

APPEAL NO. 990583

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 January 25, 1999. She determined that MW, who is a co-appellant and surviving spouse of the decedent, and TW, who is a co-respondent and adult daughter of the decedent, were proper legal beneficiaries of the decedent entitled to death benefits and that BW, who is a co-appellant and adult daughter of the decedent, was not a proper legal beneficiary of the decedent and not entitled to death benefits. MW appeals the award of benefits to TW, contending that TW did not prove her dependency through adequate documentation, and that MW alone is entitled to death benefits. BW appeals the determination that she was not a dependent, expressing her disagreement with it. The co-appellant/co-respondent (carrier) appeals the determination that TW was a dependent, contending that this determination is contrary to the great weight and preponderance of the evidence. MW and TW respond that the decision is correct, supported by sufficient evidence, and should be affirmed. The determination that MW is the surviving spouse entitled to death benefits has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

The deceased sustained a fatal injury in the course and scope of his employment on _____. Section 408.182(f)(1)(C) provides that an "eligible child" entitled to death benefits includes a child, regardless of age or student status, who is a dependent of the deceased on the date of death. A "dependent" for these purposes is "an individual who receives a regular or recurring economic benefit that contributes substantially to the individual's welfare and livelihood" Section 401.011(14). Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.2 (Rule 132.2) establishes certain presumptions in determining dependent status. Thus, a benefit flowing from the deceased on an established basis in at least monthly intervals is presumed to be a regular or recurring economic benefit. Rule 132.2(b). And an economic benefit equal to or greater than 20% of the person's net resources is presumed to contribute substantially to the person's welfare and livelihood. Rule 132.2(e) directs the person claiming to be a dependent to "furnish sufficient information to enable the commission to accurately identify the net resources and to establish the existence of the economic benefit claimed." Financial records may be used to provide the required information.

At the time of the deceased's death, TW was 29 years old. She had previously been diagnosed with lupus and epilepsy and, because of these conditions, had not worked since 1993. She was living in her own apartment at the time of the decedent's death, except during periods of illness when she stayed with her grandmother, FWB, the deceased's mother. FWB testified that she raised TW and that the deceased, her son, "always" sent FWB money to give to TW, primarily for medical bills. The amounts, she said, were as much as \$150.00 every two weeks, except when the deceased was not working, when the

amount could be as low as \$25.00 per month. TW testified that she was not working in 1996 or 1997. She said she received \$520 per month from Social Security in 1997, as well as food stamps of about \$100.00 per month, depending on her health. Her income exceeded her expenses by about \$120.00 per month. She said FWB gave her money from the deceased on a "pretty much regular" basis and that the amount varied. She said the money was used to cover her medical expenses, for which she still had outstanding debts in excess of \$3,000.00. MW testified that the deceased tried to do what he could to help his children, but she did not believe he could afford the payments described by TW and FWB or that he made them.

Based on this evidence, the hearing officer found that the deceased "contributed substantial financial support to [TW] for her welfare and livelihood either directly or through [FWB]." Finding of Fact No. 5. MW appealed this determination, contending that what TW and FWB said was incorrect and that TW failed to submit documentation to support her claim of dependency. The carrier also argues on appeal that TW failed to meet her burden of proving dependency; that is, a regular or recurring benefit from the deceased or the amount of any financial contribution. TW did not produce written financial records such as receipts or check stubs that could independently verify the frequency and amount of the deceased's contributions. Such evidence is obviously preferable, but not mandatory, and lack of documentary evidence goes to the weight to be given the testimonial or other written evidence. What is critical is that the person claiming death benefits be able to quantify in some reasonable way the amount of the deceased's support, their own income and expenses, and the regular or recurring nature of the payments. Texas Workers' Compensation Commission Appeal No. 941246, decided November 2, 1994. We have also observed that the benefits do not have to be both regular and recurrent, but only recurrent so long as they contribute substantially to the person's welfare and livelihood. Texas Workers' Compensation Commission Appeal No. 971244, decided August 14, 1997. In this case, the hearing officer found TW and FWB credible in their testimony that the deceased gave money to FWB for delivery to TW on a recurring basis according to the availability of work. There was no contention that these amounts met the 20% presumptive threshold of Rule 132.2. Rather, the contention of TW and FWB was that the money was used to meet the substantial medical bills of TW. Whether TW proved her dependent status as defined in the 1989 Act and rules was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 971244, *supra*. The carrier, in effect, demands a high level of documentary evidence that is not necessarily consistent with the way records are kept in the lives of many people. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance 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, 635 (Tex. 1986). Applying this standard of review to the record of this case, we decline to substitute our opinion of the credibility of the respective witnesses for that of the hearing officer. Rather, we find the evidence sufficient to support the determination that TW was a proper beneficiary.

BW, who was 25 years old at the time of the CCH, testified that at the time of the deceased's death she was earning about \$500.00 per month and received food stamp assistance. She said that the deceased would pay for her car upkeep and on weekends give her various amounts of money. There was also evidence that the deceased was in arrears in the amount of some \$46,000.00 in unpaid child support for BW and her three siblings. Apparently, the deceased was paying this money back to BW's mother and BW's "share" of the arrearage was \$151.00 per month. The carrier argued at the CCH that this money was owed to BW's mother for money she had already spent on child support; that she could do with it as she pleased; and that it was not a benefit flowing from the deceased. The hearing officer found that the "arrearage" was money flowing to BW's mother. Finding of Fact No. 10. The implication of this statement is that the money was not paid by the deceased to BW. The hearing officer also found that, while BW's mother may have given some of this money to BW, BW did not prove such payments were regular or recurring or that they established BW's dependency status for purposes of death benefits. Once the hearing officer found that these \$151.00 payments were from the deceased to BW's mother, and not to BW, it was unnecessary to make further findings about the recurrence or regularity of payments from her mother to BW or whether they substantially contributed to BW's welfare and livelihood. Finding of Fact No. 11. In any case, we are satisfied that the evidence was sufficient to establish that these were not payments from the deceased to BW, but to BW's mother, and that, for this reason, BW failed to establish her dependent status. Under our standard of review we decline to reverse that determination.

One final matter requires comment. In her appeal, MW asserts that she was not given time by the hearing officer to complete her recross- examination. While the hearing officer placed a time limit on closing arguments, no time limit was imposed on the examination (direct or cross) of any witness by any party. At the CCH, MW made no contention that she was deprived of any such opportunity. Under these circumstances, we find no merit in this point of appeal.

For the foregoing reasons, we affirm the decision and order of the hearing officer.

Alan C. Ernst
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Judy L. Stephens
Appeals Judge