also stated that (deceased) told her he was living with someone else when he called her in March or April 1990. Four or five months after she left (deceased), (appellant) said she met (Mr. P), lived with him for six or seven months, and that (Mr. P) was the father of her unborn child which, she said, was overdue at the time of the hearing. She said she did not plan to get married to (Mr. P). After leaving (deceased), but before meeting (Mr. P), (appellant) said she only went on one date with a man whose name she could not remember. She learned of (deceased)'s death on the day he died. She did not attend his funeral.

(appellant) also testified that (deceased) hit her with his fists in areas of her body, such as her chest and upper arms, where people would not see the bruises. She said she showed her bruises to her mom, her sister, and to (deceased)'s mom, (respondent 2). She also said (deceased)'s brother, (Mr. R), saw a bruise on her arm and that he got mad at (deceased). She stated she never sought help from the police or from a counselor, but that her mom called a counseling center and spoke to someone about her situation. She said that when she left (deceased) there was no other man in her life, and that she was not calling, seeing, or meeting anyone at that time, but was faithful to (deceased). (appellant) also said she worked for two months while she was with (deceased), but quit because he did not want her to work.

(appellant)'s mother, (Ms. AM), testified that (appellant) complained twice to her about (deceased)'s physical abuse. The first time was around November 5, 1989, when she saw a bruise on (appellant)'s arm. (appellant) told her (deceased) was angry at her, and when this witness asked (deceased) why he hit (appellant) he said he had no reason to hit her; that he didn't know why he beat her. On January 16, 1990, she said she saw bruises on (appellant)'s arm and chest, and that she took her to her sister's home. She also testified that (appellant) told her (deceased) shot the cat, that the cat didn't die, but that it had to be put to sleep due to its injuries. She also said she called "Crisis Hotline" for (appellant), that

she begged (appellant) to leave (deceased), and that (appellant) told her she loved (deceased). This witness said (appellant) wanted to stay with (deceased).

(Ms. R), (appellant)'s sister, testified she saw a really big bruise on (appellant)'s chest on November 5, 1989, and also saw bruises on her body the day (appellant) left (deceased) in January 1990 and went to her home. She said (deceased) threatened to kill (appellant) if she didn't come back and threatened to kill her, (Ms. R), if she stood in his way. She said (deceased) had a shotgun in his truck. She also said (deceased) and (appellant) were living without electricity in their home and eating potatoes and water because (deceased) wouldn't get a job and wouldn't let (appellant) continue to work. This witness also said that (appellant) didn't start seeing (Mr. P) until a long time after (appellant) and (deceased) "broke up" and after learning that (deceased) was seeing someone else. She described (deceased) as a mean individual with whom she got in a fight and "whipped" in high school.

(Mr. WP, Jr.), (appellant)'s brother, stated in an affidavit that he lived with (deceased) and (appellant) for several weeks; that many times he saw bruises and red spots on (appellant); that on one occasion he saw (deceased) hit (appellant) with his closed fist; that he, (Mr. W), tried to get (appellant) to leave; that (appellant) told him she would stay and try to work it out; and that when (deceased) threatened to kill (appellant), she moved in with their sister.

(Mr. C. H.), the brother of (appellant)'s sister's husband, stated in an affidavit that he saw bruises on (appellant)'s chest, and that (appellant) said she loved (deceased), wanted to make their marriage work, but (deceased) kept hitting her. (Ms. M. T.) also stated in an affidavit that she saw (appellant) with a bruised eye and bruises on her arm, and that (appellant) told her (deceased) had broken the windows in their trailer because it wasn't clean. (Ms. K) stated in an affidavit that she was a next-door neighbor of (deceased) and (appellant)'s; that she knew from personal observation that (deceased) beat up on (appellant); that one time (deceased) hit (appellant) in the chest and she had red marks on her neck and arms; and that (appellant) called her mom from her, (Ms. K), house to come and get her. She also stated that (deceased) left (appellant) with no food or electricity in their home.

(Ms. J. W.), (Ms. T) mother, stated in her affidavit to the effect that (deceased) had hit (Ms. T) when (Ms. T) and he were seeing each other, and that (deceased) had threatened this witness by saying, "I'll kick your lights out." (Mr. T. C.), (appellant)'s uncle, stated in an affidavit that he heard (Ms. T) warn (appellant) about (deceased)'s habit of hitting women, and recalled an incident where (deceased)'s mother, (respondent 2), called and said (deceased) had broken out all the windows in the trailer.

(respondent 2), (deceased)'s mother, testified that (deceased) was a hard worker; that he didn't break the trailer windows - they were broken when she moved the trailer; that she never heard screaming or hollering while (deceased) and (appellant) lived next to her in the trailer; that she never saw any physical abuse; and that she never saw bruises on (appellant)'s body. She also said that (appellant) never told her that (deceased) was beating her up and that (deceased) never told her he was beating (appellant). She also testified that (deceased) had no children or grandchildren. In her deposition, (respondent 2) stated that (appellant) wrote (deceased) two letters after (appellant) left him. She said one letter asked for information and money to file for divorce. She said (deceased) intended to get a divorce after Christmas 1990 because he wanted to marry someone else. She also stated that (deceased) started seeing (Ms T) a few weeks after (appellant) left him

and that (Ms.C. C.) started living with (deceased) around April 1990. She also said she felt like (appellant) abandoned (deceased) and there wasn't any good cause for doing so.

(deceased)'s brother, stepsister, friend, and stepmother, testified for his mother, (respondent 2). (Mr. R. P.), (deceased)'s brother, testified that he was living with his mother, (respondent 2), when (deceased) and (appellant) would come to the house to sleep; that he never saw them fighting; that he never saw bruises or marks on (appellant)'s body; that the only thing (appellant) complained of was the old shack (deceased) and she lived in; and that (deceased) never hit (appellant). (Ms. T. G.), (deceased)'s stepsister, also testified that she lived at (respondent 2)'s home when (deceased) and (appellant) got married and were living in the trailer in the driveway to the house; that (deceased) and (appellant) visited the house often; that she never saw marks or bruises on (appellant); and that she had no knowledge of (deceased) hitting (appellant). She also said that (deceased) didn't exhibit violence towards her (his stepsister), or others, and she knew of no reason for (appellant) to leave (deceased). (Mr. S. D.), (deceased)'s friend, testified that (deceased) was not violent; that he didn't see bruises on (appellant); and that he doesn't know of (deceased) hitting (appellant). (Ms. I. P.), (deceased)'s stepmother, testified that she lived near (deceased) and (appellant) when they lived in (city); that she didn't notice any anger or violent temper on (deceased)'s part; and that (deceased) had told her he did not hit (appellant).

In her deposition, (Ms. T) testified that she had been engaged to (deceased) before he married (appellant); that he never hit her, (Ms. T); that he never threatened her; that she moved in with (deceased) about three weeks after (deceased)'s separation from (appellant), but that they then split up; that they had talked about getting married after (appellant) left; and that (deceased) told her he would get a divorce so he could marry her.

Prior to repeal, Article 8306, Section 8a provided that death benefits would go to the surviving husband/wife who had not, for good cause and for a period of three years prior thereto, abandoned his/her husband/wife at the time of injury. The current statute, Article 8308-4.42(g)(1) defines "eligible spouse" as the surviving spouse of the deceased employee unless the spouse abandoned the employee for more than one year immediately preceding the death without good cause, as determined by the Commission. Thus, the abandonment period was changed from three years to one year under the 1989 Act, but both the prior law and the current law utilize the concepts of "abandonment" and "good cause" in determining a surviving spouse's eligibility for death benefits. Moreover, 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, and deems the surviving spouse 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 break-up of the marriage. Rule 132.3(b) places the burden on the person who opposes the claim of a surviving spouse to prove the spouse abandoned the deceased employee. The hearing officer applied Rule 132.3(b) and Article 8308-4.42(g)(1) to the facts he found in determining that (appellant) is not an eligible spouse.

The hearing officer found that (appellant) left (deceased) on or about January 16, 1990, and did not live with him in the same household from that date until he died ((date of injury)); that she voluntarily lived in a separate household; that the separation was not because (appellant) was in a hospital or in a nursing home; that they were not living apart

because of career choices or military duty; and that the separation was due to the break-up of their marriage. He also found that (appellant) left voluntarily with the intent not to return to the marriage; that (deceased) did not cause (appellant) to leave their marriage; that they did not agree to separate; that (deceased) did not ask or require (appellant) to leave the marriage; and that (appellant) did not intend to return to live with (deceased) from January 16, 1990, through (date of injury).

In Liberty Mutual Insurance Company v. Woody, 640 S.W.2d 714 (Tex. Civ. App.-Houston [1st Dist.] 1982, no writ), the court stated that:

"Abandonment in legal significance is the act of one spouse voluntarily separating from the other, with the intention of not returning to live together as husband and wife, that continues for the length of time required by statute. Such separation can not be caused, pursued, or consented to by the non-abandoning party. (citation omitted).

In Jackson v. Jackson, 470 S.W.2d 276 (Tex. Civ. App.-Fort Worth 1971, writ ref'd n.r.e.), a workers' compensation case, the court stated that:

"In order to constitute an "abandonment" the wife charged with "abandonment" must have voluntarily left the bed and board of her husband *with the intention of not returning to live with him as his wife*. (citations omitted). Those cases hold that the intention indicated is an essential element of abandonment."

In Texas Employers' Ins. Ass'n v. Grimes, 269 S.W.2d 332 (Tex. 1954), a workers' compensation case involving death benefits, the Texas Supreme Court had before it a fact situation where the claimant was married to the deceased in 1936, lived with him intermittently until 1944, instituted divorce proceedings against the deceased but dismissed the suit, and lived with the deceased for a time after that. She thereafter lived with another man, bore him two children and adopted his name. The court said that under these facts the claimant would be precluded from recovery. The court also said, "we think that such conduct, admitted on her part, would constitute abandonment as contemplated by Article 8307, Section 6a, Vernon's Annotated Civil Statutes, and thus disqualify her likewise as a beneficiary under the Workmen's Compensation Law."

In our opinion, the evidence raised a fact issue on the questions of whether (appellant) abandoned (deceased), and if so, whether she had good cause for doing so. Although the hearing officer could clearly have found from the evidence, if he were to believe (appellant) and those witnesses testifying on her behalf, that (deceased) caused (appellant) to leave him and that (appellant) did not voluntarily separate from him with the intention of not returning to live together as husband and wife, there was also testimony from witnesses who knew and observed (appellant) and (deceased) that (deceased) did not abuse (appellant); that there were no signs of physical abuse; that (deceased) was not a violent person; and that they knew of no reason for (appellant) to leave (deceased). In addition, (respondent 2) and (Mr. R) directly contradicted (appellant)'s testimony on the matter of her showing them bruises, and (respondent 2) contradicted (appellant)'s testimony as to how the trailer windows were broken. Furthermore, (appellant)'s actions after leaving (deceased) tend to negate an intention to return to live with (deceased), although (deceased)'s actions after the separation also tend to show that such intention on her part

may have been futile. The hearing officer is the trier of fact in a contested case hearing, and is the judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given the evidence. Article 8308-6.34(e) and (g). In light of the conflicting evidence on the issues of abandonment and good cause for abandonment, we cannot conclude that the hearing officer's decision that (appellant) is not an eligible spouse is so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust. See In re King's Estate, 150 Tex. 662, 224 S.W.2d 660 (1951). We do not substitute our judgment for that of the hearing officer when, as here, his findings are supported by some evidence of probative value, and are not against the great weight and preponderance of the evidence. Texas Employers' Insurance Association v. Alcantra, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). Accordingly, under the provisions of Articles 8308-2.26(a) and 8308-4.42(f) death benefits for the death of (deceased) W. Proffer are payable to the Commission for deposit in the Subsequent Injury Fund.

The hearing officer's decision is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge