APPEAL NO. 970453

This appeal arises under the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). On April 12, 1996, a contested case hearing (CCH) was held in (city), Texas, with the record held open until June 17, 1996, when it closed. (Hearing officer) presided as hearing officer. No oral testimony was presented at the April 12, 1996, CCH. The issue at the April 12, 1996, CCH was who were the eligible beneficiaries for death benefits in this case. The hearing officer determined that VW, RW, QW, (hereinafter referred to as claimants), and JD, and KD, were not eligible beneficiaries and that the sole eligible beneficiary was JW.[1] On appeal, VW, who claimed to be the common-law wife of the decedent, contended that the hearing officer erred in refusing to consider documentation of her beneficiary status and in determining that she was not entitled to death benefits. RW, a disabled adult who was alleged to be a dependent of the decedent, and QW, the minor dependent child of the decedent, also contended that the hearing officer erred in refusing to consider documentation regarding their status as death beneficiaries. JD and KD, the decedent's alleged dependent grandchildren, did not appeal the hearing officer's adverse determinations and they became final. Section 410.169. The hearing officer had refused to consider the documentation of beneficiary status of VW, RW, and QW because she determined that it was not timely submitted by their attorney, as the hearing officer had ordered on Friday, April 19, 1996. In Texas Workers' Compensation Commission Appeal No. 961447, decided September 9, 1996, we reversed the hearing officer's decision and order and remanded the case for a hearing to consider the affidavit of claimants' attorney, Mr. R, as well as the other evidence to be developed regarding when Mr. R received the hearing officer's April 19, 1996, order for submission of evidence, and regarding when Mr. R "submitted" the documentation as ordered. The hearing officer held a hearing on remand in this regard on February 6, 1997. The hearing officer determined that the April 19, 1996, order was received by Mr. R's "office" on Friday, April 19, 1996, that the documentation was not timely filed within 10 days, or by April 29, 1996, and that, because she would not consider their documentary evidence, VW, RW, and QW were not eligible beneficiaries. Claimants again appeal, contending that the hearing officer erred in determining that they were not eligible beneficiaries, that Texas Workers' Compensation Commission (Commission) orders may not be sent by facsimile transmission, that the Commission order was deemed received five days after the April 19, 1996, mailing, that a legible facsimile transmission was not received by Mr. R until Monday, April 22, 1996, and that the documentation was timely filed and VW, RW, and QW are eligible beneficiaries.

[1]JW filed for death benefits as a dependent child of the decedent. It is not disputed that JW was entitled to death benefits. JW was apparently the child of a third party and the decedent. The district court adjudicated decedent's paternity of JW in 1989.

Mr. R also incorporated his brief and arguments from the previous appeal in this case. Respondents JW and the carrier did not respond on appeal.

DECISION

We affirm in part and reverse and render in part.

It is undisputed that the decedent died on (date of injury), from a compensable injury. Therefore, his legal beneficiaries were entitled to death benefits under the 1989 Act. This case involves the claim of an alleged putative common-law spouse and children of the decedent. At the CCH, carrier did not dispute compensability, but merely sought a decision regarding the identities of the death beneficiaries.

We must first address the claimants' contention that the hearing officer abused her discretion in refusing to consider the claimants' documentary evidence regarding their claims. We will first review the procedural background of this case.

The hearing officer noted that VW, RW, QW, and Mr. R had not appeared at the April 12, 1996, CCH in [the field office] regarding these claims. Because the parties and Mr. R had not appeared for that CCH, the hearing officer subsequently ordered Mr. R to file the documentation for these claims within 10 days. In her first decision and order, the hearing officer determined that she would not consider the documentary evidence he filed regarding these claims because it was not "timely submitted" by April 29, 1996. The hearing officer further stated that, because the documentary evidence was not filed within the 10-day deadline she set, it was "appropriate" to determine that VW, RW, and QW were not eligible beneficiaries.

In an April 19, 1996, letter to Mr. R, the hearing officer had stated:

> It is generally my practice to grant late requests for continuance based on the sudden occurrence of a family emergency, and I would have been happy to do so in this case had I been advised of the emergency before arriving in the [field office].

* * * *

> To put matters quite bluntly, your handling of this matter tends to indicate that you hold Commission proceedings in relatively low esteem and consider them amenable to rescheduling solely at your convenience. . . .
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> * * * *
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> Commission personnel in the [field office] have advised me that your mother was ill. While I am truly sorry that she was ill, and I wish her speedy recovery, I also wish to advise you that on the morning of [the April 12, 1996, CCH] [my child] had a fever of 104 degrees . . . . I made alternate arrangements for my son's care, so that I could [be at the CCH]. Since, despite the efforts of all other persons involved in the case, you were unavailable [at the time of the CCH], your clients' [CCH] will be conducted in writing.

The hearing officer noted that Mr. R's secretary did not contact the Commission regarding the motion for continuance until late in the afternoon, that the Commission claim file did not reflect that Mr. R was the attorney handling the case, that Mr. R's secretary had apparently contacted claimants and told them not to appear at the CCH, and that Mr. R had not found someone else to appear at the CCH in his place. The hearing officer took official notice of Dispute Resolution Information System (DRIS) notes that stated that Mr. R's secretary called to say that another attorney could not "cover because he was taking depositions."

> The April 19, 1996, order said:
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> Within 10 days of receiving this order, Attorney [Mr. R], shall submit . . . all documentary evidence . . . in support of his client's [sic] position . . . .

Some of the documentary evidence was filed on April 30, 1996, and some was filed on May 1, 1996. We remanded for a hearing regarding when Mr. R received the April 19, 1996, order and at the February 6, 1997, CCH on remand, Mr. R testified that: (1) during April 1996 the facsimile (fax) machine in his office had been intermittently turning out "black" or illegible copies; (2) at times it was not clear who sent the faxes; (3) he did not receive the fax and did not know of its ever having been faxed until he received the hearing officer's first decision and order dated June 26, 1996; (4) the problem with the fax machine was inferior cartridges and this problem was eventually resolved; (5) he received the April 19, 1996, order on Monday, April 22, 1996; and (6) he had been unable to attend the April 12, 1996, CCH because he had to fly to New Jersey (State A) on April 11, 1996, to see about his 80-year-old mother, who was ill, and that he brought his mother back to Texas. Ms. P, Mr. R's

secretary and legal assistant, testified to similar facts regarding the problems with the fax machine, said that she did not receive the April 19, 1996, faxed order, and that she first received the April 19, 1996, order by mail on April 22, 1996.

Again, the hearing officer refused to consider the documentation because it was not filed within 10 days. The hearing officer stated in the decision and order after remand:

> Although the hearing officer has little reason to doubt [Mr. R's] testimony to the effect that he had no personal knowledge of the hearing officer's order of April 19 until the following Monday, April 22, the fact remains that [Mr. R] would have been considered to have received the order on the date that it was received at his place of business, even though he may have been unaware of the order until sometime thereafter.
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> * * * *

The hearing officer also stated that it was unlikely that the attorneys in Mr. R's office would "permit the [fax] machine to remain intermittently inoperable" and that "Mr. R has narrowly failed to persuade the hearing officer that the scenario he has proposed is more likely than not to have occurred."

To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in the admission or exclusion of evidence, an appellant must first show that the admission or exclusion was in fact an abuse of discretion, and also that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. Texas Workers' Compensation Commission Appeal No. 92241, decided July 24, 1992; *see also* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). The failure to attend 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.

Section 410.163 states, in pertinent part, that:

> (b) A hearing officer shall ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made.

* * * *

The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established. As an appeals body, we will not substitute our judgment for that of the hearing officer when the determination 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); Texas Workers' Compensation Commission Appeal No. 950456, decided May 9, 1995.

The Appeals Panel has indicated in other contexts that whether a fax transmission may constitute written notice is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 951239, decided September 1, 1995. The hearing officer apparently found that the attorney had "received" the April 19, 1996, order the day that it was faxed. However, there was uncontroverted evidence from Mr. R, who represented as an officer of the court that the fax machine was not working and that the document, in the form of a legible order, did not arrive so that the order could be "received" by Mr. R. His testimony was corroborated by Ms. P's testimony. Because there was no evidence that a legible faxed order was received by Mr. R on April 19, 1996, we conclude that the hearing officer erred in refusing to consider the documentary evidence filed by Mr. R. *See* Texas Workers' Compensation Commission Appeal No. 941196, decided October 20, 1994 (regarding uncontroverted evidence and receipt of written notice in a 90-day rule case). If the order was received by Mr. R on Monday, April 22, 1996, the documentation of the claimants' claims was timely filed because it was filed on April 30, 1996, and May 1, 1996, which was within 10 days of the April 22, 1996, receipt. We decline to uphold what amounts to the ultimate sanction of barring a party's evidence based on a record with no evidence to support a determination that the faxed order was received on April 19, 1996. *See generally* Texas Workers' Compensation Commission Appeal No. 962387, decided January 14, 1997. The hearing officer's determinations in Findings of Fact Nos. 15 and 18 that Mr. R (or his office) received the April 19, 1996, order on April 19, 1996, and did not timely submit the documentation are so against the against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we reverse them. Cain, *supra*. Any legal conclusion that claimants' documentation of their claims was not timely filed within 10 days of the receipt of the April 19, 1996, order is incorrect.[2]

[2]We need not address the propriety of the fax transmission of Commission orders and assume, without deciding, that under the facts of this case such transmission was proper.

The hearing officer made findings regarding the excluded documentary evidence in this case and, in her first decision and order, set forth what her findings would be should the Appeals Panel reverse her decision not to admit the documentary evidence. We now consider this documentary evidence and address the merits of these claims.

Regarding the merits of her case, VW contends that the hearing officer erred in determining that she was not entitled to death benefits as the decedent's putative common-law wife. VW filed for death benefits as the decedent's alleged common-law wife. In the first decision and order, the hearing officer denied VW's death benefits because VW knew the decedent was already married and, therefore, was not a putative common-law wife.[3]

In her affidavit, VW stated that: (1) she has lived with the decedent for over 30 years "as man and wife"; (2) she agreed with the decedent to be man and wife; (3) the two held themselves out in the community as man and wife; (4) the two purchased a mobile home, insurance, and other items as man and wife; (5) the two conducted transactions in the community as man and wife; (6) the two had eight children together; and (7) at no time did she have knowledge that the decedent was or may still have been married to another woman.

A marriage certificate shows that the decedent married WE on August 15, 1959. The record does not contain evidence regarding a divorce. WE is not a claimant in these proceedings. It was represented that VB, VW, and RH, were all the same person. VW stated in her affidavit that the decedent is the natural father of RW. In affidavits, Mr. HE and Ms. W stated that the decedent represented that RW was his son. Some school reports for RW were introduced and they listed RW's name as R-- E-- B-- and said under "parent or guardian," "[decedent] and [VW]." In affidavits, Mr. HA, Mr. M, Ms. TO, Ms. TU, Ms. BR, Mr. BU, and Mr. S, stated that the decedent and VW lived together as husband and wife for over 20 years, that they held themselves out as husband and wife, and that they conducted themselves as such. A certificate of ownership states that a manufactured home was owned by the decedent and "[RHW]". A signed and notarized statement dated April 30, 1996, states that VW is "sometimes known as [RHW]," that at no time did VW have knowledge that the decedent "was or may have been married to another woman," and that, up until the decedent's death, she believed they were married with no legal impediments. VW's driver's license states that her name is "[RHW]".

[3]The hearing officer also denied the benefits because she refused to consider the documentary evidence of VW's claim, but we have already determined that this was an abuse of discretion.

A putative marriage is one which was entered into in good faith by at least one of the parties, but which is invalid by reason of an existing impediment on the part of one or both of the parties. Garduno v. Garduno, 760 S.W.2d 735 (Tex App.-Corpus Christi 1988, no writ). A putative marriage may arise out of either a ceremonial or informal marriage. Rey v. Rey, 487 S.W.2d 245 (Tex. Civ. App.-El Paso, no writ). A putative marriage is based upon good faith and ignorance of the impediment. Esparza v. Esparza, 382 S.W.2d 162 (Tex. Civ. App.-Corpus Christi 1964, no writ). If the alleged putative spouse is aware that a prior marriage existed at one time or if a party to an alleged putative marriage receives reliable knowledge of an impediment to the marriage, that party cannot simply declare disbelief of information and continue as if it were untrue. Instead, that party has a duty to investigate further and not act blindly or without reasonable precaution. Garduno, *supra.*

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. . . .
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> * * * *

Section 408.182(f)(3) provides as follows in relevant part:

> "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.

Rule 132.3(c) (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 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.

The hearing officer determined that VW was not an eligible spouse. In the discussion portion of the first decision and order, the hearing officer noted that she viewed with some "skepticism" VW's statement that she did not know of the decedent's prior marriage because one of VW's children, RW, used the surname "[B]" (B--) "as late as 1995."

However, we note that other documents, such as QW's birth certificate, show that VW also used the last name "B--." The fact that a child uses his mother's last name, which is different than his father's last name, shows that, perhaps, the child was born before the mother married the father. At most, this evidence shows that perhaps RW was born before any alleged putative common-law marriage began and that RW merely continued to use the name "B--." Evidence that a child's last name is the same as his mother's previous name does not indicate that the mother has any *knowledge* about her alleged *husband's* previous marriage. The hearing officer did not mention other reasons, if any, why she found that VW's affidavit evidence was not credible. There was no evidence in the record that VW knew or had reason to know of the decedent's prior marriage.

Good faith is a question of fact and, generally, we will not substitute our judgment for that of the hearing officer regarding fact issues. Texas Workers' Compensation Commission Appeal No. 941639, decided January 20, 1995. However, in this case, the hearing officer's explanation for disbelieving uncontroverted affidavit evidence is not based on fact and solid reasoning. The hearing officer is normally in the better position for judging credibility. However, the witness, VW, was not present before the hearing officer when the hearing officer made this determination in the first decision and order; the determination was made from affidavit evidence. Based on the uncontroverted evidence, we determine that Finding of Fact No. 11 and Conclusion of Law No. 4 are so against the against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we reverse them. Cain, *supra*. We render a decision that VW maintained a good faith belief that she had previously established a common-law marriage with the decedent, that she is a putative common-law spouse, and that she is an eligible beneficiary.

QW, the decedent's minor child, contends that the hearing officer erred in determining that she was not entitled to death benefits. The hearing officer denied her benefits because QW's attorney, Mr. R, did not file her claim within 10 days of the hearing officer's April 19, 1996, order.

The only reason the hearing officer made a legal conclusion that QW was not an eligible beneficiary was because Mr. R did not file the above-mentioned documentary evidence within 10 days of the April 19, 1996, order. We note that the hearing officer stated that RW and QW would have been eligible beneficiaries if the hearing officer had considered the documentary evidence. We have already determined that the hearing officer abused her discretion and that the hearing officer should have considered this evidence. Having reviewed the unappealed determinations regarding QW and the hearing officer's decision

and order, we reverse the hearing officer's determination that QW is not an eligible beneficiary and render a decision that QW is an eligible beneficiary.

RW contends the hearing officer erred in determining that he was not entitled to death benefits. In an unappealed finding, the hearing officer determined that RW was a natural child or stepchild of the decedent and that he was dependent on the decedent because of a mental disability. The hearing officer denied RW's death benefits because Mr. R did not file RW's claim within 10 days of the hearing officer's April 19, 1996, order. We have already held that the hearing officer should have considered the documentary evidence regarding this claim. Having reviewed the unappealed determinations regarding RW and the hearing officer's decision and order, we reverse the hearing officer's determination that RW is not an eligible beneficiary and render a decision that RW is an eligible beneficiary.

We reverse the hearing officer's determination that VW, RW, and QW are not eligible beneficiaries and render a decision that VW, RW, and QW are eligible beneficiaries. We affirm that part of the decision and order that determines that JD and KD are not eligible beneficiaries and that JW was an eligible beneficiary.

Judy L. Stephens
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Robert W. Potts
Appeals Judge