

APPEAL NO. 93845

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 on August 18, 1993. The hearing officer held that the appellant, hereinafter claimant, was not entitled to death benefits arising from the compensable death of her son, ____, deceased, because he did not provide her with either a pecuniary or nonpecuniary economic benefit which contributed substantially or significantly to her welfare and livelihood. Because the hearing officer also determined that deceased did not have a dependent eligible for death benefits as a legal beneficiary who met any of the conditions set out in the 1989 Act, he accordingly ordered that a lump sum death benefit payment be made to the Subsequent Injury Fund. Claimant appeals this determination, citing evidence from the record to show that the pecuniary and nonpecuniary benefits she received from deceased exceeded 20% of her net resources. A response was filed by the deceased's employer's workers' compensation insurance carrier (carrier), reiterating its position at the hearing that it was only seeking a declaration as to the proper beneficiary, and stating that it remains neutral and does not contest the claimant's request for review.

DECISION

We reverse the decision and order of the hearing officer and remand for findings of fact and conclusions of law consistent with the applicable rule of the Texas Workers' Compensation Commission (Commission).

____ (deceased) was employed as a truck driver by (employer 1) on ____, when he was killed in an accident which occurred in the course and scope of his employment. The only person claiming death benefits was deceased's mother, (claimant).

Claimant, a widow since 1975, had worked as a registered nurse but testified that she was forced to retire in 1985 after she developed carpal tunnel syndrome and reflex dystrophy in her right hand. In September or October of 1988, following his divorce, deceased moved in with claimant and lived with her continuously since that time; from that date forward until the time of his death, claimant testified, he gave her \$300 to \$400 a month. (By stipulation, the parties agreed that deceased's average weekly wage was \$502.23.) Claimant said she used this money to pay for such things as groceries, utilities, and the taxes on the house. Claimant's neighbor, (Ms. W), and employer's personnel manager and risk manager, (Mr. F), both testified that they were aware that deceased gave his mother money every month. Ms. W also said that on occasion deceased would ask her to deposit his check and withhold money to give to claimant, or to take claimant's car for repairs, giving Ms. W a check with which to pay for the repairs.

The claimant also testified that deceased drove her places, helped with chores such as grocery shopping, and performed repair and maintenance chores around the house, and that since his death she has had to pay others to do such work. She testified that she has had to pay \$80 a week for someone to mow the grass on her property, which is three acres.

Claimant said deceased usually worked long hours and got his breakfast and lunch on the road, but that she fixed his supper and did his laundry. Under questioning from the hearing officer, claimant estimated her monthly grocery bill to be \$400-\$500, and estimated her utility bill to be \$1,500 a year.

Included in the record was claimant's 1992 federal income tax return, which showed a total taxable income for that year of \$12,898. This included \$5,333 in business income¹ which claimant said she received by virtue of her work for (employer 2) as a security gate guard. (The claimant testified that she worked in the capacity of an independent contractor and that she did not work on a regular basis, but only as the company needed her.) Claimant also received \$7,565 in taxable income from royalty payments.² She testified that these amounts fluctuated; that in August 1993 her royalty check was \$159, while the prior month it had been \$64. Claimant also testified that she received \$575 per month in Social Security, the total amount of which, for 1992, was shown as \$7,702. The claimant's testimony was that her income in 1993 would probably be about the same, except for the fact that she has worked less during this year.

Claimant testified and presented evidence to show that deceased was her natural son, that he was divorced and had no natural or adopted children from that or any other relationship, that he had not remarried either formally or informally, and that there was no other person dependent upon deceased for support. Since January of 1993 claimant said her granddaughter and the granddaughter's husband had moved in with her, but she said they did not pay rent or contribute to her support.

Pursuant to the 1989 Act, a carrier must pay death benefits to the legal beneficiary of an employee whose compensable injury results in death. Section 408.181(a). Where there is no eligible spouse nor eligible child or grandchild of the deceased, the act provides that the death benefits shall be paid to surviving dependents of the deceased who are parents, stepparents, siblings, or grandparents. "Dependent" is defined as "an

¹Claimant's gross income from this employment was reported as \$9,825.

²The gross amount of royalty payments was \$9,191, before taxes and depreciation expense or depletion.

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 the appropriate section of the Act. Section 401.011(14).

The requirement for determining whether an individual meets the statutory criteria for dependency is further amplified by rules of the Commission, Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE . 132.2 (Rule 132.2). That rule provides, in pertinent part:

- (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. . . .
- (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 (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.
- (f) If an economic benefit was provided in the form of goods and services, the value shall be the market value of the same or similar goods and services in the same vicinity.

The claimant challenges the following findings of fact and conclusions of law made

by the hearing officer:

FINDINGS OF FACT

1. Deceased and claimant were living together in the same household and shared in the monthly household expenses at the time of deceased's death.
2. Deceased's cash contributions to claimant was (sic) for deceased's livelihood and welfare.
3. Claimant was not dependent upon deceased for non cash contributions.
4. Claimant's livelihood and welfare were provided by claimant's cash and non cash contributions.
5. Claimant's livelihood and welfare were not provided by deceased's cash and non cash contributions.

CONCLUSIONS OF LAW

1. Claimant was not dependent of (sic) deceased at the time of deceased's death because deceased did not provide claimant either a pecuniary or a nonpecuniary economic benefit which contributed substantially or significantly to claimant's welfare and livelihood.
2. Claimant is not eligible for death benefits.
3. Deceased did not have a dependent eligible for death benefits as a legal beneficiary who met any of the conditions set out in the Texas Workers' Compensation Act.
4. The Subsequent Injury Fund is to be paid death benefits as required by the Texas Workers' Compensation Act.

Under the facts of this case, it was not controverted that deceased was claimant's natural son nor that he had no other dependents who would have precluded claimant's eligibility for death benefits. It also was not controverted that deceased lived with claimant and provided her with cash contributions which "flowed . . . on an established basis in at least monthly intervals" in an amount which was estimated to be between \$300 and \$400. (The value of deceased's non cash contributions was not quantified except as to claimant's

testimony regarding the \$80 per week she had had to pay for lawn care.) Thus, it appears that the claimant met two of the three statutory tests of dependency--i.e., eligibility for distribution of death benefits and receipt of a regular or recurring economic benefit. The final question is whether such economic benefit contributed substantially to the claimant's welfare and livelihood, as measured by Rule 132.2. The hearing officer, however, did not make any findings or other determination as to whether deceased's economic contribution equaled or exceeded 20% of claimant's net resources; rather, he determined in essence that deceased's payments were only for his own livelihood and welfare, so that there was no benefit which contributed substantially or significantly to claimant's welfare and livelihood.

This panel recently reversed a decision in which a hearing officer found a deceased's parents were not entitled to death benefits based on the hearing officer's calculations which, among other things, attributed a portion of expenses to the deceased. In that case, Texas Workers' Compensation Commission Appeal No. 93822, decided October 26, 1993, the panel wrote as follows:

We need not directly rule on the extent to which expenses should appropriately [be] attributed to a decedent, because the applicability of Rule 132.2 to the facts triggers the presumption. Rule 132.2 is based upon a ratio of contribution of a decedent to total resources, not to monthly expenses. Although analysis of monthly expenses of a claimant is relevant to determining whether a contribution is "significant" when the 20% standard is not met, or as evidence against the presumption that a contribution is significant, such evidence is not required as prima facie evidence to establish the presumption set forth in Rule 132.2(c). The carrier's only articulated concern at the hearing was to avoid double payment and it put on no evidence in rebuttal. As no party in this proceeding disputed that the presumption should apply, and the hearing officer's conclusion that it would not was evidently based upon erroneous interpretation of the evidence, we find that the presumption set forth in Rule 132.2 should be applied by this Appeals Panel.

We believe that the rationale of that decision applies equally here. Pursuant to the requirements of Rule 132.2(c), the claimant in this case introduced evidence by which a determination could have been made as to whether the 20% presumption attached, and it was incumbent upon the hearing officer to make such determination; had the hearing officer determined from the evidence that the presumption had not been established, he would then have had to determine whether the claimant met her burden to show that the deceased's contribution was nevertheless significant. As the language of Appeal No. 93822 suggests, evidence of deceased's expenses may be considered, insofar as it exists, to rebut the rule's presumption or as evidence of whether a contribution less than 20% of

net income is significant. We observe, however, that the evidence in the instant case appears to be in much the same posture as that in Appeal No. 93822, in that the absence of rebuttal evidence due to carrier's lack of opposition to the claim resulted in very little firmly quantified evidence on the issue of decedent's expenses.³ *Compare* Texas Workers' Compensation Commission Appeal No. 92523, decided November 18, 1992 (claimant's own testimony was that his arrangement with his deceased brother was one of shared living expenses).

Based on the foregoing, we reverse and remand to allow the hearing officer to determine whether the 20% presumption of substantial contribution contained in Rule 132.2(c) was established by the claimant and, if not, whether the benefits provided by the deceased nevertheless contributed significantly to claimant's welfare and livelihood. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order 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 such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge

³The absence of findings of fact on deceased's contributions and claimant's net income in this case distinguishes our action herein from that in Appeal No. 93822, which reversed and rendered a decision for the claimants.