

## APPEAL NO. 002873

Following a contested case hearing (CCH) held on November 14, 2000, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the sole disputed issue by concluding that the respondent/cross-appellant (claimant beneficiary), is not a legal beneficiary of (decedent), and that, the respondent (minor claimant beneficiary), is the sole beneficiary of the decedent. The appellant/cross-respondent (carrier) appeals the hearing officer's order that it pay death benefits to the minor claimant beneficiary commencing January 4, 1999, and continuing with accrued and unpaid death benefits to be paid in a lump sum, with interest, until the minor claimant beneficiary ceases to be eligible for death benefits under the 1989 Act. The carrier maintains that, despite Section 408.064, it should not be required to pay interest on the disputed, unpaid benefits. No party responded to the carrier's appeal. The claimant beneficiary appeals, asserting that the hearing officer's determination is against the great weight and preponderance of the evidence. The carrier responds, requesting that this panel affirm the hearing officer's decision and order with respect to the determination of the beneficiary. The claimant beneficiary failed to serve a copy of her appeal on the minor claimant beneficiary.

### DECISION

Affirmed.

The hearing officer ordered that the carrier pay interest on the accrued but unpaid benefits, "in accordance with the Workers' Compensation Act, the Rules of the Texas Workers' Compensation Commission (Commission), and this Decision and Order." The carrier avers that because the claimant beneficiary's action caused it to set aside one-half of the benefits ultimately due the minor claimant beneficiary, the carrier is not required to pay interest on the contested amount held in abeyance until the claim is adjudicated. We observe that this issue, which could have been anticipated by the carrier and covered by the benefit review conference and CCH, is raised for the first time on appeal. We will, however, briefly address the topic.

Section 408.064, entitled "Interest on Accrued Benefits," provides as follows:

- (a) An order to pay income or death benefits accrued but unpaid *must include interest* on the amount of compensation due at the rate provided by Section 401.023. [Emphasis added].
- (b) Accrued but unpaid compensation and interest shall be paid in a lump sum.

This statute states no exceptions nor does the carrier cite any authority for its requested relief. *See, generally*, Texas Workers' Compensation Commission Appeal No. 982792, decided January 11, 1999.

The hearing officer's order is clear and unambiguous. We find no error with respect to the order compelling the carrier to pay interest on the minor claimant beneficiary's accrued, but unpaid, benefits.

The hearing officer did not err in finding that the claimant beneficiary is not a legal beneficiary of the decedent because she failed to prove a common-law marriage to the decedent. Section 408.181 states that a surviving spouse may receive death benefits. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.3(a) (Rule 132.3(a)) contemplates that a spouse by common-law marriage may be entitled to death benefits. In order for the claimant beneficiary to prove a common-law marriage, she must show, by a preponderance of the evidence: she and the decedent agreed to be married; after the agreement they lived together as man and wife in Texas; and they represented to others that they were married. TEX. FAM. CODE § 2.401(a)(2); *Russell v. Russell*, 865 S.W.2d 929 (Tex. 1993). The State of Texas has not required a formal ceremony to establish a marriage relationship since 1847. *Id.* at 931. The Texas Supreme Court held in *Russell* that the existence of the agreement to be married may be proven by circumstantial evidence or the conduct of the parties. *Id.* at 933.

The claimant beneficiary challenges the sufficiency of the evidence to support findings that: "[t]he [decedent] did not agree to be married to the Claimant on January 1, 1994, or on any other date pertinent to this claim," and "[t]he [decedent] did not represent to others in the world at large that the Claimant was his wife or that he was married to the Claimant at any time prior to his death on January 4, 1999."

The evidence presented was in substantial conflict. Pursuant to Section 410.165(a) of the 1989 Act, the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established from the conflicting evidence. *See Garza v. Commercial Ins. Co. of Newark, N.J.*, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); *St. Paul Fire & Marine Ins. Co. v. Escalera*, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The question of the existence of a common-law marriage is one of fact. *In re Glasco*, 619 S.W.2d 567 (Tex. App.-San Antonio 1981, no writ); *Roach v. Roach*, 672 S.W.2d 524 (Tex. App.-Amarillo 1984, no writ). The fact finder may believe all, part, or none of any witness' testimony and may draw reasonable inferences and deductions from the evidence. *Ashcraft v. United Supermarkets, Inc.*, 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied); *Harrison v. Harrison*, 597 S.W.2d 371 (Tex. Civ. App.-Fort Worth 1969, no writ). The hearing officer may take into account

a witness' relationship to a party. Lindley v. Transamerica Ins. Co., 437 S.W.2d 371 (Tex. Civ. App.-Fort Worth 1969, no writ).

The evidence proffered by the claimant beneficiary and by the carrier was conflicting. This tribunal will not upset the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. We do not find them so here. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The hearing officer's decision and order are affirmed.

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Philip F. O'Neill  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge