

## APPEAL NO. 010722

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 5, 2001. The hearing officer determined that respondent claimant-beneficiary (claimant) is not ineligible to receive death benefits because of abandonment of [the] marriage pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.3 (Rule 132.3). Appellant (carrier) appealed this determination on sufficiency grounds. Claimant responded that the Appeals Panel should affirm the hearing officer's decision and order.

### DECISION

We affirm.

Carrier contends the hearing officer erred in determining that claimant is not ineligible to receive death benefits because of abandonment of the marriage with the deceased employee (decedent). Carrier asserts that even though there was evidence that claimant and decedent still had a joint bank and credit card account and that he gave money to her, they had been apart for over one year and there was a deemed abandonment of the marriage.

Rule 132.3. concerns the eligibility of a spouse to receive death benefits and states that:

(a) the surviving spouse is entitled to receive death benefits, unless subsection (b) of this section applies. The surviving spouse shall submit a certified copy of the marriage license, or satisfactory evidence of common-law marriage to the deceased employee, to the insurance company.

(b) A surviving spouse who abandoned the employee, without good cause for more than one year immediately preceding the death, shall be ineligible to receive death benefits. The surviving spouse shall be deemed to have abandoned the employee if the surviving spouse and the employee had not been living in the same household for more than one year preceding the employee's death unless the spouse is:

(1) hospitalized;

(2) in a nursing home; or

(3) living apart due to career choices, military duty, or other reasons where it is established their separation is not due to the pending break-up of the marriage. The burden is on a person who opposes the claim of a surviving spouse to prove the spouse abandoned the deceased employee.

(C) If more than one person claims to be the surviving spouse of the deceased employee, the commission [Texas Workers' Compensation Commission] shall presume the most recent spouse is the surviving spouse. This presumption may be rebutted by an individual who presents proof of a prior valid marriage to the deceased employee.

The rule states that carrier had the burden to prove abandonment by claimant. It is not disputed that the decedent and the claimant were married at the time of his death. The only dispute in this case is whether the claimant is an "eligible spouse" within the meaning of Section 408.182 and Rule 132.3, and more specifically whether claimant abandoned the decedent for longer than the year immediately preceding the death, without good cause. There was evidence that the decedent was still contributing financially to his wife and that they shared a joint bank account. There was evidence that claimant did not give up on reconciliation and that no divorce proceedings had been filed. The hearing officer considered all of the evidence and determined that claimant did not abandon the marriage and that her and decedent's separation was not due to a pending break-up of the marriage. We conclude that the hearing officer's determination in this case is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

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Judy L. S. Barnes  
Appeals Judge

CONCUR:

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Susan M. Kelley  
Appeals Judge

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Michael B. McShane  
Appeals Judge