APPEALS PANEL NO. 94020
FILED FEBRUARY 9, 1994

This appeal is considered in accordance with 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*.). On December 9, 1993, a contested case hearing was held in (City) Texas, with (hearing officer) presiding. The issues concerned benefits due relating to the death of (decedent), who died as a result of an on-the-job injury while employed by (employer). Two claimants sought to be named beneficiaries of the deceased worker, with each one claiming that she was a surviving spouse of the decedent. An issue was also presented as to the decedent's average weekly wage (AWW).

The hearing officer rejected both claims, and awarded death benefits to the Subsequent Injury Fund. He determined concerning (LW), who is an appellant, (hereinafter Claimant #2) that she was not the spouse of the decedent because he was ceremonially married to (EW), who is another appellant (hereinafter Claimant #1) at the time of his death. He further determined that Claimant #1 was not entitled to benefits because she was deemed to have abandoned him at the time of his death. Finding that decedent was not survived by any other eligible beneficiaries, the hearing officer awarded benefits to the Subsequent Injury Fund, to be paid based upon an AWW of $469.95.

Claimant #1 appeals, disputing that she had abandoned decedent at the time of his death. Claimant #1 argues that the hearing officer erred when, without authority, he construed claimant's purported election to not oppose any divorce that decedent might file as tantamount to an abandonment by Claimant #1. She further argues that if there was an abandonment, it was for good cause. The carrier responds that the case relied on by Claimant #1 has not been followed by the Appeals Panel, and that Rule 132.3 deems abandonment regardless of good cause. Claimant #2 appeals, pointing out that she was an innocent "putative spouse" and had cohabited with decedent 14 years, and acquired property with him and asking for equity. The carrier responds that Claimant #2 was not a putative wife, and not an eligible spouse under the 1989 Act.

DECISION

We affirm the hearing officer's decision that Claimant #2 was not the eligible spouse of the decedent. We reverse the determination of the hearing officer denying benefits to Claimant #1, and render a decision that Claimant #1 is the eligible spouse of decedent for purposes of receiving death benefits.

The deceased worker, (decedent), died (date). At the time, he was living with Claimant #2. However, he had been ceremonially married to Claimant #1 on May 26, 1957. The evidence was uncontroverted that they were never divorced. Claimant #2 stated that they met in 1978 in (state), and then moved to Texas from (state) in December 1979 and lived together in (city). She said that she was listed as his wife on papers at work. She admitted that in an interview with the adjuster, she gave her name without using decedent's surname. Claimant #2 indicated that decedent paid household bills.

Decedent had no children with either claimant, and no other relatives were dependent on him at the time of his death.

Claimant #2 stated that she knew nothing about Claimant #1 prior to the funeral of the decedent's sister in 1985. She said that decedent, who had told her he had "once" been married, told her a person at the funeral was his "ex" wife. Shortly after this, decedent's mother told her to ask decedent when he intended to get a divorce. When she questioned decedent, he asserted both that his mother was meddling in his business, and he would see to it. When asked what she knew about the reason for any separation between decedent and his wife, she stated that he once indicated that they broke up because the decedent had too many male friends coming over to the house. She admitted that decedent never described himself as divorced, although she concluded he was by his reference to his "ex" wife.

Claimant #1 testified that decedent left her to go live with Claimant #2 sometime around 10 years before his death. She stated that she did not want this to happen nor did she want the marriage to break up. She said that decedent just left, and there was no conversation beforehand. Claimant #1 said that decedent continued to visit her two or three times a week and had in fact been there the night before his fatal accident. This is corroborated by an affidavit of (JC), Claimant #1's daughter from a previous marriage, who stated that she lived with her mother.

Claimant #1 agreed that she received no support from the decedent, and that she worked and supported herself. Although she was not notified by the employer about decedent's death, Claimant #1 made decedent's funeral arrangements. She stated that she had told deceased at some point (not specified in the record) that if he filed for divorce she would sign a waiver, but that she herself did not want a divorce. A transcript of her May 20, 1992, interview with the adjuster stated in one point that "we decided to get a divorce." When asked about this, claimant testified she meant that "he" decided to get a divorce, but she did recall telling the adjuster that we decided to get a divorce. At the same time, she also testified that she didn't want the divorce, and figured if he wanted one he would file.

Claimant #1 stated that she never had another relationship after decedent moved away, and that she was a "single lady."

The pertinent findings of fact and conclusions of law are as follows:

FINDINGS OF FACT

3. The deceased . . . was married to [Claimant #1] on May 26, 1957, and remained married to [her] until the date of his death on (date).

4. The deceased . . . left [Claimant #1] and began cohabiting in Texas with [Claimant #2] in December of 1979. The deceased and

[Claimant #2] lived together until the date of . . . death on (date).

5. During the period of time between December 1979 and (date), [Claimant #1] consented to be divorced from [deceased] but neither person filed for divorce.

CONCLUSIONS OF LAW

2. [Claimant #2] is not the surviving spouse of [deceased] because he was legally married to [Claimant #1] during the period of time [deceased] and [Claimant #2] cohabited in Texas.

3. [Claimant #1] is not an eligible surviving spouse of [deceased] because she is deemed to have abandoned him.

WHETHER THE HEARING OFFICER ERRED BY REJECTING THE CLAIM OF CLAIMANT #2

Claimant #2, pointing out what she believes to be in her favor in the evidence, asks that this panel do equity and award benefits to her as a "putative" spouse.

The argument can be answered succinctly. The eligibility for workers' compensation benefits is determined by statute, and administrative rules and case law that implement the statute. The 1989 Act states that death benefits are awarded to a "spouse." Section 408.182. The hearing officer found as fact that decedent was ceremonially married and never divorced from Claimant #1; the second "marriage" was therefore void. TEX. FAM. CODE § 2.22 (Vernon 1993); *see also* Texas. W. C. Comm'n Rules, 28 TEX. ADMIN. CODE § 132.3(c) (Rule 132.3(c)).

Claimant #2 has not pointed to any workers' compensation case law that supports an award of death benefits to a putative spouse. Indeed, the case law is to the contrary. Texas Employers' Insurance Ass'n v. Grimes, 269 S.W.2d 332 (Tex. 1954); Woods v. Hardware Mutual Casualty Co., 141 S.W.2d 972 (Tex. Civ. App.-Austin 1940, error ref'd). While it may be that there are any number of equitable arguments for significant others who are not spouses (or otherwise enumerated beneficiaries) to qualify for death benefits, these would be matters appropriately addressed by the legislature.[1] Claimant #2 was not a spouse, and as a matter of law could not have been, because the trier of fact determined that decedent was already married. The hearing officer's decision that she was not entitled to benefits is affirmed.

[1]We would note by way of analogy that the Houston Court of Appeals, 14th District, has determined that the inter-spousal privilege from testimony set out in Rule TEXAS. R. CRIM. EVID 504(2) could not be extended to include a putative spouse. Weaver v. State, 855 S.W.2d 116 (Tex. App.-Houston [14th Dist.] 1993, no writ).

WHETHER THE HEARING OFFICER ERRED BY DETERMINING THAT APPELLANT #1 WAS NOT THE ELIGIBLE SURVIVING SPOUSE OF THE DECEDENT

In his discussion of the evidence, the hearing officer states: "[Claimant #1's] testimony, however, indicated that she would have been agreeable to a divorce if the deceased had filed. Agreeing to divorce an abandoning spouse is tantamount to consenting to an abandonment." Claimant #1 correctly identifies this statement in her appeal as circular reasoning. Texas, during the time period in question in this hearing, was (and is) a "no fault" divorce state, to which there are essentially no defenses. *See* TEX. FAM. CODE § 3.08 (1993). Living apart without cohabitation for three years is a separate ground for divorce and need not be agreed to in order to constitute a ground. TEX. FAM. CODE § 3.06 (1993). Second, the testimony on this matter indicated that Claimant #1 would sign a "waiver" should she be served with divorce papers.[2] To the extent that a willingness to sign a waiver of process could ever be said to constitute an "agreement" to a divorce, it is countered by claimant's testimony at the hearing that she did not want the divorce, whether or not it may have been discussed. Whether a respondent party does, or does not, "agree" to a divorce does not alter the ability of a divorce petitioner to prevail in his or her suit. We therefore must assign error to the hearing officer's finding that an acquiescence of a respondent party to a divorce of another is "tantamount" to an agreement to an abandonment, or that the "legal" effect of such imputed agreement is that claimant was thereby transformed into the abandoning party.

Claimant #1 testified (and her daughter's affidavit supports) that it was decedent who left her to live with Claimant #2. Claimant #2 testified that she originally did not know that Claimant #1 existed, let alone what the circumstances of separation were, and was told later on by decedent that the parties had gone their separate ways and it may have had something to do with decedent's men friends coming to the house. Therefore, it was essentially uncontroverted that decedent first abandoned Claimant #1 for another woman, and that she was not in accord with his action.

Of greater relevance in determining whether at some point Claimant #1 "abandoned" the marital relationship was that she supported herself financially and never sought support from the decedent; that she considered herself to be a single woman; and that she conceded that after the separation she went her own way. (Such actions, of course, are equally susceptible to the interpretation that Claimant #1 sought to get on with her own life and see to her own support, having been abandoned). Against this was uncontroverted testimony that decedent continued to visit claimant two to three times a week right up to his death, including the night before his death, and that he did not file for divorce. Claimant #1 did not undertake another relationship such as that found to constitute abandonment in the Grimes case, cited above.

[2] A waiver of service of process is authorized by TEX. R. CIV. P 119.

But even if a trier of fact could find an abandonment in Claimant #1's subsequent conduct, this is only half the equation. Section 408.182(f)(3) defines an eligible spouse as:

> . . . The surviving spouse of a deceased employee unless the spouse abandoned the employee for longer than the year immediately preceding the death **without good cause**, as determined by the commission [emphasis added].

The hearing officer failed to make any determination on the essential element of lack of good cause. Even were we to find that the hearing officer made an implied finding that there was no good cause, there is, in our opinion, nothing in the record that would sufficiently support such an implied finding. It would be hard for us to uphold attribution of lack of good cause to a spouse who, when left for another against her will, makes the decision to get on with her own life.

The carrier responds that Rule 132.3 has somehow done away with the need to find lack of good cause when abandonment is "deemed." We disagree. Rule 132.3(b), the section on "deemed" abandonment, begins with recitation of the statutory requirement that it be without good cause. The subsection defines what conduct will, or will not, be deemed the act of "abandonment," but there is nothing in Rule 132.3 to suggest that the Texas Workers' Compensation Commission intended to, or could, abrogate the additional statutory requirement set out in Section 408.182(f)(3). Rule 132.3 doesn't say, for exmaple, that military duty-related separation is abandonment with good cause; it says that such separation is not even deemed to be abandonment although it lasts more than a year. Rule 132.3(b) further indicates that it applies where the spouse, not the deceased employee, has left the home.

It is worth noting that when Rule 132.3 was adopted, the Commission specifically considered whether a pending divorce would, in and of itself, remove eligibility for death benefits. The following is set out at 15 Tex. Reg. 7024 (December 7, 1990):

> Concerning new § 132.3, one commentor stated that the section should be amended to limit the posibility that a person who is technically a spouse, although a divorce is pending, will claim death benefits. The commission disagrees, finding no statutory basis to support such a change, because a spouse may assert eligibility to benefits and such a person would still be a spouse.

It should be noted that the current Rule 132.3(b) list of circumstances not deemed abandonment was not the language originally proposed. The proposed language set out at 15 Tex. Reg. 5004 (August 31, 1990) is:

> (b) . . . the surviving spouse shall be deemed to have abandoned the employee if the spouse had voluntarily separated from the employee with the intent of no longer living together as husband and wife. The spouse shall not be deemed to have abandoned to employee if the separation was caused, or agreed to,

by the deceased employee . . .

The reason for the change to the current language is set out at 15 Tex. Reg. 7024 (December 7, 1990):

> One commentor stated that subsection (b) of the Section should clarify when a deceased employee has "caused or agreed to" a separation so that the separation would not constitute abandonment. Along the same line, another commentor suggested the following definition as a substitute for a determination of whether a spouse "cause or agreed to" a separation:
>
> A surviving spouse who abandoned the employee, without good cause for more than one year immediately preceding the death, shall be ineligible to receive death benefits. The surviving spouse shall be deemed to have abandoned the employee if the surviving spouse and the employee had not been living in the same household for more than one year preceding the employee's death unless the spouse is:
>
> (1) hospitalized;
>
> (2) in a nursing home; or
>
> (3) living apart due to a career choices, military duty, or other reasons where it is established their separation is not due to the pending brek-up of the marriage.
>
> In response to both comments, the commission agrees to delete the second and third sentences of the proposed subsection (b) and incorporates in its place the language suggested by the second commentor.

These comments support the interpretation of the rule set out in the majority opinion that the subsection clarified abandonment rather than curtailed good cause considerations.

Under the circumstances in this case, the great weight and preponderance of the evidence are against the hearing officer's determination that Claimant #1 was not an eligible spouse as defined in Section 408.182(f)(3). We accordingly reverse the decision of the hearing officer with respect to Claimant #1, and render a decision that Claimant #1 is the eligible surviving spouse of decedent and shall be paid death benefits by the carrier in accordance with Sections 408.182 and 408.183(a) & (b). Death benefits accrued, but not paid, should be paid in a lump sum together with applicable interest.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

I respectfully dissent.

I find absolutely no basis to conclude that the findings of the hearing officer are so against the great weight and preponderance of the evidence as determined by the majority. To the contrary, there is sufficient evidence to support his findings and conclusions, and in my opinion, his application of the law. The crux of the matter is whether Claimant #1 comes within the definition of abandonment in her relationship with the deceased for purposes of entitlement to death benefits under Section 408.182 and Rule 132.3. The evidence before the hearing officer clearly establishes that Claimant #1 and the deceased were married and had not divorced and that the deceased had lived with another woman for over 12 years up to the time of his death. The evidence also established that Claimant #1 and the deceased discussed divorce and that she indicated she would sign a waiver if he filed. Claimant #1 testified also that she was a single lady, worked and supported herself over the years.

The hearing officer states in his discussion of the case that under Rule 132.3 Claimant #1 is deemed to have abandoned to deceased. Rule 132.3 provides in pertinent part that a surviving spouse "shall be deemed to have abandoned" the deceased if they have not been living in the same household for more than a year "unless the spouse is: . .

. .(3) living apart due to . . . or other reasons where it is established their separation is not due to the pending break-up of the marriage."

Given the state of the evidence, i.e., living apart for over 12 years with the deceased cohabitating with another woman in a separate residence with Claimant #1 self-sufficient and independent and the parties, Claimant #1 and the deceased, discussing and virtually agreeing on aspects of a potential divorce if the deceased filed, I am at a loss to see where the great weight and preponderance is contrary to the hearing officer's determinations. In my opinion, the evidence clearly supports an abandonment within the criteria of Rule 132.3. And, I do not find persuasive on this point the majority's reference to the Texas "no fault" divorce provisions. It is the Workers' Compensation Act of 1989, implementing rules and specific definitions we are concerned with in establishing eligibility for death benefits. The hearing officer was on firm ground in concluding that Claimant #1 fell within the definition of abandoning the deceased for purposes of eligibility. The provisions of Rule 132.3 do not hinge on which party moved out; rather, it is the fact of not living in the same household for more than a year that sets the stage, and the abandonment becomes deemed under the provisions set out above. This is a change from the pre-1989 law as we pointed out in Texas Workers' Compensation Commission Appeal No. 92159, decided June 8, 1992. Rule 132.3, a presumed valid administrative rule, is ordinarily construed like a statute and it has changed the focus of abandonment from the prior statute and case law. Appeal No. 92159 *supra*.

I also do not agree with the majority that even if a spouse is deemed to have abandoned the deceased under the conditions set out in Rule 132.3(b), nonetheless good cause must be proven one way or the other and the hearing officer must make a specific determination on good cause. To the contrary, if the conditions specifically set forth in Rule 132.3(b) for the deemed abandonment is present, per force, good cause is not. The evidence did not indicate that their separation is not due to the pending break-up of the marriage. Under the state of the evidence, it was appropriate for the hearing officer to infer that Claimant #1 consented to a divorce even thought she indicated she was not the driving force. Regardless, a specific determination on good cause was not necessary or essential. In Texas Workers' Compensation Commission Appeal No. 92033, decided March 23, 1992, we upheld the hearing officer's decision that claimant was deemed to have abandoned the deceased within the meaning of Rule 132.3 and his denial of benefits. In that case, the hearing officer made no findings in the area of good cause although there was considerable evidence both about the deceased's abuse of the claimant and denials of abuse. The hearing officer's decision was appropriately affirmed. In the case before us, I also believe the hearing officer was sufficiently supported by the evidence in his factual findings and that he correctly applied the law.

To my way of thinking, the majority engage in unacceptable fact finding at the appeal level. On the one hand, they fault the hearing officer for failing to make a finding on the "essential element of lack of good cause," and then in rendering, apparently engaged in appellate level fact finding that there somehow was good cause for an abandonment. Again, I fail to see where the great weight and preponderance of the evidence is against

the hearing officer. I would affirm his decision.

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Stark O. Sanders, Jr.
Chief Appeals Judge