

APPEAL NO. 931114

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). A contested case hearing was held on November 15, 1993, hearing officer on his own motion reopened the hearing to allow the parties to provide certain additional evidence concerning the deceased's earnings and the dependency status of the claimant beneficiaries, who were deceased's grandsons. The hearing officer ultimately determined that the two claimant beneficiaries did not provide credible evidence that they received regular and recurring economic benefits which contributed substantially to their welfare and livelihood from the deceased. In their appeal they point to un rebutted evidence introduced at the hearing; the respondent carrier reiterates that it has never contested the eligibility of the grandsons of the deceased as legal beneficiaries.

DECISION

We affirm the decision and order of the hearing officer.

The facts surrounding this case are set out thoroughly in the hearing officer's decision and will not be repeated at great length herein. Basically, ___ (deceased) was employed by (employer) and was acting in the course and scope of his employment when he was tragically murdered on ____. It was determined at the hearing that he had no eligible spouse, and that no claims of beneficiary status were being advanced by his parents or his two adult children. The two persons seeking to be declared dependents of the deceased were his grandsons, TM and PC. Much of the evidence in the case went toward establishing the relationship between TM, PC, and deceased, and the hearing officer found that these individuals were deceased's grandchildren. At the time of deceased's death TM was four and PC was 16.

According to a list of expenses introduced into evidence, as well as some additional evidence, deceased gave TM a total of \$6955.00 over a one-year period, 1990 (although it stated that deceased had supported TM from birth). These amounts included \$45.00 each week of the year for groceries (TM's mother testified that these included items such as cereals, which were for TM); \$205.00 for haircuts (a signed statement by deceased's barber attested to the fact that deceased paid him each week for TM's haircuts); \$625.00 in doctor bills and medicines; \$165.00 per month for nine months of child care, for a total of \$1485.00 (TM's mother testified that deceased paid the child care center in cash); \$760.00 for clothing, which included amounts for coats, shoes, sneakers, pants and shorts, and "miscellaneous;" \$525.00 in entertainment (including gifts, movies, and horseback riding); \$5.00 per day lunch money for 180 days of school, for a total of \$905.00; and \$370.00 in change.

TM's mother testified that in 1990 she and her husband had a gross income of \$36,000, and that their house payment was \$1100 a month. She said they provided certain things for TM, such as transportation and housing, but that TM's share was not as much as one-third of the total.

A signed statement from WD, a friend of the deceased, stated that from TM's birth deceased provided for him financially--including clothing, food, and health needs--and took an active role in his life. Four coworkers of deceased signed notarized statements that deceased bought clothes and school supplies for his grandchildren and gave them money.

A signed statement by Mr. C, PC's maternal grandfather who was also his adoptive father, stated that deceased, "over the years," provided \$500-600 per month for PC's general welfare. Mr. C testified that the money was used for such things as food and shoes. He also stated that PC had no other source of income during the time, such as a part-time job. (PC testified to essentially the same facts, although he said he occasionally got money from other relatives.) Mr. C, with whom PC lived at the time of deceased's death, stated that his income from Social Security and a part-time job was around \$1100 a month and that his house payments were \$175.00 per month.

In holding against the two claimant beneficiaries, the hearing officer noted that he had requested from the parties a listing of the monthly net resources in accordance with Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.2 (Rule 132.2) for each person claiming to be a dependent eligible for death benefits and, if the monthly benefits provided by deceased were less than 20% of the monthly net resources for such person, proof that such monthly benefits contributed significantly to the person's welfare and livelihood, in accordance with Rule 132.2 (c). This information, the hearing officer observed, was not provided for PC, and that with "only vague generalities," it was not possible to determine that PC was an eligible dependent. The same deficiency was noted with regard to TM's net resources. While more detailed information was provided with regard to expenditures on TM's behalf, the hearing officer found such information not credible. The hearing officer also noted that deceased's 1989 tax return showed his net income for that year to be \$21,803, and stated that it was not credible, based on the alleged expenditures on behalf of TM and PC, that deceased would have provided those individuals amounts that equated to 62% of his disposable income. The hearing officer accordingly awarded deceased's death benefits to the subsequent injury fund.

In their appeal, the claimant beneficiaries contend that a specific list of expenses was submitted for TM, and testimony was adduced from PC and Mr. C. This evidence, they claim, was un rebutted, and receipts were not produced because there are none. They also contend that PC and TM had no income of their own, and that even if a percentage of their parents' income is allotted to them, the amount provided by the deceased is still in

excess of 20% of their net resources and contributed significantly to PC's and TM's welfare and livelihood.

The 1989 Act defines "dependent" as an individual who receives "a regular or recurring economic benefit that contributes substantially to the individual's welfare and livelihood if the individual is eligible for distribution of benefits under Chapter 408." Section 401.011(14). Section 408.182 makes grandchildren of a decedent eligible for benefits, so long as they are dependent upon the deceased and do not have a parent who is an eligible child.

Rule 132.2, entitled Determination of Facts of Dependent Status, provides in pertinent part as follows:

- (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) [sic; should read "subsection (c)"] 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

Rule 132.5 makes clear that a grandchild claiming benefits must present evidence of dependent status as provided by Rule 132.2.

The hearing officer's decision apparently did not dispute that there was evidence showing a regular or recurring economic benefit flowing from deceased to PC and TM. That being the case, the next determination is whether such benefit contributed substantially to the claimants' welfare and livelihood.

This panel has previously noted that the 20% of net resources standard contained in Rule 132.2 establishes a presumption, not a minimum threshold, of economic dependency which can also be established by proof of a lesser amount. However, the rule makes clear that the claimant has the burden to prove that benefits whose value was less than 20% of the person's net resources nevertheless constituted a significant contribution to the claimant's welfare and livelihood--a burden which can be met through "sufficient information to enable the commission to accurately identify the net resources and to establish the existence of the economic benefit claimed." While not specifically stated in the rule, however, it is axiomatic that the claimant would also bear the burden to establish facts showing that the 20% presumption had been met.

The 1989 Act provides that the hearing officer is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. The testimony of a claimant raises only an issue of fact, and the hearing officer may give credence to all, part, or none of the testimony offered. Escamilla v. Liberty Mutual Insurance Co., 499 S.W.2d 758 (Tex. Civ. App.-Amarillo 1973, no writ).

The hearing officer's statement of evidence, as well as his pertinent finding of fact, made clear that he had credibility problems with the bulk of the claimants' evidence, as bearing on the 20% of net resources presumptive standard as well as tending to prove a substantial contribution to their welfare and livelihood. We would emphasize, however, that an assessment of credibility in a case such as this one goes not necessarily to truthfulness, but to the accuracy of the recollection. It would not be inconsistent for the hearing officer to believe a claimant's sincerity, but also to believe that a retrospective recollection about finances is inaccurate.

The claimants point out that no receipts existed by which the claimed amounts could be substantiated. We appreciate that this will often be the case, most especially where the transactions are between relatives. However, the rule does provide that there must be "information to enable the commission to accurately identify" facts to establish dependency. In this case, for example, an affidavit from TM's child care center, attesting to monthly payments by deceased, might have assisted the hearing officer in making his decision. (We note that this form of evidence was used to establish deceased's payments

for TM's haircuts.)

Here, the hearing officer was not satisfied that evidence established the 20% presumption or furnished enough information upon which to base other findings in claimants' favor. While different inferences might reasonably be drawn from the evidence presented, this fact alone is not a sufficient basis to reverse the decision of the fact finder. Texas Workers' Compensation Commission Appeal No. 92308, decided August 20, 1992. We cannot say that his findings are so against the great weight and preponderance of the evidence in this case as to be manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). We accordingly affirm the hearing officer's decision and order.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge