APPEAL NO. 931105
FILED JANUARY 20, 1994

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq*. (formerly V.A.C.S., Article 8308-1.01 *et seq*.). On November 1, 1993, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. He determined that decedent, had no eligible beneficiaries for purposes of payment of death benefits under the 1989 Act. Parents appeal stating that several findings of fact are in error, including findings that stated decedent's income in 1992 was $3900.00 or less, that decedent only provided $150.00 per week, that decedent was not regularly contributing 20% or more to his parents' resources, and that parents did not receive regular contributions from decedent that substantially contributed to their welfare. The child appeals stating that the presumption that he is the son of the husband (decedent) of his mother, found in the Family Code, was not overcome, and he should be a beneficiary.

DECISION

Reversed and remanded.

Findings of fact related to whether child is a beneficiary of the decedent are all affirmed. Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 132.4(c) (Rule 132.4(c)) provides that if the child is listed on its birth certificate as being born of parents that do not include the decedent, then the child is presumed to be of the parents named on the certificate. While this presumption states it may be rebutted, the evidence was not sufficient to rebut it. The strongest point made for the child being a beneficiary is based not on evidence, but on the presumption contained in TEX. FAM. CODE ANN. § 12.02 (Vernon Supp.

1994) that a child born while the mother is married is the child of the husband of the mother. This presumption may be rebutted by clear and convincing evidence.

Decedent and his wife (mother of the child) were married in March 1988; they were not divorced at the time of decedent's death on the job on August 2, 1992. The child was born to the wife on September 24, 1990. Many witnesses testified that wife and decedent separated in 1988, with wife residing thereafter in New Mexico. Decedent then lived with his brother who testified that decedent had neither the means nor money to travel out of City A to see the wife. The only evidence of any contact between decedent and wife was at the funeral of decedent's grandfather in February 1990. There is no evidence that decedent saw the wife at any time other than in public at the funeral. Decedent's father testified that decedent spoke on the telephone from their home after the funeral with the wife and then remarked to him that the wife stated she was pregnant. There was abundant testimony that the name of the father of the child on the child's birth certificate was that of a man with whom the wife lived. Wife did not testify and provided no statement. There was no evidence that the child was not the issue of CB who was listed as the father on the birth certificate. In addition to there being sufficient evidence to support the presumption contained in Rule 132.4 (a child is that of the parents named on birth certificate), there is clear and convincing evidence (*See* Texas Workers' Compensation Commission Appeal No. 91023, dated October 16, 1991, which quoted from State v. Addington, 588 S.W.2d 569 (Tex. 1979), that clear and convincing evidence is between "a preponderance of the evidence" and "beyond a reasonable doubt") that the child's father is not the decedent.

There was no evidence rebutting testimony that decedent moved to City B, in June 1991, to live with and contribute to the support of the parents. Parents had moved to City B from New Mexico after decedent's father was laid off from his job in October 1990. Decedent's mother had retired from her job in April 1990. Decedent's father found a job approximately two months after moving to City B. Testimony from many friends indicated that decedent moved to City B to help his parents; no evidence contradicted this statement of purpose. The evidence as to amounts given by decedent to his parents was not well developed.

The case is remanded for reconsideration of the evidence based on the appeal of the parents. Specifically, the hearing officer should consider whether the evidence of record, including what appears to be three W-2 statements in the name of either decedent's middle name or full name, indicates that decedent made more than $3900.00 in 1992 contrary to Finding of Fact No. 13. While no specific assertion of error is addressed to Finding of Fact No. 14 which indicates that the parents' resources for 1992 were approximately $27,00.00, findings of fact which addressed regular

substantial contributions to parents are contested, and Finding of Fact No. 14 may be material to those findings. The hearing officer should consider whether parents' net resources in Finding of Fact No. 14 should be limited in time to that period that decedent provided support in 1992, i.e., would a comparison be more valid if the parents' resources were measured through the date of decedent's death only, as opposed to parents' resources that included the five months of the year remaining after his death.

The figures that may be found by the hearing officer as discussed in the preceding paragraph will only give a relationship of decedent's earnings to parents' resources for a certain period of time. They do not address the more determinative question of what decedent provided to the parents. Finding of Fact No. 16 does state that decedent provided at most $150.00 per week. Decedent's father on page 141 of the transcript appears to make one reference to $150.00 per week. (The drafter can find no other reference to this figure.) If this is the only reference to $150.00, the hearing officer should consider whether the following testimony sets a limit on the amount of the contribution made at $150.00 per week, whether it indicates a relative amount that was given from which an amount(s) may be inferred from other evidence, or whether it is open to some other interpretation:

Q:Do you know what he kept back?

A:Well, I will put it this way, if he got a check of two hundred dollars, he would give us a hundred and fifty.

After determining the parents' net resources for a period of time (*see* Rule 132.2), and the contribution made in that period by the decedent, the hearing officer should consider whether he wishes to change Finding of Fact No. 17. *See* Rule 132.2(c). In addition, Rule 132.2(b) points out that regular or recurring benefits may be found notwithstanding some irregularity of work on the part of the decedent. Whether or not Finding of Fact No. 18 remains after reconsideration, that finding indicates an appreciation by the hearing officer that a substantial contribution may be found even if it does not amount to 20% of the claimant's net resources.

The decision and order are reversed and the case is remanded for reconsideration of the evidence in regard to whether the parents qualify as eligible beneficiaries. In reconsidering the evidence as discussed previously, and as the

hearing officer may determine necessary, additional or different findings of fact and conclusions of law may be appropriate in reaching a decision. While development of the evidence may not be necessary, it is an option open to the hearing officer. Since reversal and remand necessitates issuing a new decision by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which the new decision is received, pursuant to Section 410.202. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Susan M Kelley
Appeals Judge

_____
Phillip F O'Neill
Appeals Judge