

APPEAL NO. 92721

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On November 16, 1992, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The record was closed on November 27, 1992. The hearing officer determined that appellant (claimant herein) and (AP) failed to establish entitlement to benefits under the 1989 Act from the death of (decedent herein).

Claimant appeals and contends that the hearing officer misapplied the facts, challenges the hearing officer's impartiality, alleges the proceedings were unfair, and requests that we reverse the hearing officer's decision and award him death benefits. Respondent, (carrier herein), responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

The issue at the CCH, reframed from the benefit review conference (BRC), was "[w]hether there is a legal beneficiary of (JB) entitled to receive death benefits or whether death benefits are payable to the Subsequent Injury Fund." At the BRC, (AP), represented by (TP), claimed to be the common-law spouse of the decedent. (Ms. P) failed to appear at the CCH and her attorney withdrew from the case. The record was held open to permit the Texas Workers' Compensation Commission (Commission) to contact (Ms. P). (Ms. P) failed to respond to a letter asking her to show cause why a decision and order should not be entered against her and the record was closed on November 27, 1992.

It was stipulated that decedent's death resulted from a fatal compensable injury while an employee of (employer) on (date of death). It is undisputed that claimant was decedent's father. Claimant testified he lived in a small rural town in (state) and that decedent had been sending monthly money orders in the amount of \$100.00 or \$200.00 for claimant and decedent's brother, (OB), and sister, (AB), who lived with claimant in (state). Claimant testified at the CCH that he had no personal knowledge about money orders decedent had allegedly been sending. Claimant's testimony was that decedent's 17-year-old brother (O) received and cashed the money orders because claimant's work as a construction laborer kept him away from home. Claimant testified his monthly salary was about \$100.00 U.S. a week or \$400.00 U.S. a month. There was no other documentation or evidence of claimant's earnings, living expenses, or economic benefits received from decedent. Claimant, at the BRC, submitted what purports to be receipts of six money orders dated "03-06-91," "04-02-91," "04-01-91," "9-05-91," "10-03-91," and "11-04-91" in the amount of \$100.00, each as evidence of decedent's support of claimant. These money order receipts were consecutively numbered 169 22845 950 (subsequent money orders will be identified by the last three digits only), 951, 952, 953, 955 and 956 with the named payee "[GB]" and the name "[JB]" handwritten under the amount payable line. Carrier at the CCH

submitted a sworn affidavit from the company issuing the money orders stating that the above numbered money orders were sold one week to 10 days prior to May 20, 1992 at a store in (city), Texas. Carrier also produced photographic facsimiles of the original money orders as presented and paid, showing them all purchased on "05-16-92" with the payees on 950 and 951 being (AG) (decedent's half brother who lives in (city) is also named (AG), the payee on 952 and 953 being (IP), and the payee on 955 and 956 being (LR). None of the money orders were endorsed by claimant or his son, (OB). The evidence also suggests that the photocopy receipts claimant submitted were purchaser's receipts that the purchaser keeps, rather than receipts the recipient receives. Claimant also testified that decedent, at the time of his death, had no children and was not married.

The hearing officer found that claimant was the decedent's father, but that he had failed to prove that he had received regular or recurring economic benefits from decedent, and had not offered any documentary evidence of claimant's net resources or any economic benefits received from decedent. The hearing officer concluded that claimant was not entitled to death benefits as a legal beneficiary of decedent. Claimant filed an appeal stressing the sworn "undisputed" testimony of claimant that decedent had sent him \$100.00 to \$200.00 a month to support the family, and that since claimant made only \$400.00 U.S. per month the money decedent sent ". . . exceeded 20% of the total money available for the total family support in compliance with Article 8308-4.42 and TWCC Rule 132.2." Claimant's attorney in the appeal stresses that claimant had no personal knowledge of the money order receipts. Claimant's counsel also alleges the hearing officer was not an impartial trier of fact, although presenting no evidence on this point other than to disagree with the decision. Claimant's counsel further alleges the total proceedings were "weighted against a poor Mexican family" and that failing to award them death benefits "thumbs one's nose at justice."

The hearing officer properly instructed the parties that the claimant has the burden of proving that he is the legal beneficiary entitled to death benefits in this case. See Texas Workers' Compensation Commission Appeal No. 91049, decided November 8, 1991, and Texas Workers' Compensation Commission Appeal No. 92178, decided June 17, 1992.

Article 8308-4.42(e), in discussing distribution of death benefits, provides that "[i]f 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, . . . sibling . . . of the deceased." Dependent is defined in Article 8308-1.03(14) as "an individual who receives a regular or recurring economic benefit which contributes substantially to the individual's welfare and livelihood . . ." Determination of what may constitute dependent status is fleshed out in Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.2 (Rule 132.2). Certain evidentiary presumptions, which may be overcome by credible evidence, are established by Rule 132.2. These include that dependency may be established on the basis of the receipt of "a regular or recurring economic benefit." (Rule 132.2(b)). Further, subsection (c) of that Rule provides that an economic benefit whose value was equal to or greater than 20 percent of the person's net resources is presumed to be an economic benefit which contributed

substantially to the person's welfare and livelihood. Net resources for purposes of subsection (b) are defined in subsection(d) as ". . . 100 percent of all wage and salary income and all other income including nonpecuniary income . . . less 100 percent of social security taxes and federal income tax withholding." Subsection (e) states:

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.

To meet the burden of proving regular and recurring economic benefit, the claimant offers only his testimony that he received monthly money orders from decedent and that his income was about \$100.00 U.S. weekly. No evidence, testimonial or documentary, was offered regarding claimant's household expenses, such as shelter, food, clothing and utilities. As to claimant's income, claimant testified he was paid in cash for construction work, but there was no evidence who claimant's employer was, other than working in construction in various parts of (state), whether he was paid hourly, daily or weekly and what taxes, if any, were paid. We note that subsection (e) of Rule 132.2 suggests that to enable the Commission to accurately identify a claimant's net resources and to establish the existence of the economic benefit claimed, information such as tax returns, financial statements and check stubs may be used. See Texas Workers' Compensation Commission Appeal No. 92523, decided November 18, 1992, and Texas Workers' Compensation Commission Appeal No. 92107, decided May 4, 1992 on how economic benefit may be computed. As previously noted, claimant, at the BRC, submitted what purported to be six money orders which he said were sent to him by the decedent. The benefit review officer at that time noted "some inconsistencies" in that the "dates on some of the money orders appear to be after the date of death" and "how six money orders purchased one per month for six months could be in sequential order." These questions were not answered at the CCH. Also as previously noted, carrier offered photographic facsimiles of the original money orders as presented and paid showing they were purchased 10 months after decedent's death. The hearing officer further found, with support in the evidence, that claimant "did not establish that he received regular or recurring economic benefits" from decedent and further "did not offer any documentary evidence of his net resources or of economic benefits received" from the decedent. At the CCH, claimant stated he had no personal knowledge of the money order receipts and on appeal claimant's attorney speculates that the money order receipts ". . . were the product of an attempt by the deceased (sic) friends to provide documented evidence" which claimant's attorney concedes ". . . was a misguided attempt at best." In summary, claimant presents no documentation of economic benefit and/or net resources and only estimates concerning receipt of monthly money orders. Claimant concedes he was not at his address much of the time to receive the money orders, which his other son, (OB), cashed for support of the family. Claimant failed to introduce any records verifying his monthly or weekly income at the time of decedent's death, other than his verbal estimate.

Article 8308-6.34(e) provides, and we have repeatedly held, that the hearing officer is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. See Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. In light of claimant's allegations that the hearing officer was not an impartial trier of fact and appeared to be an advocate for the subsequent injury fund, we have carefully reviewed the transcript and the tape recording of the proceedings. We find no merit to claimant's allegations and find the hearing to have been conducted properly. As discussed above, the hearing officer's findings and conclusions are supported by the evidence, or rather lack of evidence by claimant. As previously noted, there was little evidence supporting claimant's contentions and claimant's testimony consisted merely of estimates of receipt of money orders and income. Where, as here, there is sufficient evidence to support the hearing officer's determinations, there is no sound basis to disturb her decision. Only if we were to determine, which we do not in this case, 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 be warranted in setting aside her decision. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Appeal No. 92232, *supra*.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge