

APPEAL NO. 941145

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 July 22, 1994. The issues at the CCH were: 1. whether respondent (JS) (wife herein) was the deceased's beneficiary as a surviving spouse or whether she was ineligible to recover based on abandonment, and 2. whether appellant (DS) (mother herein), the deceased's mother, is an eligible beneficiary. The hearing officer found that the wife was the deceased's spouse at the time of his death and had not abandoned their marriage, entitling her to death benefits. The hearing officer ruled that the mother was not entitled to death benefits because deceased was survived by an eligible spouse. Mother appeals contending that the evidence established that wife had abandoned her marriage with the deceased. Neither wife nor respondent (carrier herein) files a response to mother's appeal.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The evidence in this case was conflicting on a number of points. Some points are undisputed, such as that in 1977 the deceased married wife ceremonially in (State 1). From the time of the marriage the husband worked in the trucking industry primarily as a truck driver. Wife testified that the deceased worked primarily at night and generally slept during the day and her schedule was the opposite. This difference in schedules as well as wife's contention of marital infidelity by the deceased led to separation in September 1990. At this time husband moved out of the house into separate residence.

At the point this separation began is where evidence begins to conflict. Wife essentially contends that even though deceased obtained another residence he left many of his belongings in their house and continued to frequently stay at the house and on such occasions wife and deceased frequently had sexual intercourse. Wife testified that she remained faithful to deceased throughout their separation. Wife testified that she never changed the locks at the house and deceased was free to come there whenever he desired. Wife testified that not only did she and deceased continue to own the house jointly, but also a vacation home in New Mexico where they frequently spent vacations and holidays together. Wife testified that she and deceased in fact spent most holidays together, spoke almost daily on the telephone and continued to contemplate reconciliation. Wife testified that in June 1993, she was involved in a motor vehicle accident out of town and deceased came to the hospital and brought her back to the house. Wife testified

deceased stated that coming so close to losing her made him realize how much she meant to him, so that he desired to reconcile and move back into the house. Wife testified that deceased moved back into the house and cared for her for several weeks during her convalescence. Wife testified that this reconciliation ended due to arguments over her desire that the decedent undergo testing for AIDS and over his drinking.

Mother's version of events after the 1990 separation of deceased and wife is quite different. Mother testified that wife told mother in 1990 she would never again have a sexual relationship with the deceased because she feared his infidelity would cause him to infect her with AIDS. Mother testified that deceased left wife because he just could not stand her anymore and after he moved out initially went to live in another city where he was living with another woman, (Ms. B). Mother testified that to the degree that the deceased ever visited wife it was primarily to see their dogs (which wife had testified were her and deceased's surrogate children). Mother testified that deceased had never indicated any desire to reconcile with wife, but instead stated his intention was to divorce her and marry Ms. B. Mother's daughter (sister of deceased) testified that the deceased helped wife for a couple of nights after her June 1993 accident until wife's sister could travel from (State 2), but there was no reconciliation.

Affidavits of various other persons were presented by either side to support her version of events. Both sides agree that sometime in the fall of 1993 the divorce action which the deceased had filed in 1991, but apparently had not pursued (out of hope of reconciliation according to wife; due to procrastination according to mother), began to be pursued vigorously. Wife hired an attorney and had temporary orders entered excluding deceased from the house. Deceased requested authority from the court to borrow against his life insurance policy and was granted permission to do so with the proviso that he not change the beneficiary of the policy from wife during the pendency of the divorce. Husband did execute a will during this period naming Ms. B executrix of his estate. Records and correspondence indicate that wife and deceased were in heated property settlement negotiations. While this was going on, the deceased was killed in _____ in a motor vehicle accident in the course and scope of employment.

The hearing officer made the following Findings of Fact in the present case:

FINDINGS OF FACT

1. In June of 1993 the deceased and (JS) reconciled a separation that had commenced in 1990, and the deceased and (JS) resided for a period of several days in their joint residence.

2. At no time during the marriage of the deceased and (JS) did JS abandon the deceased.

Section 408.182 provides as follows in relevant part:

- (b) If there is an eligible spouse and no eligible child or grandchild, all the death benefits shall be paid to the eligible spouse.

* * * *

- (f) In this section

* * * *

- (3) "Eligible spouse" means the surviving spouse of a deceased employee unless the spouse abandoned the employee for longer than the year immediately preceding the death without good cause, as determined by the commission.

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE ? 132.3(b) (Rule 132.3(b)) provides in pertinent part:

- (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:

* * * *

- (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.

Since at the time of his death the deceased had a surviving spouse, the decedent's mother had to prove pursuant to Rule 132.3 that wife abandoned decedent for more than a year immediately preceding his death. Such abandonment would be deemed under Rule 132.3(b) if it were shown that wife and decedent were not living in the same household for

more than one year prior to decedent's death. The exceptions of Rule 132.3(b)(3) clearly do not apply to the facts of the present case. However, the hearing officer chose to credit the wife's testimony that the decedent moved back into the house in June of 1993. There was conflicting testimony that the decedent did not move back into the house but was merely helping wife until her sister could get there.

Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals level body is not a fact finder, and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Applying this standard of appellate review, we cannot say the hearing officer's finding that in June of 1993 the decedent and wife resided together was against the overwhelming weight of the evidence. It has been held that mere separation of the spouses does not constitute abandonment absent the intention of not returning to live together again as husband and wife. See Texas Workers' Compensation Commission Appeal No. 92107, decided May 4, 1992. Whether such abandonment occurred is a question of fact. Texas Workers' Compensation Commission Appeal No. 94020, decided February 9, 1994. We understand mother's point that wife had a motive to misrepresent the facts, but judgment of wife's credibility was the province of the hearing officer.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge