APPEAL NO. 93619

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On June 30, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding, to determine whether the appellant (claimant) is entitled to death benefits under the 1989 Act as a legal beneficiary (common-law wife) of (decedent), and whether respondent (minor child) is entitled to all of the death benefits in this claim. The parties stipulated that decedent suffered a compensable fatal injury (electrocution) on (date of injury), while working for (employer), that employer had workers' compensation insurance with respondent Lumbermens Underwriting Alliance (carrier), that carrier accepted liability for death benefits on this claim, that minor child is the legal beneficiary of decedent, and that carrier has paid 50% of the death benefits on this claim to minor child. Based upon certain factual findings, the hearing officer determined that claimant did not establish that she is an eligible spouse of decedent and concluded that she is not entitled to death benefits in this claim. Claimant challenges the sufficiency of the evidence to support that legal conclusion and four related factual findings, alleges error in certain evidentiary rulings by the hearing officer, and asserts error in the hearing officer's failing to award attorney's fees to claimant's counsel based on counsel's affidavit. Claimant asks the Texas Workers' Compensation Commission (Commission) Appeals Panel to reverse the hearing officer's decision and render a decision that claimant is a legal beneficiary eligible to receive death benefits or, in the alternative, remand the case for reconsideration by the hearing officer. In her response, minor child urges the sufficiency of the evidence to support the challenged findings and conclusion, the correctness or lack of reversible error in the disputed evidentiary rulings, and asserts that claimant was not entitled to attorney's fees. The carrier, whose role in the hearing was minimal, filed what it termed an *amicus curia* response urging our affirmance and asserting, in essence, that the evidence proved no more than that claimant was the decedent's fiance with whom he was cohabiting at the time of his unfortunate death and not his common-law wife.

DECISION

Finding the evidence sufficient to support the challenged findings and conclusion, and further finding no reversible error, we affirm.

Claimant testified that she met the decedent in February 1992 and began dating him. The decedent's roommate was transferred and decedent had to make other living arrangements. He moved in with claimant and they occupied one of two bedrooms in a house owned by claimant's mother, (Ms. W). Claimant testified that at the time decedent moved in with her, they specifically agreed to start being husband and wife at that time, and that they henceforth held themselves out as husband and wife. Claimant called a number of witnesses including her mother, a coworker, friends, her mother's friends, and her aunt, (Ms. B), all of whom testified, in essence, that claimant had, on occasion, referred to herself and decedent as married, referred to decedent as her husband, referred to herself as decedent's wife, and were perceived by these witnesses as married. Claimant also introduced affidavits from most of her witnesses containing essentially similar information.

Claimant testified that before decedent closed his bank account with (Bank No. 1) he gave her a cash withdrawal card for the account which she used, that he subsequently opened an account with the (Bank No. 2), the bank she used, but that they were unable to open a joint account since they lacked a marriage license. She said the decedent did not designate her as a beneficiary on any insurance policies as he was unaware he had any insurance. She said they prepared a budget, pooled their paychecks, shared their expenses including $500.00 monthly payments to Ms. W, and that she became substantially financially dependent upon decedent. A number of cancelled checks introduced by claimant were signed by the decedent and made payable to "TW." She introduced evidence of various correspondence sent to her as "Mrs. Tina Moore" and "Ms. Stacy Moore," as well as an application for a Sears charge account she signed as "TM." She also testified that decedent called her daily at the dentist's office where she worked, left messages referring to her as "my wife," and received a "family" discount for his dental work.

Claimant also testified that in September 1992, she and decedent decided to have a church wedding, that they selected March 20, 1993, as their wedding date, that claimant selected her bridesmaids and a wedding dress, and that decedent worked overtime to earn the money to buy her ring he gave her in September. Claimant testified that she did not believe the planned church wedding disqualified her from being a common-law wife to decedent. It was the theory of minor child and the carrier, however, that claimant and decedent were merely engaged to be married despite their premarital cohabitation, and that claimant's notion of having effected a common-law marriage when their cohabitation was commenced was arrived at following the decedent's tragic and untimely death.

The parties viewed, off the record, a videotape of a local TV station feature item concerning the refusal of the wedding dress shop to refund the money for the wedding dress after decedent's death. Apparently the story referred to claimant as the decedent's fiance. The videotape was not offered into evidence, no objection was made respecting its not being made a part of the record, and there is no appealed issue respecting the completeness of the hearing record. The letter to the TV show host, written by Ms. B, referred to the decedent as claimant's "husband to be." Ms. B testified nevertheless that claimant and decedent "were married." Ms. B also testified that it was she who provided the information for decedent's obituary in a local newspaper which referred to the claimant as "TM." According to claimant's mother, claimant used the name TW more often than the name TM. Ms. W also testified that claimant told her they were moving into Ms. W's house as husband and wife and that once when Ms. W was discussing another wedding with decedent, he said he "didn't need a party." Ms. W conceded that the decedent's parents did not regard claimant as their son's wife.

Minor child, whom the evidence showed not to be the claimant's child, adduced testimony and introduced affidavits from several of the decedent's friends and coworkers who stated, in essence, that the decedent had not held himself out as being married, had

not referred to claimant as his wife nor to himself as her husband, and was not perceived by these witnesses as being married. The president of employer testified that when decedent was with him and others doing work in (state), decedent asked him if his "girlfriend" could pick up his check in (city). A company form was introduced which acknowledged that claimant had picked up decedent's September 3, 1992, paycheck. The form was signed by "TW." Minor child introduced claimant's tax return for 1992, signed on February 12, 1993, by the preparer, which reflected claimant's status as "single." Claimant introduced an application for an extension of time to file a 1992 federal income tax return for decedent and signed it "TW" on April 14, 1993. Claimant stated that her driver's license was in her maiden name and that her automobile insurance, renewed in December 1992, did not list the decedent as another driver.

Section 1.91 of the Family Code was amended in 1989 (V.T.C.A., Family Code Sec. 1.91) and provides in pertinent part:

Sec. 1.91. **Proof of Certain Informal Marriages**.

(a)In any judicial, administrative, or other proceedings, the marriage of a man and woman may be proved by evidence that:

(1)a declaration of their marriage has been executed under Section 1.92 of this code; or

(2)they agreed to be married, and after the agreement they lived together in this state as husband and wife and there represented to others that they were married.

(b)A proceeding in which a marriage is to be proved under this section must be commenced not later than one year after the date on which the relationship ended or not later than one year after September 1, 1989, whichever is later.

With respect to the first mode of proving an informal marriage, the hearing officer found that claimant and decedent did not execute a declaration of informal marriage. This finding is not disputed. As for the second mode of proof, the hearing officer found that claimant did not establish that she and the decedent made a present agreement to be married when they began living together in May 1992 or at any time prior to his death on (date of injury), that they lived as husband and wife from May 1992 until his death, and that they presented themselves as husband and wife on occasion to family, friends, and coworkers of claimant but not to decedent's family, friends, or coworkers. Claimant does not challenge the favorable finding that she and the decedent lived as husband and wife for the period in question, but does challenge the sufficiency of the evidence to support the

adverse finding respecting the agreement to be married and the partially adverse finding respecting their holding themselves out to others as being married. Claimant does not challenge a finding that she and the decedent planned a ceremonial marriage in March 1993 and that invitations and other wedding activities were in progress at the time of decedents death. We cannot agree with claimant's assessment and are satisfied these challenged findings are sufficiently supported by the evidence. Similarly, the challenged legal conclusion that claimant did not establish that she is an eligible spouse of the decedent and is not entitled to death benefits in this claim finds adequate support.

Claimant also challenges a finding that she filed her 1992 tax return after decedent's death as a single taxpayer under the name "TW," that she and the decedent maintained separate bank accounts prior to his death in the names of "SM" and "TW," and that decedent did not list "TW" in any document for any purposes or spousal benefit prior to his death. Again, our review of the evidence indicates the elements of this finding are supported. In Texas Workers' Compensation Commission Appeal No. 92007, decided February 21, 1992, we observed that tax returns, driver's licenses, and bank and pay records are but factors for the hearing officer to weigh but they do not in and of themselves negate an existing common-law marriage.

The hearing officer also found that claimant and decedent did not commence a proceeding to prove the existence of an informal marriage. Claimant states in her appeal that this finding is in error asserting she has pending in the County, Texas, probate court a proceeding to establish her status as a surviving spouse of the decedent. No evidence of any such a proceeding was adduced at the hearing. Further, that finding is not only supported by the lack of evidence of such a proceeding, but appears unnecessary for the determination of the existence of a common-law marriage in this case in any event.

According to the authorities we cited in Appeal No 92007, *supra*, the existence of a common-law marriage is one of fact. The hearing officer is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility it is to be given. Section 410.165(a). As the trier of fact, the hearing officer resolves the inconsistencies and conflicts in the evidence and the decision of the hearing officer should not be set aside because different inferences and conclusions may be drawn on review even though the record contains evidence of or gives equal support to inconsistent inferences (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)); and we will not substitute our judgement for that of the hearing officer where, as here, the challenged findings are supported by sufficient evidence (Texas Employers Insurance Company v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ)). The law requires a present agreement to be married as an element of a common-law marriage and an agreement on present cohabitation and future marriage is insufficient. Rosetta v. Rosetta, 525 S.W.2d 255, 261 (Tex. Civ. App.-Tyler 1975, no writ). *Compare* Texas Workers' Compensation Commission Appeal No. 92324, decided August

26, 1992.

Claimant complains that the hearing officer erred in not making a factual finding respecting her financial dependency on the decedent. We find no merit in this assertion. The challenged, pivotal legal conclusion is adequately supported by the factual findings made and which themselves are sufficiently supported by the evidence.

We find no merit to claimant's assertion of error based upon hearsay in the admission of four affidavits from decedent's coworkers. Section 410.163(a)(5) provides that the hearing officer shall allow the presentation of evidence by affidavit. Claimant herself introduced a number of affidavits. Nor is there merit in claimant's assertion of error in the hearing officer's exclusion of a business record affidavit accompanied by several answering service telephone messages for claimant from the decedent some of which referred to her as his wife. The hearing officer was satisfied the documents had not been timely exchanged by the claimant with the carrier pursuant to the requirements of Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13 (Rule 142.13). We further observe that claimant essentially testified to the content of the telephone messages. We also find no error in the hearing officer's admission of decedent's death certificate nor a funeral home list of persons who sent flowers, nor in the hearing officer's limiting testimony concerning the decedent's relationship with his parents and a lawsuit which claimant has apparently brought against the decedent's employer. The hearing officer is the sole judge of the materiality and relevance of the evidence. Further, to obtain a reversal based on the hearing officer's error in the admission or exclusion of evidence, it must be shown not only that the hearing officer committed error but further that such error was reasonably calculated to and probably did cause the rendition of an improper decision. Gee v. Liberty Mutual Fire Insurance Company, 765 S.W.2d 3994 (Tex. 1989). We find no such error in this record.

Claimant also complains of the hearing officer's allowing minor child to call a witness out of order to accommodate that witness' time constraints. When that testimony was taken, the testimony of the witness whose testimony was interrupted was resumed to completion. We find no error. During the presentation of minor child's case, claimant asked that her attorney's legal assistant, namely Ms. B, claimant's aunt, be called for testimony out of turn to accommodate her time constraints. The hearing officer and the other parties accommodated claimant's request.

Claimant stated in the appeal: "The hearing officer erred when she failed to award Appellant's [claimant's] counsel attorney's fees based on his prior filed affidavit." The record on appeal contains no attorney's fees affidavit from claimant's attorney nor any order of the hearing officer respecting the award of such fees. Further, the records of the Texas Workers' Compensation Commission (Commission) indicate that the Commission has taken no action thus far respecting any requested attorney's fees by claimant's attorney. When the Commission does approve attorney's fees for claimant's attorney, then an issue

respecting the amount of such fees may become ripe for appeal pursuant to the applicable Commission rules respecting the appeal of attorney's fees.

Finding the evidence sufficient to support the challenged findings and conclusion, and further finding no reversible error, the decision of the hearing officer is affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Gary L. Kilgore
Appeals Judge