APPEAL NO. 950179

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 opened on December 6, 1994, in (city), Texas, with the record closing on December 30, 1994. (hearing officer) presided as hearing officer. The sole issue at the CCH was who are the legal beneficiaries of (deceased herein). The hearing officer determined that the eligible beneficiaries of workers' compensation death benefits of the deceased were: his spouse, respondent (BW); his dependent stepson (SS); and his minor son, (XS). Appellant, (CW), files a request for review contending that she is the spouse of the deceased and the sole legal beneficiary. CW argues that her prior marriage to the deceased precluded him from entering into a marriage with BW, making both BW and SS (BW's son) ineligible for death benefits. CW asserts that since XS never appeared at the benefit review conference (BRC) or at the CCH he should not be entitled to receive death benefits. Respondent BW files a response to CW's request for review arguing that CW's ceremonial marriage to the decedent was invalid because at the time he was married to another and that time had expired for her to establish a valid common-law marriage. BW argues that the decedent entered into a valid common-law marriage with her and she was his spouse at the time of his death.

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.

It is undisputed that the deceased, who was employed by a gas company, suffered a fatal burn injury on (date of injury). The question in this case is therefore who are the decedent's legal beneficiaries for workers' compensation death benefits. To determine this we need to review the decedent's family and marital history, the facts of which are not in dispute.

Prior to marriage the decedent had a son named (CH). At the time of decedent's death, CH was 31 years old and in the Air Force. On April 25, 1978, the decedent ceremonially married (RM) in (city) City, (state). There were no children born to this marriage. RM divorced the deceased on November 2, 1987, in (city) City, (state). Deceased and respondent (BS) had an intimate relationship in 1984, but did not consider themselves married. As a result of this relationship, XS was born to BS on January 8, 1985, in (state). The hearing officer found that XS was the son of the decedent and this factual finding is supported by sufficient evidence in the record and is not appealed.

On December 18, 1985, the decedent ceremonially married CW (*nee* (CS)) in (JP), (state). No children were born or adopted to this marriage. CW had three minor children by a prior marriage who lived with deceased and CW after their marriage. Deceased, CW and these children moved to (city), Texas, in July 1987. In July 1988 CW and deceased separated with CW moving to (city). In September 1988 deceased and CW reconciled

and lived together until May 1989 when deceased left their home and never came back. CW next encountered deceased in September 1989 when she spent the night with him at a (city) hotel while he was in town on a business trip.

Deceased started dating BW (*nee* (BO)) on February 2, 1989. They were engaged in May 1989 and were ceremonially married in (city), Texas, on June 13, 1989. They lived together as husband and wife until decedent's death with BW's son by a prior marriage, SS, who had been born January 1, 1979. The hearing officer found that the claimant provided the majority of support for both BW and SS while they lived together, and at the date of his death no others were dependent upon the deceased for their support. These findings are not appealed.

CW disputes the hearing officer's following Conclusions of Law:

CONCLUSIONS OF LAW

2.The marriage of DECEASED and [BW] is presumed to be valid since it is the most recent marriage.

3.DECEASED's ceremonial marriage to [CW] on 12-18-85 was void because on that date he was still married to [RM].

5.The impediment to the marital relationship of DECEASED and [CW] was removed on 11-02-87 by the divorce of [RM] from DECEASED. Since that date they continued to live together as husband and wife and represented themselves to others as being married so that a valid marriage without formalities (common-law marriage) could have arisen from the co-habital relationship following that divorce.

6.The co-habital relationship and informal common-law marriage of DECEASED and [CW] was dissolved by operation of law on 10-01-90, because she failed to commence a proceeding to prove a marital relationship with DECEASED within one year after their co-habital relationship ended in September, 1989.

7.Although the then potentially valid common-law marriage of DECEASED to [CW] existed on 06-13-89 when DECEASED ceremonially married [BW], that impediment to [BW]'s marriage was removed by operation of law on 10-01-90. [BW] and DECEASED had a valid common-law marriage on or after 10-01-90 until the date of his death.

9.At the date of his death, DECEASED's eligible workers' compensation death beneficiaries were his spouse, [BW], his minor son, [XS], and his dependent step-child, [SS].

Section 408.182 provides as follows in relevant part:

(a)If there is an eligible child or grandchild and an eligible spouse, half of the death benefits shall be paid to the eligible spouse and half shall be paid in equal shares to the eligible children . . . .

(f)In this section:

(1)"Eligible child" means a child of a deceased employee if the child is:

(A)a minor;

(B)enrolled as a full-time student in an accredited educational institution and is less than 25 years of age; or

(C)a dependent of the deceased employee at the time of the employee's death . . .

(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(c) (Rule 132.3(c)) provides as follows:

If more than one person claims to be the surviving spouse of the deceased employee, the 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.

Rule 132.4(a) provides as follows:

A child eligible for death benefits is the son or daughter of a deceased employee, including an adoptive child and including a dependent stepchild, who meets any of the conditions set out in the Texas Workers' Compensation Act (the Act), § 4.42(g)(2).

Rule 132.4(d) provides as follows:

A person claiming benefits as the dependent stepchild of the deceased employee shall prove that the employee was married to a parent of the claimant, and must also establish dependent status as set out in § 132.2 of this title (relating to Determination of Facts of Dependent Status).

CW argues that the evidence she presented overcame the presumption of validity of the marriage of deceased and BW and established that under Texas law CW and deceased were validly married at the time of his death. CW also argues that since she and deceased were married in the State of (state) that (state) law controls in determining the validity of their marriage and that under (state) law her marriage to the deceased in good faith entitles her to benefits. CW argues that SS is not entitled to recover workers' compensation benefits because his rights are dependent on the rights of BW to such benefits. Claimant argues that XS and BW are barred from receiving workers' compensation benefits because they failed to follow the proper procedures in pursuing benefits--XS by not appearing at the CCH and BW not by not filing a death benefits claim before the BRC. Finally the claimant argues that the hearing officer erred by considering the effect of TEX. FAM. CODE ANN. § 1.91 (Vernon 1993) (hereinafter Section 1.91).

First we address the argument of CW that she was validly married to the deceased at the time of his death under Texas law. CW argues that she rebutted the presumption in favor of the most recent marriage with evidence that she married the deceased and that they were never divorced, thus creating an impediment to the validity of BW's marriage to the deceased. BW counters that CW's ceremonial marriage to the decedent was invalid because at the time the claimant was married to RM.

TEX. FAM. CODE ANN. § 2.22 (Vernon 1993) (hereinafter Section 2.22) provides as follows:

A marriage is void if either party was previously married and the prior marriage is not dissolved. However, the marriage becomes valid when the prior marriage is dissolved if since that time the parties have lived together as husband and wife and represented themselves to others as being married.

Section 1.91, which was amended in 1989, provides in pertinent part:

Proof of Certain Informal Marriages

(a)In any judicial, administrative, or other proceedings, the marriage of a man and woman may be proved by evidence that:

(1) a declaration of their marriage has been executed under Section 1.92 of this code;

(2)they agreed to be married, and after the agreement, they lived together in this state as husband and wife and there represented to others that they were married.

(b)A proceeding in which a marriage is to be proved under this section, must be commenced not later than one year after the date on which the relationship ended or not later than one year after September 1, 1989, whichever is later.

Clearly under Section 2.22 CW's ceremonial marriage to the deceased was void because at the time it took place the deceased was married to RM. RM divorced the deceased in 1987, while CW and deceased were still living together as husband and wife and representing themselves as being married. During this period there was no impediment to CW and the deceased marrying. The hearing officer correctly concluded that any such marriage would be common-law in nature and under Section 1.91(b) dissolved by October 1, 1990.[1] Texas Workers' Compensation Commission Appeal No. 92100, decided April 27, 1992. CW argues that there is a distinction between marriages created by operation of Section 1.91 and Section 2.22 and that Section 1.91(b) does not apply to marriages validated under Section 2.22 in that the operation of Section 2.22 would revive her original ceremonial marriage or, alternatively, create a common-law marriage not subject to the requirements of Section 1.91(b). We rejected the argument that Section 2.22 could revive an earlier ceremonial marriage in Appeal No. 92100, stating as follows:

Caddel v. Cadell, 486 S.W.2d 141 (Tex. Civ. App.-Amarillo 1972, no writ) holds that Section 2.22, which provides for the validation of a subsequent marriage when a prior marriage is dissolved, applies prospectively from dissolution of the prior marriage; validation of the subsequent marriage does not relate back to the date when it was contracted, and that such subsequent marriage is common law in character.

Nor are we persuaded that a common-law marriage formed under Section 2.22 is not subject to the requirements of Section 1.91(b), which clearly envisioned that common law marriages be proved within one year after the relationship ended.

Without proof of a valid marriage to CW after October 1, 1990, and in light of evidence that BW and the deceased agreed to be married, lived together as husband and wife, and represented to others they were married, it was not error for the hearing officer to

[1]We reject CW's argument that the issue of application of Section 1.91 to this case could not be considered at the CCH because it was not raised by the BRC. The issue out the BRC in this case was who are the legal beneficiaries of the deceased. The application of the statute is germane to this issue. The parties are limited at the CCH to the issues, but not the arguments, brought up at BRC.

conclude that under Texas law BW and the deceased formed a valid common law marriage which was in existence at the time of deceased's death. CW argues that (state) law and not Texas law should control the determination of the validity of her marriage to the deceased and her entitlement to benefits. CW cites Braddock v. Taylor, 592 S.W.2d 40 (Tex. Civ. App.-Beaumont 1979, writ ref'd n.r.e) and Nevarez v. Bailon, 287 S.W.2d 521 (Tex. Civ. App.-El Paso 1956, writ ref'd) for the proposition that in Texas the validity of a marriage is determined by the law of the place where it was celebrated. There is a question as to whether these cases reflect the current state of the Texas law. The 14th Court of Appeals stated as follows in Williams v. Home Indemnity Company, 722 S.W.2d 786, 787-8 (Tex. App.-Houston [14th Dist.] 1987, no writ):

> In her first point of error appellant contends the court "erred in not applying Texas law" in determining whether she was the surviving wife of the deceased. Traditionally, in determining the validity of a marriage, Texas courts have applied the law of the place it was celebrated. Braddock v. Taylor, 592 S.W.2d 40 (Tex. Civ. App.-Beaumont 1979, writ ref'd n.r.e.); Nevarez v. Bailon, 287 S.W.2d 521 (Tex Civ. App.-El Paso 1956, writ ref'd). If this rule is still to be applied, the court, without doubt, properly applied the laws of Virginia and New York.
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> Appellant, however, citing Duncan v. Cessna Aircraft Company, 665 S.W.2d 414 (Tex. 1984) and Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979), argues that the choice of law decision should be made on the basis of the most significant relationship approach. In fact, the Fort Worth Court of Appeals recently held that this approach, rather than the place of celebration test, should be applied to determine choice-of-law in a marriage context. Seth v. Seth, 694 S.W.2d 459 (Tex. App.-Fort Worth 1985, no writ).

Further CW's argument is not that (state) law validates her ceremonial marriage to the deceased, but that under (state) her invalid, putative marriage provides "civil effects" comparable to those of a valid marriage to a party entering into it in good faith. CW describes this as follows in her request for review:

> The words `civil effects' are used without restriction, and necessarily embrace all civil effects given to marriage by the law; or, in the language of Marcade in commenting on the identical article [to Article 96 of the Civil Code of (state)] in the French Code, such a marriage, 'although actually null, has the same effects as if it were not null,--the ordinary effects of a valid marriage." * * * Every marriage, though invalid, if contracted in good faith, produces the effects of a valid marriage in the interval between the celebration and the judicial declaration of nullity. When such declaration intervenes, the marriage produces no further effect; but, be it understood, ***the effects produced remain forever.*** I Marcade, 525.

Thus, CW recognizes that her ceremonial marriage to the deceased in (state) was "null" or invalid under (state) law. Therefore, if we were to apply (state) law to determine the marriage's validity, we would still find it invalid. The doctrine that we look to the law of the state in which the marriage was celebrated to determine its validity certainly does not mean that we would adopt the law of any other state concerning the effects of marriage. For instance, if a couple validly married in a common-law marital property state moves to Texas, this couple certainly is subject to the Texas community property laws. Similarly, even if (state) law gives a party to an invalid marriage property rights not granted in Texas, this does not mean that such rights would exist in Texas.

However, we need not determine this issue in affirming the decision of this hearing officer. CW did not bring up the issue of the application of (state) law until final argument and never requested that the hearing officer take official notice of (state) law. Without such a request, it was not error for the hearing officer not to make findings concerning CW's good faith or the applicability of (state) law. Without such findings, we have no basis to review the hearing officer concerning this issue.

CW argues that BW is precluded from claiming death benefits because she did not file a Claim for Death Benefits prior to the BRC. The hearing officer ruled that her claim for death benefits was timely if filed within one year after the date of death. Section 409.007(a) provides that "[a] person must file a claim for death benefits with the commission not later than the first anniversary of the date of the employee's death." BW met this statutory requirement. Nor did BW avoid the BRC process in that the BRC report shows that she presented her position at the BRC. We find no error here.

The only argument that CW makes that SS is not entitled to benefits is that his rights are dependent upon the rights of his mother, BW. Having found the hearing officer was correct in finding BW was the deceased's wife at the time of his death, we affirm the hearing officer in concluding that SS is an eligible beneficiary.

CW argues that XS is not entitled to benefits in that neither he nor his representative attended the CCH. Both XS, a minor, and his representative apparently live in (state). The BRC report reflects that their position was presented at the BRC. At the CCH, the ombudsman presented evidence in behalf of XS's claim. The hearing officer appears to have implicitly found good cause for the failure to attend the hearing and the circumstances certainly support such a finding. We have previously held that the failure to attend to a CCH is a matter for an administrative violation and will not preclude a party from presenting evidence. Texas Workers' Compensation Commission Appeal No. 941679, decided February 2, 1995; Texas Workers' Compensation Commission Appeal No. 950044, decided February 21, 1995.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Philip F. O'Neill
Appeals Judge