

APPEAL NO. 92391

On May 20, 1992, a contested case hearing was held in (city), Texas, (hearing officer) presiding as hearing officer. He determined that the appellant was not a "dependent parent" under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). Appellant urges, in essence, that the hearing officer erred in finding insufficient evidence to establish economic dependency or, alternatively, that the decision was against the great weight and preponderance of the evidence and incorrect as a matter of law. Appellant also urges the decision and procedures followed by the hearing officer were arbitrary, capricious, and discriminatory thereby violating the appellant's rights to a fair hearing in violation of the United States Constitution. Respondent argues that the request for review was not timely filed, that the evidence supports the hearing officer's decision, that the decision complies with the law and correct evidentiary standards, and that there has been no violation of the appellant's constitutional rights.

DECISION

Determining that the hearing officer's findings, conclusions and decision are not against the great weight and preponderance of the evidence and that there is probative evidence supporting his determinations, we affirm.

Initially, we have reviewed the records in this case and determine that the request for review was timely filed. In this regard, when a filing date falls on a holiday, Saturday, or Sunday, the filing date is extended to the next working day. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 102.3 (TWCC Rule 102.3).

Briefly, this case involves the untimely death of a young man who was fatally injured in the course and scope of his employment in (month year). The only issue for resolution at the contested case hearing which has been appealed involves the matter of the dependency status of the decedent's mother. Since there is no spouse, children or other beneficiaries in question, if the surviving parent, the appellant, is not eligible for death benefits, such sums would be payable to the Texas Workers' Compensation Commission's Subsequent Injury Fund. Article 8308-4.42(f), 1989 Act.

To be eligible for death benefits, a parent must be a surviving dependent (Article 8308-4.42(e), 1989 Act). Dependent, under Article 8308-1.03(14), 1989 Act, is defined as:

an individual who receives a regular or recurring economic benefit which contributes substantially to the individual's welfare and livelihood if the individual is eligible for distribution of benefits under Article 4 of the Act.

TWCC Rule 132.2, in providing for the determination of facts of dependent status, states:

- (a) This section applies to a person who claims death benefits as a dependent of the deceased employee.
- (b) A benefit which flowed from a deceased employee, at the time of death, on an established basis in at least monthly intervals to the person claiming to be dependent, is presumed to be a regular or recurring economic benefit. This presumption may be overcome by credible evidence. The burden is on the claimant to prove that benefits, which flowed less frequently than once a month, were regular or recurring at the time of the employee's death.
- (c) It shall be presumed that an economic benefit, whose value was equal to or greater than 20% of the person's net resources in the period (see subsection (d) of this section) for which the benefit was paid, is an economic benefit which contributed substantially to the person's welfare and livelihood. This presumption may be overcome by credible evidence. The burden is on the claimant to prove that benefits whose value was less than 20% of the person's net resources contributed significantly to the person's welfare and livelihood.
- (d) Net resources for the purpose of subsection (b) of this section are 100 percent of all wage and salary income and all other income including non-pecuniary income and all income of the individual's spouse, less 100 percent of social security taxes and federal income tax withholding.
- (e) The person claiming to be a dependent shall furnish sufficient information to enable the commission to accurately identify the net resources and to establish the existence of the economic benefit claimed. This information may include, but is not limited to, tax returns, a financial statement of the individual, and check stubs.
- (f) If an economic benefit was provided in the form of goods and services, the value shall be the market value of the same or similar goods and services in the same vicinity.

With this backdrop of the 1989 Act and implementing rules, we look to the evidence proffered in this case. The appellant was the only witness to testify and she indicated that her deceased son was living in her home at the time of his death. This living arrangement had been in effect for some seven months commencing in October 1990, and followed her son's graduation from college and his having subsequently been laid off from a job in another city. Without specificity as to amounts, the appellant stated her son initially earned some income from performing personal services for individuals such as income tax returns, making "wire tree," and other odd jobs. She stated he also did a number of jobs around the house for her including painting inside and out, installing carpet, repairing cracks, putting

up tile, installing a flood light, mowing the lawn and taking care of her dog. She testified and introduced a written statement she made assigning values for these services. She also testified that her son paid her some \$192.00 per month for a part of the house payment, utilities and groceries. In January 1991, the deceased secured employment. The last 13 weeks of wages prior to his death on this job totaled \$2,757.39. The appellant stated she had obtained some prices and that the value of the decedent's monthly contribution to her was \$1,373.00. There was no documentary evidence in the record on this value or on the income or expenditures of the decedent other than his last 13 weeks wages prior to his death.

Appellant was employed throughout this period as a rehabilitation nurse. Documents in evidence indicate her net annual income for 1991 was approximately \$22,951.00 or \$1,913.00 per month, which included some overtime. Her tax return does not reflect any income from the decedent but she was advised this would be considered a gift rather than income. She also indicated she claimed her son as a dependent on her 1990 tax return. The appellant also acknowledged that the decedent had looked for an apartment but decided to stay at home because the available apartments were not satisfactory. At one point she indicated the decedent had to live at home to "have a roof over his head" and that she was supporting him. She acknowledged that the money he gave her was at least partially for his own expenses such as groceries.

It is recognized that total dependency for support is not required and that partial dependence may entitle one to death benefits. IAB v. Lance, 556 S.W.2d 101 (Tex. Civ. App.-Amarillo 1977, no writ); Aetna Casualty and Surety Co. v. Cassavaugh, 486 S.W.2d 815 (Tex. Civ. App.-Houston [14th Dist] 1972, writ ref'd n.r.e.). However, the economic benefit must contribute substantially to the individual's welfare and livelihood. Article 8308-1.03(14). The idea inheres in the term dependency itself that the relations must be such that one relies for support, in part at least, upon the aid of another. Federal Underwriters Exchange v. Hall, 182 S.W.2d 703, 706 (Tex. 1944).

From the evidence of record the hearing officer determined the appellant had not established the necessary dependency status as provided and required by the 1989 Act and implementing rules. We are unable to find that he misapplied the law in any way or that he placed an unwarranted or unauthorized burden of proof on the appellant. It is apparent that he did not fully accept the appellant's testimony at face value and was not convinced that the decedent was making financial contributions to the economic welfare of the appellant which equaled 20% or more of her net income during the months immediately preceding his death. In this regard, a reasonable inference could well be drawn from the evidence that the claimed monthly monetary contributions were for the decedent's own necessary living expenses and were not contributions to the welfare and livelihood of the appellant. Too, the claimed painting, tiling and other long term capital improvements of the house can not reasonably be considered a benefit flowing "on an established basis in at least monthly intervals" thereby giving rise to a presumption "to be a regular or recurring economic benefit." These types of capital improvement expenditures would seem to be more

commonly and reasonably amortized over a period of time and would not, at least in their total cost, be considered as flowing on an established basis in monthly intervals. Given the evidence before him, including the earning level of the appellant and that of the decedent at pertinent times surrounding this case, the cost involved in supporting the decedent himself, the somewhat limited acknowledgement that the appellant was supporting the decedent, the rather limited quantity and quality of supporting documentation as suggested in TWCC Rule 132.2, the rather limited duration of the living and financial arrangement between the appellant and decedent at the time of his unfortunate demise, and the questionable valuation of services performed, the hearing officer was not compelled to find that the economic benefit flowing from the decedent to the appellant was equal to or greater than 20% of the appellant's net resources. Hence, the presumption that the economic benefit contributed substantially to the appellant's welfare and livelihood provided for in TWCC Rule 132.2(c) would not apply. Texas Workers' Compensation Commission Appeal No. 92107 (Docket No. redacted) decided May 4, 1992. The evidence presented supports the inference and conclusion that the appellant was not dependent on the decedent, as contemplated in the 1989 Act, and that he did not contribute significantly to appellant's welfare and livelihood.

The hearing officer is the sole 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). In arriving at his findings of fact, he has the responsibility to resolve conflicts and inconsistencies in the evidence. Garza v Commercial Insurance Co. of Newark, N.J., 605 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ.). The testimony of a claimant only raises an issue of fact for the hearing officer and he may believe all, part or none of the testimony offered as is the case with other witnesses. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.- Amarillo, 1973, no writ); Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.- Amarillo 1977, writ ref'd n.r.e.). Only if we were to determine, which we do not, that the determinations of the hearing officer were so against the great weight and preponderance of the evidence as to be manifestly wrong or unjust would we set aside or otherwise disturb his decision. Texas Workers' Compensation Commission Appeal No. 92232 (Docket No redacted) decided July 20, 1992; Texas Workers' Compensation Commission Appeal No. 92252 (Docket No. redacted) decided July 27, 1992.

As indicated above, we have reviewed the record in this case and can not find any indication of arbitrary, capricious or discriminatory action on the part of the hearing officer in applying the procedures under the law. Insofar as the appellant's assertion that the Commission's procedures and regulations were constitutionally flawed, we have previously stated that judicial bodies are the more appropriate forum for resolving constitutional issues involving statutes and administrative agencies. See Texas Workers' Compensation Commission Appeal No. 91080 (Docket No. redacted) decided December 20, 1991 and Texas Workers' Compensation Commission Appeal No. 92124 (Docket No. redacted) decided May 11, 1992.

Accordingly, the decision is affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Philip F. O'Neill
Appeals Judge