

APPEAL NO. 92523
FILED NOVEMBER 18, 1992

On August 19 and September 2, 1992, a contested case hearing was held in (city), Texas, with [hearing officer] presiding as the hearing officer. The hearing was held pursuant to the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1992) (1989 Act). The deceased, [deceased], sustained a fatal injury on [Date of Injury], while in the course and scope of his employment with his employer, [Employer]. The hearing was held to determine who are the legal beneficiaries of the deceased. The claimant, [claimant], is the brother of the deceased. The hearing officer determined that the deceased was not survived by legal beneficiaries, including the claimant, for the purpose of entitlement to death benefits under the 1989 Act. Accordingly, the hearing officer ordered that the claimant take nothing on his claim, and ordered that the carrier pay death benefits to the administrator of the Texas Workers' Compensation Subsequent Injury Fund for deposit in the fund.

Appellant, hereafter called the claimant, disagrees with certain findings of fact and contends that he is the legal beneficiary of the deceased and is entitled to death benefits. No response was filed.

DECISION

The decision and order of the hearing officer are affirmed.

The parties stipulated that the deceased sustained a fatal injury while in the course and scope of his employment on [Date of Injury], and that the carrier was the workers' compensation insurance carrier for the employer on that date. Pursuant to Article 8308-4.41, the carrier must pay death benefits to the legal beneficiary of the deceased. Article 8308-1.03(31) provides that a "legal beneficiary" is a person who is entitled to receive death benefits under the 1989 Act. Death benefits are paid to the legal beneficiaries according to the priority established in Article 8308-4.42. The deceased was 20 years of age at the time of his death and had never been married and had no children or grandchildren. Article 8308-4.42(e) provides that if the employee is not survived by an eligible spouse, child, or grandchild, the death benefits shall be paid to a surviving dependent who is a parent, stepparent, sibling, or grandparent of the deceased. Article 8308-4.42(f) provides that if the employee is not survived by legal beneficiaries, the death benefits shall be paid to the subsequent injury fund.

According to the benefit review conference (BRC) report, which was in evidence, both the claimant, who is the brother and only sibling of the deceased, and the deceased's mother, [deceased's mother], who is also the mother of the claimant, initially

claimed death benefits. However, the BRC report states that [deceased's mother] withdrew her claim and urged that the claimant be awarded benefits. The report further states that [deceased's mother] and [stepparent], who is the husband of [deceased's mother] and the father of the deceased and the claimant, specifically denied that they were financially dependent on the deceased and that they understood that they would be prevented from sharing in the death benefits. The hearing officer stated that the issue to be determined at the contested case hearing was: "Who are the legal beneficiaries of [deceased], deceased." However, in essence the real issue to be determined at the hearing was whether the claimant was a "surviving dependent" sibling of the deceased since the deceased was never married, had no children or grandchildren, and no one other than the claimant claimed to be dependent on the deceased.

Article 8308-1.03(14) provides that "dependent" means "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 this Act." Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE. § 132.2 (Commission Rule 132.2) provides for the determination of facts of dependent status and applies to a person who claims death benefits as a dependent of the deceased employee. The uncontroverted testimony of the claimant and of the father of the claimant established that the claimant was the sibling of the deceased, and there was no question as to the claimant having survived the deceased. Thus, having established his sibling relationship to the deceased, the claimant was left with establishing that he was a dependent of the deceased as that term is defined in Article 8308-1.03(14) and as determined under the provisions of Commission Rule 132.2.

The deceased worked for the employer as a full-time employee from September 1991 to the date of his fatal accident on [Date of Injury]. He made \$5.75 per hour. The employer's wage statement showed his total gross pay for the 13 weeks preceding the date of his death to be \$2,923.76, which gives an average weekly wage of \$224.90.

The claimant, who was 26 years of age at the time of the deceased's death, began working for [employer] when he got out of the Navy in 1989. He made \$9.00 per hour. He presented an affidavit in which he indicated that his gross monthly pay was \$1,548 after deductions for social security and federal income tax withholding, and that his net monthly take home pay, after deducting amounts he contributed to savings, stock, and 401-K plans, was \$1,217. The claimant continued working until June 20, 1992. He was not working at the time of the hearing. He said he had registered to attend college in the fall of 1992.

Prior to the end of October 1991, the claimant and the deceased lived with their parents in their parents' home. According to the claimant, he and the deceased entered into an oral agreement to live together apart from their parents and to share living expenses as of October 31, 1991. The claimant said that he purchased a house under the "GI Bill" and that he and the deceased moved into the house on October 31, 1991. The house was in the claimant's name only and the monthly mortgage payment was \$493. The deceased did not sign any of the closing papers on the house nor did he pay any of the closing costs. The claimant said that under the terms of the house loan, he is required to live in the house for at least three years. The claimant and the deceased lived together in the house purchased by the claimant from October 31, 1991 to the date of the deceased's death on [Date of Injury]. The claimant continued to live in the house after the deceased's death.

The claimant stated in his affidavit and testimony that the deceased gave him \$250 in cash every two weeks to pay for the deceased's share of certain monthly household expenses. The claimant said that the deceased paid cash because the deceased did not have a checking account and that the deceased was paid at work every two weeks. The average total monthly expense for electric, water, cable, telephone, and groceries was \$466, which the deceased and the claimant shared equally. The claimant said that \$240 of the money that the deceased gave him each month was used to pay the deceased's share of the mortgage payment. The claimant paid the remaining \$253 of the monthly mortgage payment of \$493. Thus, the average monthly household expenses, including the mortgage payment, totaled \$959, and the deceased's share of this total amount was \$473, for which the deceased gave \$500 in cash to the claimant each month. The claimant testified that whatever money was left over that was not used for payment of bills would be used for groceries. The claimant testified that the money that the deceased gave him was for the deceased's benefit for the deceased to be able to stay at the house and that he applied the money to the deceased's part of the monthly household expenses. He further testified that the deceased's share of the mortgage payment could be considered as rent, and that the deceased could not have lived in the house if the deceased did not pay him the \$240 he applied to the mortgage payment. (DG) stated in an affidavit that she was aware that the deceased paid the claimant a certain amount of cash every two weeks for room and board and for the deceased's share of the bills. The claimant testified that the deceased did not give him any money other than the \$250 payment every two weeks. The claimant further testified that the deceased was aware of his plan to attend college on

the GI Bill once they were settled in the house and that he had planned to obtain a part-time job while attending college.

In his appeal, the claimant urges that "the monthly household expenses paid to me by my brother [the deceased] were for our benefit," that he was economically dependent on the deceased's income, and that "we would not have bought this house without each other." Therefore, the claimant disagrees with the following findings of fact:

Finding No. 13. The monthly household expenses paid by deceased to claimant was paid from deceased's net resources for deceased's room and board and no other purpose.

Finding No. 14. Claimant was not economically dependent upon deceased other than deceased paying deceased's share of the monthly household expenses.

In Conclusion of Law No. 2, the hearing officer concluded that the claimant was not a dependent of the deceased at the time of the deceased's death because the deceased did not provide the claimant either a pecuniary or a nonpecuniary economic benefit which contributed substantially or significantly to the claimant's welfare and livelihood. The hearing officer also concluded that the deceased did not have a dependent eligible for death benefits as a legal beneficiary who met any of the conditions set out in Article 8308-4.42.

As previously mentioned, under the 1989 Act a "dependent" is 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 death benefits. Rule 132.2 applies to a person claiming death benefits as a dependent of the deceased employee. Subsections (c) and (d) of that rule provide as follows:

(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) (sic) of this section are 100% of all wage and salary income and all other income including nonpecuniary income and all income of the individual's spouse, less 100% of social security taxes and federal income tax withholding.

In our opinion, a reasonable inference could be drawn from the evidence that the \$500 monthly payment the deceased gave to the claimant was for the deceased's own necessary living expenses and was not a contribution to the claimant's welfare and livelihood. See Texas Workers' Compensation Commission Appeal No. 92391, decided September 16, 1992. In *Larson, Workmen's Compensation Law*, Vol., 2A, Sec. 63.12(b) (Matthew Bender, 1992), it is stated that: "it has been frequently held that, if the decedent's contribution is offset by the value of the board and room received, he is doing no more than to pull his own weight; he is merely supporting himself, with nothing left over to represent support of dependents." In the present case, the claimant and the deceased had an agreement to share certain household expenses. The deceased paid his share; however, he did not contribute money to the claimant to cover the claimant's share of the expenses. The claimant's circumstances in life are said to be clearly pertinent and material to the issue of dependency. See 75 TEX. JUR. 3d *Work Injury Compensation* § 155 (1991). In this regard, we note that the claimant was able to secure a loan for the purchase of the house on the strength of his own financial resources. The claimant made \$9.00 per hour whereas the deceased made only \$5.75 per hour. The claimant's after tax take home pay was \$1,548 per month compared to the deceased's after tax take home pay of less than \$920 per month (the claimant's before tax income of \$230 per week would result in before tax monthly income of approximately \$920; after deductions for taxes the amount would, of course, be less). Given the comparative financial circumstances of the claimant and the deceased, the claimant's testimony, and the fact that the deceased paid only his share of the expenses, we conclude that the hearing officer's finding that the expenses paid by the deceased were for his room and board and for no other purpose is supported by the evidence and is not against the great weight and preponderance of the evidence.

We observe that Finding of Fact No. 14 might be read to be contrary to the hearing officer's Conclusion of Law No. 2. However, when read in conjunction with Finding of Fact No. 13, Finding of Fact No. 14 can reasonably be construed to mean only that the claimant was benefited by not having to contribute to the support of the deceased since the deceased was supporting himself, and that that benefit to the claimant was not a contribution to the claimant's welfare and livelihood in that the deceased was merely "pulling his own weight." We further observe that Conclusion of Law No. 2 is supported by Finding of Fact No. 13, and that Finding of Fact No. 14 may be disregarded as being unnecessary to the decision. Conflicts or contradictions in findings which are apparent rather than real may be disregarded and a decision entered

on findings which afford a sufficient basis for the decision. See Texas Indemnity Insurance Company v. Staggs, 134 Tex. 318, 134 S.W.2d 1026 (1940).

As we view the situation, if any economic benefit flowed from the deceased to the claimant which could have contributed to the claimant's welfare and livelihood, it would be the deceased's payment of \$240 a month to be applied to the mortgage payment. That amount is less than 20% of the claimant's net resources (\$1,548) for the month, which was the period in which the payment was made. Consequently, the presumption in Rule 132.2(c) would not be applicable. However, under the circumstances of this case, we do not believe that the hearing officer was required to find that the deceased's payment to the claimant for a portion of the mortgage payment was a contribution to the claimant's welfare and livelihood in that it could be viewed as merely the payment by the deceased of his own living expenses for his own support. The other expenses which the claimant and the deceased shared would likely fluctuate depending on use or consumption (with the possible exception of the television cable bill). Thus, that portion of the deceased's monthly payment to the claimant to cover the deceased's share of those expenses could reasonably be found to be payment of the deceased's own necessary living expenses for his own support and not contributions to the claimant's welfare and livelihood.

Although not cited by the claimant, we observe that in Travelers Insurance Company v. Moore, 386 S.W.2d 634 (Tex. Civ. App.-Beaumont 1964, writ ref'd n.r.e.), the court held that the evidence supported the finding that the brother of the deceased employee was a dependent of the deceased employee where the deceased employee lived with his brother and his brother's wife for 25 years, maintained and repaired things about the home, allowed his brother and his wife to use his automobile, and paid them \$40 a month for room and board, plus \$50 a month contribution to their support which was increased to \$100 a month five months before the employee died. The other income of the brother and his wife was \$300 per month. In distinguishing the Moore case from the present case, we observe that the former workers' compensation statute did not define the term "dependent," and that the court in Moore held that the trial court properly defined the term "dependent" for the jury even though the trial court did not include in the definition that the person claiming to be a dependent relied on contributions of the deceased "in a substantial way." Under the 1989 Act the term "dependent" is defined such that the economic benefit received by an individual must contribute substantially to the individual's welfare and livelihood. Thus, the trier of fact in the Moore case did not have to find that the benefit flowing to the deceased's brother contributed "substantially" to the welfare and livelihood of the deceased's brother in order to find that he was a dependent of the deceased, whereas in the instant case such a finding, supported by the evidence, would be necessary to establish that the claimant was a dependent of the deceased. We also observe that the question of

dependency is generally one of fact to be determined by the trier of fact, unless there is no dispute as to the facts and they lead to a definite conclusion. See Federal Underwriters Exchange v. Hall, 182 S.W.2d 703 (Tex. 1944).

Having reviewed the record, we conclude that the hearing officer's determination that the claimant was not a dependent of the deceased at the time of the deceased's death because the claimant did not receive an economic benefit from the deceased which contributed substantially to the claimant's welfare and livelihood is supported by the evidence and is not against the great weight and preponderance of the evidence. Appeal No. 92391, *supra*.

The decision and order of the hearing officer are affirmed.

Robert W Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Lynda Nesenholtz
Appeals Judge