

APPEAL NO. 94060

This appeal is brought pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 29, 1993, in (city), Texas, with (hearing officer) presiding as hearing officer. The issues at the hearing concerned who were the proper legal beneficiaries of RW (deceased), who was killed in the line of duty as a policeman for the city of (city), Texas, and what was the entitlement period. The hearing officer determined that the proper legal beneficiary was the respondent, who was the deceased's surviving spouse (wife or spouse). The appellant, who was the deceased's mother (mother) appeals this decision, asserting that the evidence establishes that the spouse abandoned the deceased. The spouse replies that the decision of the hearing officer is supported by the evidence and should be affirmed.

DECISION

The decision and order of the hearing officer are affirmed.

Although the mother refused to stipulate at the hearing that the spouse was the wife of the deceased at the time of his death, there was unrefuted evidence in the form of the spouse's testimony and a copy of the marriage license that the spouse and deceased were married in a civil ceremony by a Justice of the Peace on May 2, 1988. There were no children of this marriage and the spouse testified that her two sons by a previous marriage were not adopted by the deceased and they were not dependent on him for support. See Section 401.011(7).¹

Section 408.182(b) provides that "[i]f there is an eligible spouse and no eligible child or grandchild, all the death benefits shall be paid to the eligible spouse." An "eligible spouse" is 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." Section 408.182(f)(3). Tex. W.C.Comm'n, 28 TEX. ADMIN. CODE § 132.3(b) (Rule 132.3(b)) provides in pertinent part:

(b)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:

¹The city also sought clarification whether the two sons of the spouse by a prior marriage, and not adopted by the deceased, were beneficiaries. The record indicates that the spouse was not claiming on behalf of her children, but only filed a claim as a spouse. See Texas Workers' Compensation Commission appeal No. 92159, decided June 8, 1992. The hearing officer by clear implication determined they were not beneficiaries, and this determination has not been appealed by any party.

* * * * *

(3)living apart due to career choices . . . or other reasons where it is established their separation is not due to the pending break-up of the marriage. The burden is on a person who opposes the claim of a surviving spouse to prove the spouse abandoned the deceased employee.

Parents and siblings² are eligible to receive death benefits if there is no eligible spouse, child or grandchild, provided the parent or sibling is dependent on the employee on the day of death. Section 408.182(d) and Rule 132.6(a). A "dependent" is defined by the 1989 Act as a person who receives a regular or recurring economic benefit that contributes substantially to the individual's welfare and livelihood. Section 401.011(14). Rule 132.2 further presumes that benefits in at least monthly intervals are "regular or recurring" and that economic benefits equal to or greater than 20% of the person's net resources contribute "substantially to the person's welfare and livelihood."

The spouse testified that after her marriage to the deceased in 1988, the couple moved into an inadequate mobile home on some property they had recently purchased. Shortly thereafter, they bought a newer mobile home and placed it on the property. This mobile home was repossessed for failure to make payments. The couple then moved into a rented mobile home in a trailer park.

According to his spouse, the deceased, except for a brief period of time, worked the midnight to 8:00 a.m. shift. He tried but was unable to sleep during the day at the trailer park because of the noise of traffic, neighborhood children, and pets. For this reason she said he slept at his mother's house approximately 80% of the time, but kept some clothes, shaving gear and toiletry articles at the mobile home. She testified that the deceased's mother was a live-in caregiver for an elderly person and typically was not at home four days a week. She herself worked in a convenience store from 5:30 a.m. to 3:00 p.m. Until his death, they both used the mother's house for a mailing address because mail was not secure at the trailer park. She conceded that during the first year of the marriage there was talk of divorce and that she would leave her husband for days or weeks at a time, but always came back. She insisted that over the last couple of years there was no discussion of divorce. The deceased, she said, would often take her sons fishing, and she and the deceased frequently worked together on their trucks both at the mother's house and at the trailer park and spent time together when not working. She believed all the talk of a pending divorce came from deceased's mother. As to family finances, the spouse testified that they had separate checking accounts and filed their tax returns as "married filing separately" because the deceased thought this was to their financial advantage. She paid the rent and utilities on the mobile home while he paid the note on the land. She insisted that rather than providing support to his mother, the deceased actually used his mother's credit to purchase a riding mower, and pay his debts.

²Although the deceased had surviving siblings, none claimed death benefits.

The spouse introduced an affidavit from the deceased's brother and his wife to the effect that from personal observation they saw the deceased and his wife together almost daily and that "their relationship certainly seemed fine to us." The spouse's supervisor at the convenience store also gave a sworn written statement that the deceased and his wife regularly were at the store together both before and after she was hired, and that the deceased was very supportive of his wife some five months before his death when her mother died. A week before the deceased died, the supervisor saw him and his wife walking arm and arm and he gave her a kiss. A neighbor also gave an affidavit that he frequently saw the couple together for coffee at a local restaurant and they "appeared to be married and 'together' all of the numerous times I saw them up until the time of his death." The deceased's supervisor and Chief of Police saw them frequently together, knew they slept in different locations presumably because of their work hours, but "they were definitely married, right up to the day of (the deceased's) death." Another neighbor provided an affidavit that he saw the deceased and his wife together frequently and they were never "upset or angry with each other." Finally, an employee of a local auto parts store where the deceased and his wife frequently shopped stated she regularly saw the couple together and that the week before his death, the deceased told her that he was "happier than he had been in a long time and that he was really glad that [they] were together."

The deceased's mother testified that in her opinion, her son's marriage was "unhappy." He had talked of divorce many times and as recently as the week before he died. According to his mother, he was only waiting to earn enough money for the divorce and meanwhile did not want to unnecessarily antagonize his wife because he feared in a divorce he would lose the real property they owned together. She recalled that he came back to live with her when he and his wife lost the trailer to repossession, and he never went back to his wife. He kept his personal belongings at her house and used her phone number as an emergency contact point with the police department. She depended on him to do handy-work around the house, and he bought most of the groceries. She gave no specific figures on how much support he provided her. She was never listed by the deceased as a dependent on his federal tax return, but she, not his wife, shared a checking account and he was joint owner of her savings account.

The deceased's oldest brother testified that the deceased lived with their mother for about two or three years after his wife (in the brother's opinion) left him and they lost the trailer. He reports the deceased as saying that his wife left him five times and that he was going to get a divorce. He conceded that to his knowledge, his mother signed loan papers to help deceased pay off his debts and that he gave her money when she needed it and bought groceries and a new living room suite for his mother shortly before his death.

Another brother testified that the deceased moved in with his mother after the mobile home was repossessed and told him he could not live under the same roof with his wife. About six months before his death, he allegedly told this brother "if he had money he would get a divorce."

A female police officer and co-worker with the deceased testified that she was having an "affair" with him and that the deceased often told her, as recently as two days before his death, that he was separated and he would get a divorce, but did not want to risk losing the land. The deceased's wife later testified that she had known nothing about this affair.

A neighbor (and the mother's brother) testified that he thought the deceased lived with his mother, but he had seen the deceased and his wife together and they never said anything to him about a divorce.

Based on this evidence, the hearing officer made findings of fact that the deceased and his wife were living in the same household at the time of his death; that the deceased frequently slept at his mother's "for reasons related to his job and not due to the pending breakup of his marriage," and that the deceased and his wife "continued to exercise conjugal rights." Implicit in this finding is a finding that the spouse was not "deemed not to have abandoned the employee." Rule 132.3(b). The hearing officer then concluded that the surviving spouse was the proper beneficiary and the deceased's mother was not entitled to death benefits.

Since at the time of his death, the deceased had a surviving spouse, the deceased's mother had to prove pursuant to Rule 132.3 that deceased spouse abandoned her husband for more than a year immediately preceding his death. It has been held that mere separation of the spouses does not constitute abandonment absent the intention of not returning to live together again as husband and wife. See Texas Workers' Compensation Commission Appeal No. 92107, decided May 4, 1992. Whether such abandonment occurred or can be deemed to have occurred is a question of fact. See Texas Workers' Compensation Commission Appeal No. 94020, decided February 9, 1994. The hearing officer, as fact finder, is the sole judge of the relevance and materiality of the evidence and of its weight and credibility. Section 410.165. To this end, the hearing officer may believe all, part or none of the testimony of any witness. The testimony of an interested party raises only an issue of fact for the hearing officer to resolve. Burelsmith v. Liberty Mutual Insurance Company, 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629 (Tex. 1986). The testimony of the spouse in this case, if credited by the hearing officer, presented a plausible explanation of why they had separate sleeping arrangements for a substantial portion of the time (estimated to be up to 80% of the week) and why they spent a significant amount of time apart.³ Evidence was also presented at the hearing that during the time the

³The hearing officer partly framed his conclusion of no abandonment in terms of the deceased's continued

deceased and his spouse were seen together they acted as husband and wife in terms of expressing affection for each other and doing leisure time activities together (working on cars, fishing, drinking coffee). Conflicting evidence from the deceased's mother about the state of her son's marriage could have been considered by the hearing officer to be based more on wishful thinking than actual fact. He could have discounted talk of a divorce, especially from the deceased's co-worker with whom he allegedly was having an affair, as indicating a pending breakup of the marriage since that talk had been going on a long time without action. For these reasons, we are unable to say the decision of the hearing officer that the deceased's spouse, and not his mother, was the proper beneficiary of his death benefits lacks a sufficient basis in the evidence or that it was so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust, which is our standard of review.

The deceased's mother also appeals the hearing officer's findings that she did not establish that the deceased contributed substantially to her welfare and livelihood or confer an economic benefit on her of a value of 20% or more of her net resources and hence was not dependent on her son at the time of his death. Evidence presented by the deceased's mother as to her status as a dependent was imprecise. According to the testimony (no documentary evidence on this issue was presented) he regularly bought groceries for both of them, but no dollar figure or estimate of their value was ever given. He similarly was said to have performed routine household and fix-up chores around the house, which were not assigned a value, and to have bought some living room furniture. The deceased's mother on appeal reiterated that her income was between \$500 and \$1000 per month and her expenses were \$1400 per month. She asserted that her deceased son made up the difference between her income and expenses which amounted to at least 20% of her income and "contributed substantially to her welfare and livelihood." She does not address whether she made any payments on loans and charges taken out in her name for her son's benefit and how they entered into these calculations.

In Texas Workers' Compensation Commission Appeal No. 931114, decided January 21, 1994, the Appeals Panel affirmed the decision of the hearing officer that grandchildren did not meet their burden of proving dependent status because in part they offered only "vague generalities" based on memory without receipts or other written evidence of funds expended on their behalf. We did not in that opinion require actual receipts, but we did note that Rule 132.2 does require "sufficient information to enable the commission to accurately identify facts to establish dependency." As in Appeal No. 931114, the hearing officer in the case under review was not satisfied that the deceased's mother presented enough evidence to make a finding in her favor on the issue of her dependent status. We cannot say that his findings on this issue are so against the great weight and preponderance of the evidence as

exercise of "his conjugal rights." He extended this concept of conjugal rights to include not only sexual contact, but also public appearances, providing financial support, jointly owning real property, and assisting in the repair of personal property. Our decision in this case should not be interpreted to mean that sexual contact must be proven to defeat an allegation of abandonment deemed or otherwise.

to be manifestly erroneous and unjust. Cain v. Bain, supra; Pool v. Ford Motor Company, supra.

The decision and order of the hearing officer are affirmed.

Alan C. Ernst
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Lynda H. Nesenholtz
Appeals Judge