

APPEAL NO. 061381-s
FILED AUGUST 16, 2006

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 2, 2006. The hearing officer resolved the disputed issue by deciding that respondent, (claimant/beneficiary, hereinafter referred to as claimant), is a proper legal beneficiary of the deceased (sometimes referred to herein as decedent), and is entitled to death benefits. The appellant (carrier) appealed, arguing that the hearing officer's determination is not supported by sufficient evidence and is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Additionally, the carrier argues that the hearing officer committed reversible error when he determined that he was bound to accept the validity of a final judgment rendered by a court of competent jurisdiction on the issue of the validity of the claimed marriage. The claimant responded, contending that the doctrines of res judicata and collateral estoppel apply and that the Texas Department of Insurance, Division of Workers' Compensation (Division) is bound by the judgment entered by the district court.

DECISION

Reversed and remanded.

The parties stipulated that the deceased sustained a compensable injury on _____, that resulted in his death. Claimant asserted that she and the decedent had entered into an informal marriage, as defined by the Texas Family Code (hereafter Family Code), prior to his death. At issue was whether the claimant was the surviving spouse of the decedent, and if so, whether she is a proper legal beneficiary under the 1989 Act.

The decedent's death certificate listed him as having never been married; the decedent's life insurance policy application listed him as single and named his cousin as beneficiary; claimant's tax returns for both 2002 and 2003 identified her marital status as single, and one obituary identified the claimant as the decedent's girlfriend; while another listed her as a close friend of the decedent. Claimant testified that she and the decedent held themselves out to some people as being married, but did not tell others because her parents were not likely to accept the validity of a marriage that did not take place in the church. There was conflicting evidence presented regarding the elements required by the Texas Family Code § 2.401(a)(2) to establish a common-law marriage.

The Family Code pertaining to proof of informal marriages, provides that in any judicial, administrative, or other proceeding, a marriage may be proved by evidence that the couple "agreed to be married, and after that agreement they lived together in this state as husband and wife and there represented to others that they were married." The evidence reflected that a jury trial had been held in district court to determine the issue of whether the claimant and the decedent were married. On May 15, 2006, a final

order was signed by the district judge who presided over the jury trial documenting the prior interlocutory order of March 28, 2006, ordering the existence of a legally binding, informal marriage, prior to and as of _____, and providing that said order became final. The hearing officer correctly noted that there was no evidence that the final judgment of the district court had been abated, appealed, or overturned. The hearing officer noted that the couple lived apart for most of “their marriage” and that “the couple’s failure to maintain a single household may be some evidence that they did not fulfill the requisites for an informal marriage.” The hearing officer then noted that he “is bound to accept the validity of a final judgment rendered by a court of competent jurisdiction on the issue of the validity of the couple’s marriage.”

In Appeals Panel Decision (APD) 961010, decided July 10, 1996, the claimant beneficiary contended a probate court order declaring informal marriage and heirship collaterally estops the hearing officer from determining the issue of whether the claimant beneficiary and deceased were married at the time of the decedent’s death. In that case, the Appeals Panel held that the probate court order did not collaterally estop the hearing officer from determining the issue of whether a common-law marriage existed between the decedent and claimant beneficiary.

APD 961010 decided July 10, 1996, stated:

“Collateral estoppel, frequently referred to as issue preclusion, bars relitigation of any ultimate issue of fact actually litigated and essential to the judgment in a prior suit, regardless of whether the second suit is based on the same cause of action. Wilhite v. Adams, 640 S.W.2d 875 (Tex. 1982). A party seeking to invoke this doctrine must establish that the facts sought to be litigated in the second action were fully and fairly litigated in the prior action; that those facts were essential to the judgment in the first action; and that the parties were cast as adversaries in the first action. Benson v. Wanda Petroleum Company, 468 S.W.2d 316 (Tex. 1971). In other words, there must be identity of parties and issues between two proceedings.”

APD 961010 further cited the Texas Supreme Court case of Benson v. Wanda Petroleum Company, *supra*: “Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy, and, where not so, that, at the least, the presently asserted interest was actually and adequately represented in the prior trial.” The court has further stated that the doctrine applies only when the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. Tarter v. Metropolitan Savings & Loan Association, 744 S. W. 2d 926 (Tex. 1988).

