APPEAL NO. 93822

On August 4, 1993, a contested case hearing was held. The hearing was held pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act) (formerly V.A.C.S., Article 8308-1.01, *et seq*.). The deceased, sustained an undisputed fatal injury on _____, while in the course and scope of his employment with his employer, (employer). The hearing officer determined that the claimants were not eligible for benefits because they had not proved that their deceased son contributed substantially to their welfare and livelihood. Accordingly, the hearing officer ordered that the claimants take nothing on their claim, and ordered that the carrier pay death benefits to the administrator of the Texas Workers' Compensation Subsequent Injury Fund for deposit in the fund.

Claimants have appealed, and point out that the decision reached by the hearing officer is against the great weight and preponderance of the evidence. The claimants argue that the hearing officer erred by reducing the fair market value of the deceased son's services "in kind" around the family farm by half. The claimants note other evidence that they argue was not given credence by the hearing officer. The claimants point out that the vehicle driven by their late son, and from which payments were made from his paycheck, was owned by his father, and the hearing officer erred by not figuring the payment into his calculation of the late son's contribution. Various other errors in analysis are pointed out. The carrier (which is liable for 364 weeks of benefits regardless of whether claimants prevail or not) essentially does not reply or refute claimant's points of error, but asks that it be allowed reimbursement of amounts paid to the Subsequent Injury Fund according to the hearing officer's decision. No response has been filed by the Subsequent Injury Fund, although it was given notice of the decision.

DECISION

The decision and order of the hearing officer are reversed, and a new decision rendered that the claimants are legal beneficiaries of the deceased employee and entitled to payment of death benefits.

The deceased tragically sustained a fatal injury, through accidental electrocution, while in the course and scope of his employment on _____, after having worked for the employer for around two months. He was 21 years old at the time.

At the outset, we will note that this case involves uncontroverted testimony about the facts. The issue facing the hearing officer was not whether to believe one side or the other, but whether the claimants put forth enough evidence to establish a prima facie case of dependency. This case involves the unique situation, for this Appeals Panel, in which the deceased worker lived with his parents, and turned his entire paycheck over to his mother for expenditure on the expenses of the entire household. In addition, the deceased worker, by all accounts, was an active worker on the family farm, to an extent estimated to amount to $586 per month. As such, this case is distinguishable from other situations

encountered by this Panel, where a non-resident decedent is argued to have substantially contributed to a relative's welfare.

Testimony was provided by both claimants (hereinafter Ms. and Mr. B), by decedent's half brother (Mr. S), by decedent's girlfriend (Ms. L), and by a coworker of Ms. B. Ms. B was essentially the only witness who had direct knowledge of the income and expenditures of the decedent's family.

The deceased worked for the employer as a full-time employee from December 16, 1992 to the date of his fatal accident on _____. He was paid $7.00 per hour, but his actual weekly wages varied somewhat. In response to questions from the claimants' attorney, which assumed a rate of withholding of 28% of the gross check for social security and income tax, Ms. B stated that the deceased's net monthly income was $614.10. The hearing officer therefore used this figure in the computations in his decision. However, copies of two weekly paychecks (when taken with the employer's wage statement, also in the record) indicate that this figure was too low. One check is in the amount of $209.65, and indicated that the gross wage for that period (the week of January 29 through February 4, 1993) was $266.00. Another check on its face shows $248.52 net income against a gross of $316.75. From these checks, it can be inferred that the percentage of withholding was not 28%, but slightly more than 21%. Using the average weekly wage of $213.23 (derived from the wage statement) and reducing it by 21% yields a weekly average net paycheck of $168.45, for average monthly net paychecks of approximately $673 total, and not the $614.10 testified to by Ms B.

The record also indicated that the deceased was provided a per diem allowance to cover his "on-the-road" expenses of lodging, meals, and gasoline which varied; there is some evidence that for a two week period, it was as high as $145. However, Ms. B stated she did not use it to figure her late son's contribution, although this check was also turned over to her. We would note that as some of the household expense claimed by Ms. B, a certain amount was attributed to decedent's gasoline use, which included the amounts for which he received reimbursement.

In summary, the following facts were also brought out: the deceased lived at home and gave his checks to his mother, who managed all money and paid all household bills. Ms. B stated that decedent had done this since he was 16. She bought his clothes, paid educational loans "that we made" for the deceased, paid for the truck that he drove (and which was titled to Mr. B), and additionally paid for upkeep of the family residence, farm and livestock out of the three paychecks provided into the family "pool." Although Ms. B stated that on rare occasion her late son might go by the credit union and there make a payment on the truck he drove, and get the balance in cash, he would also turn this cash over to her. Ms. L testified that while decedent might pay around $20 a month to their social activities, she would generally pay most of their dating expenses. The decedent did have a boat in his own name on which payments were made.

Mr. and Ms. B and Mr. S testified that decedent did extensive work around the farm, estimating two hours a day on weekdays and anywhere from four hours to all day on weekends. Mr. B testified that he helped out but his physical capabilities were limited because he had broken his neck, so that much of the physical tasks were performed more by decedent. Mr. B said he never paid his son for his work. Tasks performed were "shredding," welding, fence building and repair, cleaning stalls, feeding and caring for the livestock, changing oil on three vehicles and the tractor, repairing items around the home, hauling hay, and mowing. The family farm was approximately 20 acres. Mr. B estimated that the value of his son's contribution was in a range of $500-600, based upon what he felt he would have to pay an assistant to perform the same tasks.

Ms. B testified that her net monthly income was $1,478.28,[1] and that her husband's was $1,481.78. (Both figures are substantiated by claimants' W-2 forms for 1992.) She computed $586 per month as the value of her son's "in kind" contribution,[2] for tasks such as oil changes, shredding, welding, cleaning stalls, hauling hay, and fence repair. Using the $614.10 figure for her late son's net paycheck, and a figure of $586 as fair market value of his "in kind" contribution, Ms. B testified that a conservative estimate of her son's contribution to the family livelihood was a total of $1,200.10. She testified that she derived her "in kind" estimate from figures she obtained from persons who perform such services. (A figure of $50 per hour for welding is substantiated by a notarized statement from a welding company in the record; the oil change amount is verified by a bill.) Although Mr. B testified that they had not, at the time of the hearing, actually hired anyone to do farm work, he testified that the condition of the farm was deteriorating and that he would shortly have to do so. Ms. B testified that a neighbor had been hired to clean out the stalls on a one-time basis. Ms. B stated that her son's death has worked financial hardship on the family's ability to meet expenses.

According to Section 408.181(a), the carrier must pay death benefits to the legal beneficiary of the deceased. Section 401.011(29) provides that a "legal beneficiary" is a person who is entitled to receive death benefits under the 1989 Act. Death benefits are paid to the legal beneficiaries according to the priority established in Section 408.182. Section 408.182(d) provides that if the employee is not survived by an eligible spouse, child, or grandchild, the death benefits shall be paid to a surviving dependent who is a parent, stepparent, sibling, or grandparent of the deceased. Section 408.182(e) provides that if the employee is not survived by legal beneficiaries, the death benefits shall be paid to the subsequent injury fund.

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[1]The hearing officer's statement of evidence that cites $1,504.32 as Ms. B's net income apparently comes from the expenses exhibit; when it was called to her attention, she stated that this figure was erroneous. The figure used by the hearing officer is further refuted by the W-2 forms.

[2]The hearing officer found, as fact, that the deceased's nonmonetary contributions were for his own livelihood and welfare. Although Mr. S testified that the horses were jointly owned by all three persons, there was otherwise no evidence to support the hearing officer's finding of fact on the nonmonetary contributions. Clearly, services for the benefit of the horses would benefit claimants under even a "joint ownership" theory.

Section 401.011(14) provides that "dependent" means "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. . . ." Tex. Workers' Comp. Comm'n, 28 TEX. ADMIN. CODE § 132.2 (Rule 132.2) provides for the determination of facts of dependent status and applies to a person who claims death benefits as a dependent of the deceased employee. The record established that claimants were the natural parents of the deceased employee, and that he had no children or surviving spouse. He was also survived by a half-brother who was not dependent upon the deceased and made no claim for benefits.

The question of dependency is generally one of fact to be determined by the trier of fact, unless there is no dispute as to the facts and they lead to a definite conclusion. *See* Federal Underwriters Exchange v. Hall, 182 S.W.2d 703 (Tex. 1944). Under the 1989 Act, Rule 132.2 would also bind the fact finder.

Under the 1989 Act a "dependent" is an individual who receives a regular or recurring economic benefit which contributes substantially to the individual's welfare and livelihood if the individual is eligible for distribution of death benefits. Rule 132.2 applies to a person claiming death benefits as a dependent of the deceased employee. Subsections (b), (c) and (d) of that rule provide as follows:

> (b) A benefit which flowed from the 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. . . .
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> (c) 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 (see Subsection (d) of this section) for which the benefit was paid, is an economic benefit which contributed substantially to the person's welfare and livelihood. 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.
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> (d) Net resources . . . are 100% of all wage and salary income and all other income including nonpecuniary income and all income of the
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> individual's spouse, less 100% of social security taxes and federal income tax withholding.

Unquestionably, the proof met the presumption in subsection (b) that the benefit

was regular and recurring, because the deceased's weekly pay was consistently turned over to his mother. We believe that the great weight and preponderance of the evidence in this case are against the hearing officer's apparent determination not to also apply the presumption in subsection (c). The evidence indicates that the conservative value of decedent's monthly contribution is $673 plus $586, or a total of $1,259. Added to Mr. and Mrs. B's net incomes, the total family resources were $4,219.06, of which deceased's contribution was just under 30%.[3] We do not believe that it was incumbent upon the hearing officer to go behind the presumption to allocate the benefits of the pooling arrangement in this case.

In Larson, Workmen's Compensation Law, Vol., 2A, Sec. 63.12(b) (Matthew Bender, 1992), it is stated that: "it has been frequently held that, if the decedent's contribution is offset by the value of the board and room received, he is doing no more than to pull his own weight; he is merely supporting himself, with nothing left over to represent support of dependents." This language was recited in Texas Workers' Compensation Appeal No. 92523, decided November 18, 1992, in which we affirmed a determination that deceased worker who contributed a fixed amount toward his expenses twice a month did not, under the facts of that case, substantially contribute to his roommate/brother's welfare and livelihood. That case is clearly distinguishable from the facts in this case.

Here, decedent did not simply "contribute" but turned over his check in total, and it was used with the rest of the family "pool" income to pay all of the household expense, including costs such as taxes and mortgage payment which would have been the same whether or not the decedent lived on the premises. He further rendered substantial valuable services around the farm. The fact that he also benefited from the arrangement does not, in and of itself, preclude a finder of fact from also determining that he made a substantial contribution to his parents' economic welfare and livelihood. Because the facts were not truly in dispute, there was no controverting evidence developed as to the "value" of decedents' room and board compared to his contributions.

We agree with the claimants that the hearing officer has misconstrued the evidence as to the value of the late son's nonmonetary labor services on the farm, and that his arbitrary reduction of the fair market value of these services by half has no basis in the record. Although the testimony was that the claimant father and his late son performed tasks together, no testimony was developed at all on the value of the claimant/father's services. The claimant/mother was the person most familiar with the family finances, who had developed information upon which to base her valuation of services. She plainly and unequivocally testified that the total amount of her late son's contributions to the household was $1,200.10 (without including per diem), an estimate she characterized as conservative (and, of course, based upon an incorrect low estimate of decedent's net average monthly paycheck). The hearing officer evidently credited her testimony on the valuation of the

[3]As claimants pointed out during their case in chief, without figuring the "in-kind" into the resource calculation, the decedent's contribution exceeds 20%.

services at $600 per month, the top of her "range," since he used it in his own calculations. His conclusion that only half this amount could be used to figure the deceased employee's contribution is against the great weight and preponderance of the evidence.

We also agree that there was no basis for the hearing officer to deduct from decedent's contribution the amount of $300 monthly payment paid on the truck. The decedent apparently only occasionally made this payment directly. Even if taken as true that such payment was not always made from the "pool," the testimony was undisputed that the truck was titled to Mr. B, and not to the decedent.

It is possible that the hearing officer was somewhat misdirected by Ms. B's affirmative responses to leading questions from her own attorney in which she "attributed" 1/3 of expenses for property taxes, house payment, cable television, utilities, health insurance, gasoline expense, telephone, and other household costs to her late son. It was not clear what the theory was behind this line of questioning.

Testimony "attributing" 1/3 of all expense to the decedent, taken literally, evidently lead the hearing officer to focus on whether the decedent was "pulling his own weight" rather than contributing substantially to the claimants' livelihood. However, there is no indication that fixed costs for such things as mortgages or taxes (unlike food or clothing expenses) would be decreased by 1/3 after the decedent's death. (For example, Ms. B indicated that a basis for so attributing the cable television bill to her son was that he stayed up watching it more than the claimants did, a fact which would have no bearing on the expenses unless the local cable television company billed by hours watched, which is not supported by claimants' expense statement). In any case, the great weight of the evidence, taken as a whole, was against the deceased's contribution merely being accepted as reimbursement for his own living expenses. In fact, later in her testimony, Ms. B characterized the family expenses as "community" debts.

We need not directly rule on the extent to which expenses should appropriately attributed to a decedent, because the applicability of Rule 132.2 to the facts triggers the presumption. 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). The carrier's only articulated concern at the hearing was to avoid double payment and it put on no evidence in rebuttal. As no party in this proceeding disputed that the presumption should apply, and the hearing officer's conclusion that it would not was evidently based upon erroneous interpretation of the evidence, we find that the presumption set forth in Rule 132.2 should be applied by this Appeals Panel.

The decision of the hearing officer will be set aside only if the evidence supporting

the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Co. v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). For this reason, and because we believe Rule 132.2 applies to trigger an uncontroverted presumption of dependency under the facts of this case, we reverse the findings of fact and conclusions of law of the hearing officer that determined that claimants were not entitled to payment of death benefits on behalf of their son's death, and render a decision that the carrier pay death benefits to claimants in accordance with the 1989 Act and applicable rules, and that carrier is entitled to reimbursement for the amounts paid into the Subsequent Injury Fund (from that Fund) pursuant to the hearing officer's otherwise erroneous decision.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Gary L. Kilgore
Appeals Judge