

APPEAL NO. 971244

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 June 5, 1997. With regard to the disputed issue at the CCH, she determined that respondent (claimant) is a legal beneficiary of decedent. The appellant (carrier) appeals, seeking a reversal of the decision, and the claimant does not respond.

DECISION

We affirm.

On April 21, 1993, the decedent started working as a construction worker for (employer), based in city 1, Texas. On _____, while in the course and scope of his employment in city 2, Texas, he expired as the result of being struck by a motor vehicle. He was 21 years old. It is undisputed that he was unmarried and had no children at the time of his death and that the claimant is his mother. She is the only person claiming to have been dependent upon him.

"An insurance company shall pay death benefits to the legal beneficiary if the compensable injury to the employee results in death." Section 408.181(a). If there are no other eligible beneficiaries, "the death benefits shall be paid in equal shares to surviving dependents of the deceased employee who are parents . . ." Section 408.182(d). "A parent . . . of a deceased employee who was dependent on the employee on the day of death is entitled to receive death benefits. . . ." Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE 132.6(a) (Rule 132.6(a)). "'Dependent' means an individual who receives a regular or recurring economic benefit that contributes substantially to the individual's welfare and livelihood . . ." Section 401.011(14). In determining dependent status, we turn to Rule 132.2:

Determination of Facts of Dependent Status

- (a) This section applies to a person who claims death benefits as a dependent of the deceased employee.
- (b) A benefit which flowed from a 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. This presumption may be overcome by credible evidence. The burden is on the claimant to prove that benefits, which flowed less frequently than once a month, were regular or recurring at the time of the employee's death.
- (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.

- (d) Net resources for the purpose of subsection (b) of this section are 100 percent of all wage and salary income and all other income including non-pecuniary income and all income of the person's spouse, less 100 percent of social security taxes and federal income tax withholding.
- (e) The person claiming to be a dependent shall furnish sufficient information to enable the commission [Texas Workers' Compensation Commission] to accurately identify the net resources and to establish the existence of the economic benefit claimed. This information may include, but is not limited to, tax returns, a financial statement of the individual, and check stubs.

* * * *

The claimant testified at the CCH that the decedent sent money to her at her home in Mexico. The hearing officer, in her "Statement of the Evidence," states that the payments were not monthly. Therefore, we cannot presume the benefits were regular or recurring. Rule 132.2(b). For these reasons, our analysis will focus on whether the evidence supports a decision that the claimant met her burden of proof to show the benefits "were regular or recurring at the time of the employee's death." *Id.*

The record contains customer's receipts from money orders, some bearing the claimant's name as payee and the decedent's name as payor, reflecting the following dates and amounts:

October 19, 1992:	\$2,100.00
March 15, 1993:	300.00
May 5, 1993:	700.00
June 22, 1993:	500.00
August 6, 1993:	500.00
August 28, 1993:	1,000.00
December 17, 1993:	1,000.00
April 20, 1994:	200.00
April 30, 1994:	500.00
June 17, 1994:	1,700.00
December 22, 1994:	600.00

The claimant testified that she received the payments as listed above and that "sometimes" the decedent also sent her cash. She said he sent her money each month, but she did not specify the months to which she was referring. The claimant testified that her monthly expenses were and are \$200.00 per month. The decedent's brother and the claimant's son, Mr. S, testified that he works for the employer. He and the claimant said the decedent was the claimant's primary supporter. Mr. S said that he has two other brothers who work for the employer and a sister who works in the United States, but neither he nor any of them sent money to the claimant after the decedent started to send money to her. He said he did not know whether his three other siblings, who live in Mexico, sent money to the claimant. He said that the decedent developed a wart in his eye sometime after he came to Texas, went home to Mexico for treatment and missed three months of work.

The hearing officer made findings of fact that the decedent provided greater than 20% of the claimant's net resources and that the benefit contributed substantially to her welfare and livelihood. She also made a finding of fact that "[t]he benefits provided to [the claimant] by Decedent were recurring." The "Statement of the Evidence" indicates she believed the December 1994 to August 21, 1995, gap in payments was explained by the time the decedent missed work for his eye problem. The carrier argues that the decedent only sent \$600.00 to his mother in the 14 months prior to his death and that the claimant's testimony as to additional cash payments should not have been believed. It maintains that the claimant was not a dependent beneficiary because the decedent's economic support to her was not regular or recurring at the time of his death. The carrier does not concede that the decedent's payments contributed substantially to the claimant's welfare. However, its argument on appeal centers on whether the benefits were regular or recurring.

An eligible beneficiary must show that benefits received from the decedent were "regular or recurring at the time of the employee's death." Rule 132.2(b). "At the time of death" is not defined in the 1989 Act or the Commission's rules, but regular or recurring payments are, by definition, payments made over some period of time. The applicable period for determining the regularity or recurrence of benefits in an analysis of dependent status is not defined. While Rule 132.2(c), dealing with substantiality of the contributions, refers to "net resources in the period" and directs us to Rule 132.2(d), that subsection defines "net resources" without defining "the period." The carrier argues that the applicable period for Rule 132.2(b) is the year preceding the decedent's death. We find no authority for this assertion.

In Texas Workers' Compensation Commission Appeal No. 970753, decided June 9, 1997, the record contained an uncontroverted sworn affidavit from the beneficiaries. It stated that they "relied heavily upon" the deceased employee's financial support, that he "sent money home so [they] could survive financially" and that without the deceased employee they had "severe struggles simply to survive." *Id.* The hearing officer determined that the eligible beneficiaries did not meet their burden of proof to show the benefits received were regular or recurring and we reversed the decision. We held that, in the face of an uncontroverted affidavit, the decision that the payments were not regular

was against the great weight of the evidence. Although that case dealt with the regularity, rather than the recurrence of the benefits, that case is instructive. Under Rule 132.2(b), the benefits need only be regular *or* recurrent and in the case in review the hearing officer found they were recurrent. The relevant time period for analysis is for the hearing officer to consider on a case-by-case basis.

We hold that the determinations as to whether the claimant received regular or recurring benefits at the time of the decedent's death and whether those benefits contributed substantially to her welfare and livelihood were questions of fact for the hearing officer to decide. The 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. Section 410.165(a). It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). 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. Given the record of payments from the decedent to the claimant, including the money order receipts and her testimony, we conclude that the determination that the claimant was a dependent of the decedent is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust.

The decision is not against the great weight and preponderance of the evidence and, therefore, we affirm.

Christopher L. Rhodes
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Judy L. Stephens
Appeals Judge