

APPEAL NO. 992698

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 October 5, 1999, with the record closing on October 20, 1999. Addressing the sole disputed issue of who were the proper legal beneficiaries of (deceased), he determined that there were no proper legal beneficiaries and awarded death benefits to the Texas Workers' Compensation Commission (Commission) Subsequent Injury Fund (SIF). The appellant (claimant), appeals, arguing that she was totally dependent on the deceased at the time of his death. The respondent (carrier) replies that the hearing officer was correct in finding that the claimant did not provide sufficient evidence that she was dependent upon deceased, and that no other person has timely prosecuted a claim for benefits. The appeals file contains no response from the SIF.

DECISION

Reversed and remanded.

The parties stipulated that on _____, the deceased sustained a fatal injury in the course and scope of his employment. The only person claiming death benefits is the claimant, deceased's sister. Although other siblings of the deceased filed claims for death benefits, they have since withdrawn their claims.

The claimant testified that the deceased lived with her from 1995 until the date of his death. According to the claimant, her biweekly income was \$1,200.00, with a net income of \$900.00 biweekly or \$450.00 per week after taxes. The claimant testified that the decedent gave her \$150.00 to \$200.00 per week; mowed the grass weekly, an approximate value of \$30.00 to \$35.00; cleaned the gutters; painted the house; repaired flooring; babysat; and converted the garage to a habitable room. According to the claimant, she had no other source of income besides her own job and the money provided by the decedent. The claimant testified that she was dependent on the money provided by the decedent because 11 nieces and nephews, ages newborn to 15, live with her. The claimant did not provide any documentation indicating the amount of her net income. The decedent did not have a checking account and no documentation indicating the amount of the decedent's contributions was provided. The claimant relied solely upon her testimony that her sisters, neighbors, and pastor were aware that decedent was financially supporting her and helping with the children.

The claimant has attached to her appeal documents, written statements, and copies of checks, not offered or admitted into evidence at the CCH. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the documents that the claimant has attached to her appeal, but not in evidence, will not be considered on appeal. See Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992.

Pursuant to the 1989 Act, a carrier must pay death benefits to the legal beneficiary of an employee whose compensable injury results in death. Section 408.181(a). Section 408.182(d) provides, in part, that, if there is no eligible spouse, no eligible child, and no eligible grandchild, the death benefits shall be paid in equal shares to surviving dependents of the deceased employee who are parents, stepparents, siblings, or grandparents. "Dependent" is defined as "an individual who receives a regular or recurring economic benefit that contributes substantially to the individual's welfare and livelihood if the individual is eligible for distribution of benefits" under the appropriate section of the 1989 Act. Section 401.011(14).

The requirement for determining whether an individual meets the statutory criteria for dependency is contained in Rule 132.2. Rule 132.2(b) provides, in part, that a benefit which flowed from a deceased employee, at the time of death, on an established basis in at least monthly intervals to the person claiming to be dependent, is presumed to be a regular or recurring economic benefit and that the presumption may be overcome by credible evidence. Rule 132.2(c) provides, in part, that it shall be presumed that an economic benefit, whose value was equal to or greater than 20% of the person's net resources in the period for which the benefit was paid, is an economic benefit which contributed substantially to the person's welfare and livelihood and that this presumption may be overcome by credible evidence. The burden is on the claimant to prove that benefits whose value was less than 20% of the person's net resources contributed significantly to the person's welfare and livelihood.

The issue of a claimant's dependency for purposes of benefits under the 1989 Act is generally a factual matter for the hearing officer's determination. Texas Workers' Compensation Commission Appeal No. 92523, decided November 18, 1992. We note that Rule 132.2(e) states that to enable the Commission to accurately identify a claimant's net resources and to establish the existence of the economic benefit claimed, information such as tax returns, financial statements, and check stubs may be used. While written records indicating the amount of the claimant's net income and the amount and frequency of the deceased's contributions is preferable, it is not mandatory, and lack of documentary evidence goes to the weight to be given the testimonial or other written evidence. Texas Workers' Compensation Commission Appeal No. 990953, decided April 16, 1999; Texas Workers' Compensation Commission Appeal No. 961330, decided August 23, 1996.

The claimant contended that she met the 20% presumptive threshold of Rule 132.2(c). The hearing officer in his Statement of the Evidence and Discussion states in pertinent part:

The [claimant's] statement of her own income was essentially an estimate, and no explanation was offered as to why some documentation of at least her own income was not provided. Nevertheless, as even the highest estimate of the [claimant's] income (600.00/week) and the lowest estimate of the [deceased's] contribution (\$150.00/week), combine to indicate that the deceased contributed at least 20% of the net income, the [claimant] might yet

have prevailed were it not for the near-total absence of evidence regarding the household expenses. One might intuitively conclude that the expenses involved in housing eleven children would be substantial, and any significant contribution would be 'substantial.' However, intention is not the standard of proof in a [CCH], and Appeals Panel Decisions have characterized evidence of a Claimant[']s expenses as a crucial element in a dependency determination.

The hearing officer made the following findings of fact:

FINDINGS OF FACT

1. There is insufficient evidence to determine that [the claimant] was a dependent of [deceased] at the time of his death.
2. No other person has timely prosecuted a claim for benefits based on the [deceased's] fatal accident.

The hearing officer did not make any findings, nor is it clear from his Statement of the Evidence and Discussion whether he determined that the deceased's economic contribution equaled or exceeded 20% of claimant's net resources. The hearing officer, instead, focused on the claimant's expenses, perhaps because the deceased lived with the claimant. We note that Rule 132.2 is based upon a ratio of contribution of a decedent to total resources, not to monthly expenses. Although analysis of monthly expenses of a claimant is relevant to determining whether a contribution is "significant" when the 20% standard is not met, or as evidence against the presumption that a contribution is significant, such evidence is not required as prima facie evidence to establish the presumption set forth in Rule 132.2(c). See Texas Workers' Compensation Commission Appeal No. 93822, decided October 26, 1993.

Based on the hearing officer's Statement of the Evidence and Discussion, it does not appear that the hearing officer correctly applied Rule 132.2. Pursuant to the requirements of Rule 132.2(c), the claimant introduced evidence by which a determination could have been made as to whether the 20% presumption attached and the hearing officer should have made such a determination. If the hearing officer determined that the presumption had not been established, he should have determined whether the claimant met her burden to show that the deceased's contribution was nevertheless significant. Additionally, pursuant to Rule 132.2(b), the claimant introduced evidence that the deceased provided regular or recurring economic benefit but no determination was made as to whether the deceased provided regular or recurring economic benefit to the claimant. Based on the foregoing, we reverse the hearing officer's decision and order and remand for the hearing officer to make findings of fact, based on the existing record, which address whether the 20% presumption of substantial contribution contained in Rule 132.2(c) was established by the claimant and, if not, whether the benefits provided by the deceased nevertheless contributed significantly to claimant's welfare and livelihood and whether the deceased

provided regular or recurring economic benefit to the claimant. We note that the Decision section states that death benefits are to be paid to the SIF based on two different amounts, a weekly payment of \$240.00 and \$180.00. On remand, should the hearing officer determine that there are no proper legal beneficiaries, a new decision should be issued which reflects the appropriate amount of the weekly death benefit.

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 Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Dorian E. Ramirez
Appeals Judge

CONCUR:

Alan C. Ernst
Appeals Judge

Judy L. Stephens
Appeals Judge