In Barr v. Resolution Trust Corp., 837 S.W.2d 627 (Tex. 1992), the Texas Supreme Court noted that, broadly speaking, res judicata is the generic term for a group of related concepts concerning the conclusive effects given final judgments, and that within this general doctrine, there are two principal categories: (1) claim preclusion

(also known as *res judicata*); and (2) issue preclusion (also known as collateral estoppel). The Supreme Court further noted that *res judicata*, or claims preclusion, prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit, and that issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit. In Barr, the Supreme Court reaffirmed the “transactional” approach to *res judicata*, stating that a subsequent suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of due diligence, could have been litigated in a prior suit. The doctrine of *res judicata* has been applied to administrative action that has been characterized by the courts as adjudicatory, judicial, or quasi-judicial. Bryant v. L.H. Moore Canning Co., 509 S.W.2d 432 (Tex. Civ. App.-Corpus Christi, 1974), cert. denied 419 U.S. 845. The doctrine of *res judicata* would not apply to an entity which was not a party, or in privity with a party, to the first proceeding. See generally Amstadt v. U.S. Brass Corp., 919 S.W.2d 644 (Tex. 1996) regarding the elements of *res judicata*.

No prevailing definition of privity exists that automatically applies to all cases involving *res judicata*. Ayre v. J. D. Bucky Allshouse, P.C., 942 S.W.2d 24, 27 (Tex. App.-Houston [14th Dist.] 1996, writ denied). Rather the determination of who are privies requires careful examination of the circumstances of each case. *Id.* A person may be in privity with a party in at least three ways: (1) he can control the action even though not a party to it; (2) his interests can be represented by a party; or (3) he can be a successor in interest, deriving his claim through a party to the prior action. Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, (Tex. 1996).

Privity connotes those who are in the law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right. Gaughan v. Spires Council of Co-Owners, 870 S.W.2d 552, 555 (Tex. App.-Houston [1st Dist.] 1993, no writ); Amstadt. However, privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same facts. Ayre. An insurer and its insured do not share privity when they possess a conflict of interest as to the subject matter of the litigation. See Employers Cas. Co. v. Block, 744 S.W.2d 940, 943 (Tex. 1988), overruled on other grounds State Farm Fire and Cas. Co. v. Gandy, 925 S.W.2d 696, 714 (Tex. 1996).

In the instant case, the carrier was not a party to the district court suit. The carrier could exercise no control over the suit and was not a successor in interest. What is left to be examined is whether or not its interest was represented by the parties who appeared in the district court judgment. The attorney who represented the claimant at the CCH stated in his opening statement that the employer was non-suited on the day of the jury trial held to consider whether the decedent and the claimant were married on the date of his death. The trial continued against the operator and owner of the well site. The style of the court charge and interlocutory order in evidence reflect this to be the case as does the final judgment. The attorney represented that the employer had

participated in pre-trial discovery although it did not participate in the actual trial to determine the decedent's marital status.

To determine whether subsequent parties are in privity with prior parties, we examine the interests the parties shared. See Texas Real Estate Comm'n v. Nagle, 767 S.W.2d 691, 694 (Tex. 1989). Privity exists if the parties share an identity of interests in the basic legal right that is the subject of the litigation. While the issue in both the district court proceeding and the CCH was whether the claimant and the decedent had a common-law marriage at the time of his death, it does not automatically follow that the interest of the carrier and the interest of the owner and operator of the well site where the decedent's injury occurred, are the same.

There was no allegation that the decedent had any children. There was evidence at both the district court proceeding and the CCH that both of the decedent's parents were living. Section 408.183(b) provides that an eligible spouse is entitled to receive death benefits for life or until remarriage. On remarriage, the eligible spouse is entitled to receive 104 weeks of death benefits, commuted as provided by Commissioner rule. However, under the facts as presented, the other potentially applicable statutory provision dealing with the duration of death benefits provides in Section 408.183(g) that any other person entitled to death benefits is entitled to receive death benefits until the earlier of: the date the person dies or the date of the expiration of 364 weeks of death benefit payments. As noted above, privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same facts. Under the facts as presented, we cannot agree that the carrier was in privity with any party that participated in the district court proceeding. Therefore, the carrier cannot be bound by the district court judgment.

Although the hearing officer found that the claimant was the surviving spouse of the decedent, he failed to make findings of fact regarding the specific elements required by the Family Code to establish an informal marriage. The hearing officer's belief that he was bound by the district court judgment under the facts of this case is in error. Therefore, we remand this case back to the hearing officer to make findings of fact, based on the evidence in the record, whether the claimant and the decedent agreed to be married, and if so, whether after such agreement they lived together in the state of Texas as husband and wife, and represented to others that they were married. If the hearing officer determines that such marriage existed, the hearing officer should then make a determination regarding whether the claimant was an eligible spouse such that she is entitled to the payment of death benefits.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section

662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL OLIVER, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Veronica L. Ruberto
Appeals Judge