

APPEAL NO. 992348

A contested case hearing (CCH) was held on September 27, 1999, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). The disputed issues were set out as follows:

1. Did the Claimant, sister of the Deceased, and biological son of the Deceased, timely file a claim for compensation with the Commission not later than the first anniversary of the date of the employee's death as required by TEX. LABOR CODE ANN. §409.007, and if not, does good cause exist for failing to timely file a claim?
2. Who are the proper legal beneficiaries of the Deceased?

The parties agreed at the hearing that claimant beneficiary Mr. ID is not an eligible beneficiary and is not eligible to receive death benefits and the hearing officer found that Mr. ID is not a dependent adult child of (decedent).

With respect to claimant beneficiary Ms. YD, the hearing officer found that she does not have good cause for failing to timely file a claim for compensation within one year of the date of the decedent's death and that she did not present sufficient evidence to accurately identify the net resources and to establish the existence of the economic benefit claimed in order to establish her status as a dependent of the decedent. Based on these findings, the hearing officer concluded that Ms. YD is not eligible for death benefits and Ms. YD has not requested our review.

With respect to appellant and claimant beneficiary Ms. ID, the hearing officer found that she failed to present sufficient evidence to establish that she and the decedent had agreed to be married, that after the agreement they had lived together in the State of Texas as husband and wife, and that they had represented to others that they were married. Based on these findings, the hearing officer concluded that Ms. ID is not eligible for death benefits. Ms. ID has filed a timely request for review asserting that the hearing officer erred in deciding that she was not the common-law wife of the decedent at the time of his death. Ms. ID further asserts five of the six points of error assigned by respondent and cross-appellant (carrier) in an untimely request for review. The file does not contain any responses to Ms. ID's appeal.

The hearing officer further concluded that the decedent had no eligible beneficiaries and that the respondent (SIF) of the Texas Workers' Compensation Commission (Commission) is to be paid death benefits as required by the 1989 Act.

The carrier asserts in its request for review that because the parties stipulated that the decedent's average weekly wage (AWW) was \$324.21, the hearing officer erred in the

"Decision" portion of his Decision and Order by directing the carrier to pay the SIF "based on a weekly payment of \$508.00 for 364 weeks"; by concluding that \$27,377.50 in weekly death benefits and \$910.59 in interest had accrued; by concluding that \$111,306.43 in weekly death benefits had not accrued and remained for future weekly payments; and by concluding that the lump sum owed to the SIF was \$125,587.54. The carrier further asserts error in the "Decision" in stating that interest continues to accrue on death benefits which had accrued by the date of the hearing and on death benefits that will accrue because the 1989 Act does not authorize recovery of interest on unpaid benefits that have not yet accrued. The carrier further asserts that the hearing officer erred in the "Order" portion of his Decision and Order in directing the carrier to pay death benefits to the SIF in a lump sum because the SIF failed to present any evidence at the hearing "that the request or directive for lump sum payment had secured the written approval of the executive director of the [Commission] as required by Section 403.007(b)." The file does not contain any responses to the carrier's appeal.

DECISION

Affirmed as to Ms. ID; reversed and remanded as to the carrier.

Ms. ID testified that she and the decedent were married in December 1976 and divorced in January 1978. The documentary evidence reflects that the decedent and Ms. ID were divorced on January 6, 1978; that the decedent married Ms. M on June 29, 1982; and that this marriage was annulled on October 5, 1992. Ms. ID further testified that in March 1998, the decedent moved into her house, where their son, Mr. ID, also resided, and that they lived together there on a full-time basis and held themselves out to others as husband and wife until his sudden, tragic death on _____, when the vehicle he was driving for his employer collided with a train. Ms. ID further stated that claimant's television, stereo and clothing were at her house and that she made the arrangements for and borrowed the money to pay for his burial. Asked on cross-examination if it was only after the decedent's death that she began using the decedent's last name again, Ms. ID replied, "I guess you could say that" and she conceded that her Social Security account and her identification cards identified her as Ms. IR. She also stated that sometime in March 1998 the decedent said to her that "we're going to get married and do it right this time." Ms. ID introduced affidavits from two persons who stated that the decedent referred to her as his "wife." Mr. ID testified to similar effect.

The decedent's sister, Ms. YD, testified that when decedent moved back to (city) from (state), he lived with her and her husband and that while he spent some nights away from their house, he kept his clothes and stereo and television there. She also said that he never referred to Ms. ID as his wife.

The October 19, 1999, letter from Ms. ID's representative, timely filed with the Appeals Panel states merely that "we are requesting an appeal of the decision made by [the hearing officer] on October 6, 1999, regarding [Ms. ID] as a beneficiary." We will treat

this letter as a request for a review of the sufficiency of the evidence to support the hearing officer's finding and conclusion stated above. The Request for Review dated November 3, 1999, which was received by the Appeals Panel on November 8, 1999, is not timely as an appeal and is disregarded. See Section 410.202 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(c) (Rule 143.3(c)).

Section 408.182 provides that if there is an eligible spouse and no eligible child or grandchild, all the death benefits shall be paid to the eligible spouse and Section 408.182(f)(3) defines eligible spouse, in part, to mean the surviving spouse of a deceased employee. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). The Appeals Panel, an appellate reviewing tribunal, will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight of the evidence as to be clearly wrong or manifestly unjust. We are satisfied that the hearing officer's finding and conclusion concerning Ms. ID are sufficiently supported by the evidence.

Section 408.181(b) provides that subject to Section 408.061 (pertaining to maximum weekly benefit), the amount of death benefits is equal to 75% of the employee's AWW. *And see* Rule 132.1 which provides that death benefits shall be computed by multiplying the employee's AWW by .75 and that the amount paid shall not exceed 100% of the state AWW as determined by the Commission and in effect on the date of injury. As noted, the parties stipulated that the decedent's AWW was \$324.21. Further, the hearing officer took official notice that on the date of death, the maximum weekly death benefit was \$508.00.

In its request for review, the carrier states that notwithstanding the stipulation and finding of fact that the AWW was \$324.21, "the Commission's central staff stated in the decision" portion of the CCH order that "the [SIF] is to be paid death benefits . . . based on a weekly payment of \$508.00 for 364 weeks . . ." and that the "central staff and the CCH officer have inexplicably ordered the [carrier] to pay the SIF a sum that is more than double the amount owed under the stipulations of all parties." As the carrier notes in its appeal, since all of the dollar amounts contained in the "Decision" portion of the Decision and Order were apparently calculated by using the maximum amount of weekly death benefits payable, \$508.32, and not 75% of the AWW, the amounts are in error. We remand for that purpose, noting also the passage of time since the hearing officer's decision was signed.

We do not find merit in the carrier's fifth assertion of error in that we do not read the language used in the "Decision" portion of the Decision and Order as requiring the carrier to pay interest on unaccrued death benefits. The carrier's sixth assertion of error states that the hearing officer "erred in directing the [carrier] 'to . . . pay death benefits to the [SIF] in a lump sum' because the SIF failed to present any evidence at the CCH that the request or directive for lump sum payment had secured the 'written approval of the executive director' of the [Commission] as required by §403.007(b), . . ." Section 403.007(b) provides in part

that the insurance carrier may elect or the Commission may order that death benefits payable to the SIF be commuted "on written approval of the executive director." Rule 132.10 provides for the payment of death benefits to the SIF. Rule 132.10(b) providing for a lump sum payment to the SIF is silent on the matter of securing the written approval of the Commission's executive director but does not appear to alter the provision of Section 403.007(b). Accordingly, the hearing officer shall address this requirement also on the remand.

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.

Philip F. O'Neill
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Dorian E. Ramirez
Appeals Judge