

APPEAL NO. 980142
FILED MARCH 10, 1998

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on December 16, 1997. The issue at the CCH involved the identification of the legal beneficiaries of the deceased worker, (deceased), for purposes of payment of death benefits. The essence of the dispute, however, involved whether appellant (claimant), who shall be referred to herein as claimant, was entitled to benefits as the surviving widow of the deceased, with the carrier claiming that she had abandoned the marriage relationship for at least one year prior to the deceased's death. There was no dispute that (JS) was the surviving minor child of the deceased on the date of death and was also a student and therefore entitled to death benefits.

The hearing officer awarded death benefits to (JS) so long as he remained a full-time student, to end when he was no longer a full-time student or reached age 25, whichever came first. However, the hearing officer determined that the claimant was not entitled to benefits as a surviving widow because she abandoned the marriage without good cause for more than a year preceding the deceased's death.

An appeal has been filed by claimant and her son, but it is essentially an appeal by the claimant. The appeal cautions the Appeals Panel not to impose notions of "traditional" marriages on the relationship of the deceased and the claimant, and argues that, although the parties were separated since 1986, there was no intent to abandon the marriage relationship and the deceased and claimant remained financially interdependent. The claimant points out that witnesses against her claim were interested witnesses or did not really know what the facts were. The claimant argues that there was never any intent to divorce. The carrier responds that the decision should be affirmed, and recites the facts in support of the hearing officer's decision.

DECISION

Affirmed.

The deceased died in the course and scope of employment for (employer), on _____. He was married to the claimant in September 1971. His child was born in 1979.

It was undisputed that the deceased and claimant separated in the summer of 1986. Claimant testified that the deceased had become abusive, and in June 1986 an argument escalated and the deceased pulled a gun on her. At this point, claimant moved out with her son and lived with her sister until school was about to begin. She testified that she felt she needed a separation. She said when she moved back to the house (that was in her name and that of the deceased), he moved out, but kept a key and would still come to the house

to clean up or fix meals. This situation continued until sometime in 1990. Claimant testified that the deceased furnished money to her for expenses and taxes related to the property and for her son. Her testimony may be fairly summarized as indicating that, after 1990, claimant would see the deceased on occasion, would sometimes go for weeks without seeing him, did not maintain any joint bank accounts with the deceased, filed income tax since 1987 as a separated head of household, and had primary financial responsibility for her own day-to-day living expenses. At some point, her house was entirely paid for but deceased would give her money toward property taxes. Claimant testified that although there were family holiday gatherings, deceased was sometimes not in attendance at the same time but would come by later to get Christmas gifts. She testified that on one occasion he cooked a turkey and brought it by the house for her and her son.

When asked if she considered getting a divorce, claimant said she looked into it, but that it would cost money which she needed for her son and herself, finances being "tight." She said that the deceased on occasion helped her out financially, and he continued to maintain a relationship with their son. Claimant had some awareness that the deceased lived at various times with friends, then bought his own mobile home, then sold it to move in with his mother. After 1986 there was no cohabitation on a continuous basis, although deceased stayed at the house for two weeks on one occasion when there had been a burglary, until the burglar bars could be repaired. When asked if she intended to "work on" the marital relationship, claimant generally testified that it was easier for their son if the two of them could get along and that this was another reason that she did not file for divorce, as arguing with deceased over a divorce wouldn't have benefitted either of them. There was no evidence brought forward as to what steps, if any, deceased and claimant were taking to reconcile their differences or resume cohabitation.

(Mr. R), a supervisor of the deceased who was semi-retired at the time of the CCH, testified that he knew the deceased very well and that the deceased told him he was divorced. Mr. R said that he found out later that the claimant and the deceased were in fact separated. Mr. R said that in the two months before his death, deceased mentioned to him his intent to go ahead and get a lawyer to "finalize" the divorced status. Mr. R said that deceased asked him for recommendations for a lawyer. Mr. R said that claimant dated and introduced him to his dates. A co-worker, (Ms. D), also testified that deceased told her before he died that he had been separated for years and was in the process of making it legal.

Claimant presented statements from friends who said that the deceased and claimant were still married although not living together. There was evidence that deceased opened up a certificate of deposit with his mother's name as joint holder. On August 14, 1994, deceased filed a W-4 form in which he indicated he was single. However, there are earlier W-4s, from 1987 through 1992 in which he indicated that he was "married."

Although claimant has premised much of her argument on whether she and deceased continued to "hold themselves out" as man and wife, this is a concept more pertinent to analysis of a common law relationship. The issue before the hearing officer, given that there was an undisputed ceremonial marriage between the principals, was whether there was abandonment of that relationship on the part of the claimant. The hearing officer could conclude from the claimant's testimony alone, even without considering the testimony of the witnesses who testified for the carrier, that the parties were in essence divorced in every manner but for the decree. The hearing officer could conclude that it was claimant's financial situation, and not her desire to reconcile the relationship as a marriage, that prevented filing of a divorce. The fact that there was no cohabitation, that there were separate finances relative to everyday living expenses of claimant, and that there was separate filing of income tax returns were facts that the hearing officer could consider to determine that, whatever had triggered the initial separation, the claimant abandoned the marriage relationship at least by the time her husband was no longer coming to the house on a regular basis.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.3(b) (Rule 132.3(b)) states that a spouse shall be deemed to have abandoned a deceased employee if the surviving spouse and the employee had not been living in the same household for more than one year preceding the death, unless for hospitalization, residence in a nursing home, or living apart for career choices, military service, or "other reasons where it is established their separation is not due to the pending break-up of the marriage." These determinations would be matters of fact for the hearing officer to decide. Although he agreed that the deceased caused the initial separation, the hearing officer determined that the claimant was deemed to have abandoned the deceased because they did not live apart for reasons other than the pending break-up of the marriage.

The hearing officer is the sole judge of the relevance, the materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). Finding the decision of the hearing officer sufficiently supported by the evidence, we affirm his decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Joe Sebesta
Appeals Judge

Elaine M. Chaney
Appeals Judge