

APPEAL NO. 031434
FILED JULY 16, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 2, 2003. The hearing officer resolved the disputed issues by deciding: (1) that respondent 1 (claimant beneficiary 1), decedent's son, is the proper legal beneficiary of the decedent, thus entitling him to death benefits; (2) that respondent 2 (claimant beneficiary 2), decedent's common law spouse, is the proper legal beneficiary of the decedent, thus entitling her to death benefits; and (3) that the appellant (carrier) did not waive its right to dispute the legal beneficiaries of the decedent by not timely contesting the compensability of the decedent's fatal injury. The carrier appealed, arguing that the hearing officer's determination of proper legal beneficiaries is against the great weight and preponderance of the evidence. Claimant beneficiary 2 responded, urging affirmance. The appeal file does not contain a response from claimant beneficiary 1. The hearing officer's carrier waiver determination was not appealed, thus, that determination has become final pursuant to Section 410.169.

DECISION

Affirmed.

It is undisputed that the decedent suffered a fatal injury on _____. The carrier has accepted that the decedent's death resulted from a compensable injury, however it disputes whether claimant beneficiary 1 and 2 are proper legal beneficiaries entitling them to death benefits.

CLAIMANT BENEFICIARY 1

The carrier asserts that claimant beneficiary 1 is not a proper legal beneficiary because he did not meet the requirements for dependency as provided by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 132.2 (Rule 132.2). Rule 132.2(b) provides, in part, that 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 and that the presumption may be overcome by credible evidence. Rule 132.2(c) provides, in part, that 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 for which the benefit was paid, is an economic benefit which contributed substantially to the person's welfare and livelihood and that 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. The hearing officer was persuaded by claimant beneficiary 1's testimony and the evidence presented that the decedent provided 37% of claimant beneficiary 1's total net resources. The hearing officer determined that the testimony provided sufficient evidentiary support that

claimant beneficiary 1 was dependent under Rule 132.2(b) and (c), in that the decedent contributed equal to or greater than 20% of claimant's beneficiary 1's net resources.

The carrier asserts that there was insufficient documentation to establish that claimant beneficiary 1 was dependent on the decedent. Rule 132.2(e) states that to enable the Texas Workers' Compensation Commission to accurately identify a claimant's net resources and to establish the existence of the economic benefit claimed, information such as tax returns, financial statements, and check stubs may be used. While written records indicating the amount of a claimant beneficiary's net income and the amount and frequency of the deceased's contributions is preferable, it is not mandatory, and lack of documentary evidence goes to the weight to be given the testimonial or other written evidence. Texas Workers' Compensation Commission Appeal No. 990953, decided June 16, 1999; Texas Workers' Compensation Commission Appeal No. 961330, decided August 23, 1996.

The issue of a claimant beneficiary's dependency for purposes of benefits under the 1989 Act is generally a factual matter for the hearing officer's determination. Texas Workers' Compensation Commission Appeal No. 92523, decided November 18, 1992. The evidence sufficiently supports the hearing officer's determination that claimant beneficiary 1 is a proper legal beneficiary of the decedent and that he is entitled to death benefits. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust and we do not find them to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

CLAIMANT BENEFICIARY 2

The carrier asserts that claimant beneficiary 2 is not a proper legal beneficiary because her divorce from her previous spouse was not final until April 3, 2001, a date that is after the date of the decedent's death. An Order from the Circuit Court of (County, State, signed on _____, reflects that claimant beneficiary 2 was granted a divorce on that date and that the issues of support and property distribution would be determined at a later date. A Final Divorce Decree signed on April 3, 2001, from the same court reflects that support and property issues were decided, and that a divorce was again granted by the decree. The hearing officer was persuaded from the evidence that claimant beneficiary 2's divorce was final on December 22, 2000.

The carrier, in the alternative, asserts that even if claimant beneficiary 2's divorce was final on December 22, 2000, the evidence did not establish that she was the decedent's common law spouse. TEX. LAB. CODE ANN. § 2.401(a)(2) (Vernon's 2002) provides that in a judicial, administrative, or other proceeding, the marriage of a man and woman may be proved by evidence that the man and woman 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. The existence of a common-law marriage is a question of fact for the hearing officer to decide. Texas Workers'

Compensation Commission Appeal No. 961010, decided July 10, 1996. The 1989 Act provides that the hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). There was conflicting evidence on the issue of whether the deceased and the claimant entered into a common-law marriage. Where there are conflicts in the evidence, the hearing officer resolves the conflicts and determines what facts the evidence has established.

A review of the hearing officer's decision demonstrates that he was persuaded by the testimony and documentary evidence presented at the hearing that a common-law marriage was established. The evidence sufficiently supports the hearing officer's determination that claimant beneficiary 2 was a proper legal beneficiary of the decedent, and that she was entitled to death benefits. Nothing in our review of the record demonstrates that the hearing officer's determination in that regard is so contrary to the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination. Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986); Cain, *supra*.

The hearing officer specifically found that a judicial court of the State of Texas decreed on February 6, 2002, that claimant beneficiary 2 was the common-law spouse of the decedent at the time of his death. The carrier argues in its appeal that the finding cannot be res judicata against it because it was not a party to the heirship proceeding. The hearing officer noted in his Statement of Evidence paragraph that the judgment might be res judicata. The hearing officer made a separate finding of fact that the decedent lived with claimant beneficiary 2 in Texas, they intended to be married, and they held each other out to the general public as married. See TEX. LAB. CODE ANN. § 2.401(a)(2) (Vernon's 2002). The hearing officer did not rely solely on res judicata to determine that claimant beneficiary 2 was a proper legal beneficiary of the decedent.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **TEXAS PROPERTY & CASUALTY INSURANCE GUARANTY for Colonial Casualty Insurance Company**, an **impaired carrier** and the name and address of its registered agent for service of process is

**MARVIN KELLY
9120 BURNET ROAD
AUSTIN, TEXAS 78758.**

Veronica Lopez-Ruberto
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Margaret L. Turner
Appeals Judge