

APPEAL NO. 931183

Pursuant to 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 in (city), Texas, on November 19, 1993, (hearing officer) presiding as hearing officer. She determined that the appellant was not a legal beneficiary of the deceased, JG, at the time of his death and that MG and XG are legal beneficiaries. Benefits were ordered paid to the latter two. Appellant (claimant) appeals urging that the evidence conclusively showed that she met the requirements for being the deceased's wife (common law) under the Texas Family Code. The respondent/cross appellant (carrier) urges that the evidence is sufficient to support the determination of the hearing officer and asks that the decision be either affirmed or alternatively, that we "reverse and render a decision that the alleged widow failed, as a matter of law, to satisfy the procedural requirements of Section 1.91(b), Family Code." This latter matter had been raised in a conditional request for review.

DECISION

Finding the evidence sufficient to support the decision of the hearing officer, we affirm.

The deceased suffered a fatal injury while in the course and scope of his employment on (date of injury). He left surviving the two minor children, set out above, from his marriage to the claimant. The deceased and claimant were married in a ceremonial service in May 1970 and were divorced by the County District Judge on June 7, 1990, and the decree of divorce was signed and ratified on July 31, 1990. There is some conflict in the evidence concerning the relationship thereafter between deceased and claimant. Claimant contended that at times after the divorce they lived together and the deceased would spend nights in her home (although there was also evidence that the deceased maintained a residence of his own and maintained his own telephone at such residence)¹ and they appeared in public together with their children at times. The claimant indicated that after the divorce, they lived together and discussed getting married in a church or before a justice of the peace at some time in the future---probably sometime in the new year, 1992. She testified that she conditioned any remarriage on the deceased not seeing other women, particularly the one who was the cause of the divorce. She said they had filed separate tax returns, but that the deceased held them out as husband and wife and called stores to say she was his wife to enable her to charge clothing for the children.

Several witnesses called by the claimant indicated that they were aware that the deceased frequently stayed at the claimant's house and that they did things together as man and wife. They were generally aware of the deceased having a separate house and that he had been seeing another woman. They also stated that the deceased talked about

¹A related case has been before the Appeals Panel wherein another individual was apparently claiming death benefits as the common law wife of the deceased. Texas Workers' Compensation Commission Appeal No. 93908, decided November 17, 1993 (unpublished).

remarrying the claimant sometime in the future. The claimant's father testified that the deceased said he wanted to get married again to the claimant but wanted a little more time.

Based upon this state of the evidence, the hearing officer determined that the claimant was not, at the time of the decedent's death, a legal beneficiary. The hearing officer, the sole judge of the relevancy and materiality of the evidence and of the weight and credibility to be given the evidence, is the finder of fact in a contested case hearing. Sections 410.165(a) and 410.168(a). We have stated in Texas Workers' Compensation Commission Appeal No. 92007, decided February 21, 1992, that the existence of a common law marriage is a question of fact. Clearly, there is sufficient evidence to support the hearing officer's determination on the claimant's lack of status as a legal beneficiary and conversely, that determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951); Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. The evidence is clear that the claimant and deceased were divorced in June 1990 and that although they may have cohabitated after that and discussed a potential remarriage in the future, there was no present intent to be married; rather, any remarriage was conditional. The claimant herself testified that she had put a condition on any remarriage that the deceased would stop seeing other women, particularly one who was the cause of the divorce. The deceased's former father-in-law testified that the deceased told him that he wanted to get married again but he wanted a little more time. Other testimony also tended to support only some future plan to remarry.

The situation in this case bears some analogy to Texas Workers' Compensation Appeal No. 93619, decided September 3, 1993, where the claimant and decedent cohabitated and held themselves out to be man and wife on occasion and were planning a ceremonial wedding at the time of the compensable fatal injury. The hearing officer in that case found, in pertinent part, that the claimant did not establish a present agreement to be married in accordance with the requirements for certain informal marriages as set forth in TEX. FAM. CODE ANN. § 1.91 (Vernon 1993). Death benefits were paid to a minor child not of that relationship. In that case, which we affirmed, as in the instant case, the claimant has not established that she was a legal beneficiary (common law wife) of the deceased. A present agreement to be married was not shown; rather, only a conditional agreement to potentially marry in the future was established by the evidence and found by the hearing officer.

The hearing officer is sufficiently supported by the evidence of record and we affirm her decision.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge