

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Elk Mountain Ski Resort, Inc.,	:	
Petitioner	:	
	:	
v.	:	No. 1017 C.D. 2014
	:	SUBMITTED: October 3, 2014
Workers' Compensation Appeal	:	
Board (Tietz, deceased, and	:	
Tietz-Morrison),	:	
Respondents	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION BY
JUDGE LEADBETTER

FILED: April 7, 2015

Elk Mountain Ski Resort, Inc. (Employer) petitions for review of the order of the Workers' Compensation Appeal Board (Board) that affirmed the decision of the Workers' Compensation Judge (WCJ) granting the fatal claim petition filed by Tara Tietz-Morrison (Claimant) as the surviving wife of Wayne Tietz (Decedent) and guardian of their children.

Employer questions (1) whether the WCJ failed to require Claimant to establish a common-law marriage by clear and convincing evidence, (2) whether Claimant was competent to testify to establish a common-law marriage contract with Decedent under Section 5930 of the Judicial Code (Dead Man's Act), *as amended*, 42 Pa. C.S. § 5930, and (3) whether Claimant's documentary evidence postdating the 2005 abolishment of common-law marriages in Pennsylvania could support the alleged June 12, 2004 common-law marriage of Decedent and

Claimant. We reject Employer's argument that the WCJ placed the incorrect burden of proof upon Claimant. We further conclude that Claimant's testimony was not proscribed by the Dead Man's Act, that Claimant established a common-law marriage by clear and convincing evidence, and that her documentary evidence was relevant to the issue of constant cohabitation of Decedent and Claimant and a reputation of their marriage. Accordingly, we affirm.

On November 10, 2011, Claimant filed a fatal claim petition alleging that Decedent died on October 11, 2011 as a result of multiple traumatic injuries sustained in a utility-tractor rollover accident. Claimant listed herself as Decedent's wife and their daughters, Shea and Tarwyn Tietz, as dependents.¹ In a subsequently filed Stipulation, Employer agreed that Decedent's death was caused by work-related injuries, that Decedent's daughters were entitled to weekly death benefits of \$180.18 under Section 307(1)(b) of the Workers' Compensation Act (Act), Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. § 561(1)(b), and that their benefits should be paid to Claimant who was their legal guardian.² The parties did not resolve whether Claimant was legally married to Decedent at the time of his death. They agreed to submit the issue for the WCJ's determination and stipulated that Employer would be entitled to a credit for previously paid death benefits upon the WCJ's determination that Claimant was entitled to death benefits

¹ Claimant also listed as a dependent John Tietz, Decedent's son from his previous marriage, who was over 18 years old. Claimant later withdrew the claim filed on his behalf.

² Under Section 307(1)(b) of the Act, if there is no widow or widower entitled to death benefits, benefits are paid to the guardian of two children in the amount of 42% of the decedent's wages which cannot be less than 50% of the statewide average weekly wage. The parties agreed that Decedent's average weekly wage was \$396.08, less than 50% of the statewide average weekly wage of \$858, and that the children's benefits, therefore, should be 42% of \$429.

as Decedent's surviving wife.³

Before the WCJ, Claimant testified as follows to establish that she and Decedent entered into a common-law marriage contract on June 12, 2004. Claimant is a Native American (Nanticoke and Cherokee). Decedent was also a Native American (Mohawk). As Native Americans, Claimant and Decedent were "very, very much into [their] culture." March 8, 2012 Hearing, Notes of Testimony (N.T.) at 16; Reproduced Record (R.R.) at 43a. Decedent previously asked Claimant's parents "for [Claimant's] hand in marriage." *Id.* at 12-13; R.R. at 39a-40a. On Saturday, June 12, 2004, Decedent and Claimant, who had been living together, visited Claimant's parents. Decedent told Claimant's parents that he and Claimant would come back as husband and wife. Claimant's parents responded that they were happy for Decedent and Claimant.

Decedent and Claimant then went down to the field by the stream behind the house of Claimant's parents to have a traditional Native American marriage ceremony. The ceremony involved wrapping a Native American blanket around them, which signified their "joining as one," and exchanging vows. *Id.* at 13 and 16; R.R. at 40a and 43a. Decedent first asked Claimant to be his wife. Claimant then asked Decedent to be her husband. Decedent prayed that "Creator would watch over [them] and keep [them] safe." *Id.* at 16; R.R. at 43a. Following the Native American tradition, they exchanged wedding gifts. Decedent gave Claimant meat, which signified that he would be the provider for the family. Claimant in turn gave Decedent corn wrapped in red, the Native Americans'

³ A widow or widower who is a guardian of two or more children is entitled to death benefits in the amount of sixty-six and two-thirds percent of the decedent's wages, but not in excess of the statewide average weekly wage. Section 307(3)(b) of the Act.

favorite color. Although it was not customary for a Native American wedding, they also exchanged silver wedding rings and bands. The marriage ceremony took 30 to 45 minutes.

After the ceremony, Claimant and Decedent went back to Claimant's parents who were outside waiting for them. Claimant's mother took photographs of Claimant and Decedent in the front yard. One photograph (Exhibit C-5) taken on the day of the ceremony showed Decedent wearing the silver wedding ring that Claimant gave him during the marriage ceremony. To celebrate the marriage, Claimant's mother prepared the traditional meal of fried bread and venison. Photographs taken at subsequent events showed Decedent wearing the silver wedding ring and band and Claimant wearing the silver wedding ring. Claimant was wearing the silver wedding ring and band at the hearing.

After the marriage ceremony, Claimant and Decedent continued to live together and held themselves out as husband and wife until Decedent's death. They had two daughters born in 2005 and 2011. Claimant also worked for Employer from 2004 until she became pregnant with her second daughter in 2011. She used Morrison-Tietz and Tietz interchangeably as her last name. Decedent and Claimant did not file a joint tax return because they believed that they were required to wait for 7 years before their common law marriage would be recognized by the IRS and other governmental agencies. Claimant's mother, Jean Morrison, a Native American who was familiar with the Native American marriage ceremony, testified corroborating Claimant's testimony.

Claimant also presented numerous documentary evidence. Exhibit C-2 included the Susquehanna County Coroner's report, dated February 6, 2012, listing Claimant as Decedent's wife; the rental application completed by Decedent

and Claimant in December 2005; utility bills sent to Decedent and Claimant; the school district's parental consent forms signed by Decedent and Claimant; a 2005 note congratulating "Tara Tietz" on the birth of her daughter; a contract signed by Claimant, "Tara L. Tietz," to perform Pow Wow dance at the 2009 Native American Heritage Mini Pow Wow; the schedule for the Clifford Township Bicentennial Events, listing "Wayne and Tara Tietz" for American Indian Art and Display; a Christmas card that Decedent gave Claimant, stating that "I Thank God for Our Marriage"; and a letter from the Department of Labor, Occupational Safety and Health Administration offering condolences to "Mrs. Tara Tietz" on "the tragic death of [her] husband." The documentary evidence also included the bill for Decedent's funeral services sent to Claimant (Exhibit C-3); the photographs of Decedent, Claimant and their children (Exhibit C-5); and, the bank account ownership change from Decedent to Decedent and Claimant (Exhibit C-9).⁴

On May 3, 2012 the Court of Common Pleas of Susquehanna County, Orphans' Court Division issued a final decree which stated that "Tara L. Morrison (a.k.a. Tara Tietz) is the surviving spouse of Wayne Tietz" and that she "is entitled to receive as an intestate heir of Wayne Tietz." Exhibit C-10. On June 13, 2012, the Register of Wills of Susquehanna County granted Claimant letters of administration for Decedent's estate. Exhibit C-11.

The WCJ found the testimony of Claimant and her mother and the documentary evidence credible. The WCJ concluded that Claimant established

⁴ Claimant also presented more than 50 sworn affidavits of Native Americans, business owners and representatives, Employer's employees, a school employee, neighbors and friends, stating that Decedent and Claimant were married and shared the marital residence with their children (Exhibit C-4). The WCJ sustained Employer's hearsay objections and did not admit Exhibit C-4 into evidence.

that she and Decedent entered into a common-law marriage contract on June 12, 2004 and that she was entitled to death benefits as Decedent's surviving spouse. The WCJ accordingly granted the fatal claim petition and ordered Employer to pay death benefits to Claimant and her daughters with a credit to be given to Employer for benefits already paid. The Board affirmed the WCJ's decision. The Board stated that because Decedent was unable to testify, there was a rebuttable presumption in favor of a common-law marriage upon proof of constant cohabitation and a reputation of marriage. The Board concluded that Claimant's evidence supported the WCJ's findings. Employer's appeal to this Court followed.⁵

In Pennsylvania, a marriage is a civil contract. *In re Manfredi's Estate*, 159 A.2d 697, 700 (Pa. 1960). There are two kinds of marriage: (1) ceremonial and (2) common law. *Id.* A ceremonial marriage is a wedding or marriage performed by a religious or civil authority with the usual or customary ceremony or formalities. *Id.* See Sections 1501 through 1504 of the Marriage Law, 23 Pa. C.S. § 1501-1504 (marriage ceremony). A common-law marriage can only be created by *verba in praesenti*, i.e., an exchange of words in the present tense, spoken with the specific purpose of creating the legal relationship of husband and wife. *Manfredi's Estate*, 159 A.2d at 700.

In *PNC Bank Corporation v. Workers' Compensation Appeal Board*

⁵ This Court's review in this appeal is limited to determining whether the WCJ committed an error of law and whether the WCJ's findings of fact were supported by substantial evidence. *Cooney v. Workers' Comp. Appeal Bd. (Patterson UTI, Inc.)*, 94 A.3d 425, 429 n.2 (Pa. Cmwlth. 2014), *appeal denied*, ___ A.3d ___ (Pa., No. 393 WAL 2014, filed February 10, 2015). Our appellate role in a workers' compensation case is not to reweigh the evidence or the credibility of the witness, but to simply determine whether the WCJ's findings have the requisite measure of support in the record as a whole. *Bethenergy Mines, Inc. v. Workmen's Comp. Appeal Bd. (Skirpan)*, 612 A.2d 434, 437 (Pa. 1992).

(*Stamos*), 831 A.2d 1269 (Pa. Cmwlth. 2003), this Court prospectively abolished common-law marriages in Pennsylvania. The legislature subsequently amended Section 1103 of the Marriage Law, 23 Pa. C.S. § 1103, effective January 24, 2005, statutorily abolishing common law marriages in Pennsylvania. Section 1103 provides: "No common-law marriage contracted after January 1, 2005, shall be valid. Nothing in this part shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid." In *Costello v. Workers' Compensation Appeal Board (Kinsley Constr., Inc.)*, 916 A.2d 1242 (Pa. Cmwlth. 2007), this Court held that the legislative action of amending Section 1103 superseded the *PNC Bank* holding and that any common-law marriage contract entered into on or before January 1, 2005 remained valid. Claimant was therefore required to prove that she and Decedent entered into a valid common-law marriage contract on or before January 1, 2005 to be entitled to death benefits as Decedent's surviving wife.

A common-law marriage contract does not require any specific form of words; all that is essential is proof of an agreement to enter into the legal relationship of marriage at the present time. *Estate of Gavula*, 417 A.2d 168, 171 (Pa. 1980). Common-law marriage cases most frequently involve a putative surviving spouse's claim for a share of the decedent's estate and thus present "a fruitful source of perjury and fraud to be tolerated and not encouraged." *Id.* Consequently, common law marriage claims are reviewed "with great scrutiny." *Id.*

A party claiming a common-law marriage "bears the burden of producing clear and convincing evidence of the exchange of words creating the marriage contract." *Cooney v. Workers' Comp. Appeal Bd. (Patterson UTI, Inc.)*,

94 A.3d 425, 432 (Pa. Cmwlth. 2014), *appeal denied*, ___ A.3d ___ (Pa., No. 393 WAL 2014, filed February 10, 2015). If a putative spouse "who is able to testify and fails to prove, by clear and convincing evidence, the establishment of the marriage contract through the exchange of *verba in praesenti*, then that party has not met its 'heavy' burden to prove a common law marriage." *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1021 (Pa. 1998).

If a party is unable to testify as to the exchange of *verba in praesenti* but proves constant cohabitation and a reputation of marriage which is not partial or divided but is broad and general, a rebuttable presumption arises in favor of a common law marriage. *Staudenmayer*, 714 A.2d at 1020-21. Such rebuttable presumption is "one of necessity" to be applied only in cases of the party's "inability to present direct testimony regarding the exchange of *verba in praesenti*." *Id.* at 1021. There is no basis to resort to the presumption if the claimant is available to directly testify to the words allegedly exchanged with the decedent. *Giant Eagle v. Workmen's Comp. Appeal Bd. (Bahorich)*, 602 A.2d 387, 389 (Pa. Cmwlth. 1992). The validity of a common-law marriage is a mixed question of law and fact. *PPL v. Workers' Comp. Appeal Bd. (Rebo)*, 5 A.3d 839, 843 (Pa. Cmwlth. 2010).

Employer first argues that the WCJ incorrectly required Claimant to establish a common-law marriage "by substantial evidence," rather than "by clear and convincing evidence," equating the appellate review standard with the applicable burden of proof.

Citing *Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Products)*, 861 A.2d 938 (Pa. 2004), which involved a fatal claim petition filed by the decedent's surviving wife, the WCJ stated that Claimant was

required to establish the existence of a common-law marriage "by substantial evidence" which "must have sufficient indicia of reliability to support a finding and must be relevant to the matter under consideration." WCJ's Findings of Fact Nos. 6 and 7. In *Gibson*, the existence of a common-law marriage was not an issue. Our Supreme Court stated that "[a]s with all claim petitions, the elements necessary to support an award must be established by substantial evidence." *Gibson*, 861 A.2d. at 943. The Court further stated that to constitute substantial evidence, "information admitted into evidence must have sufficient indicia of reliability and be relevant to the matter under consideration" and that "[i]f the evidence is both competent and sufficient, then the finding is supported by substantial evidence." *Id.* at 944. In *Pennsylvania Labor Relations Board v. Kaufmann Department Stores, Inc.*, 29 A.2d 90, 94 (Pa. 1942), the Supreme Court made a similar statement that "the burden was upon [the parties] to prove by substantial and legally credible evidence" the necessary elements of the case.

Substantial evidence is the appellate review standard for ascertaining whether the evidence is sufficient to support the fact-finder's finding; it is not a quantum of proof necessary to persuade a fact-finder. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). This Court construed the "substantial evidence" language in *Kaufmann Department Stores* as "not attempting to state that substantial evidence is a standard to be applied at the fact finding level as well as the appellate level," but to mean that "a litigant must satisfy its *burden of proof* with evidence that is substantial and legally credible, not with mere 'suspicion' or by only a 'scintilla' of evidence." *Id.* (emphasis added). We likewise construe the statement in *Gibson*, relied on by the WCJ in Findings of Fact Nos. 6 and 7, to mean that Claimant was required to satisfy her burden of

proving a common-law marriage with substantial, credible evidence.

The function of a burden of proof or standard of proof is "to instruct the factfinder as to the level of confidence that society believes he should have in the correctness of his conclusion." *Commonwealth v. Maldonado*, 838 A.2d 710, 715 (Pa. 2003). Ordinarily, claimants in workers' compensation proceedings must prove the necessary elements of a claim by a preponderance of evidence. *Rossa v. Workers' Comp. Appeal Bd. (City of Phila.)*, 839 A.2d 256, 260 (Pa. 2003); *Dillinger v. Workers' Comp. Appeal Bd. (Port Auth. of Allegheny Cnty.)*, 40 A.3d 748, 753 n.10 (Pa. Cmwlth. 2012). Because common-law marriage claims are discouraged and not favored by the courts and are reviewed with great scrutiny, however, a party claiming the existence of a common-law marriage has the heightened burden of proving the marriage by "clear and convincing evidence." *Staudenmayer; Cooney*. Clear and convincing evidence is "evidence that is 'so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts of the issue.'" *Rohm & Haas Co. v. Cont'l Cas. Co.*, 781 A.2d 1172, 1179 (Pa. 2001) [quoting *Lessner v. Rubinson*, 592 A.2d 678, 681 (Pa. 1991)]. The clear and convincing standard falls between the most stringent beyond-a-reasonable-doubt standard and the preponderance-of-the-evidence standard. *Maldonado*, 838 A.2d at 715.

Employer insists that Claimant's testimony cannot constitute clear and convincing evidence of a common-law marriage because her testimony was proscribed by the Dead Man's Act, 42 Pa. C.S. § 5930, which provides in relevant part:

Except as otherwise provided in this subchapter, in any civil action or proceeding, where any party to a thing or contract in action is dead, ... and his right thereto or therein has passed ... to a party on the record who

represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased ... party, shall be a competent witness to any matter occurring before the death of said party

The purpose of the Dead Man's Act is "to prevent the injustice that would result from permitting a surviving party to a transaction to testify favorably to himself and adversely to the *interest* of a decedent, when the decedent's representative would be hampered in attempting to refute the testimony or be in no position to refute it, by reason of the decedent's death." *In re Estate of Hall*, 535 A.2d 47, 53 (Pa. 1987) (emphasis in original). The application of the Dead Man's Act, therefore, requires that "the interest of the proposed witness be adverse to the interest of the decedent's estate." *Punxsutawney Mun. Airport Auth. v. Lellock*, 745 A.2d 666, 670 (Pa. Super. 2000). *See, e.g., In re Estate of Stauffer*, 476 A.2d 354 (Pa. 1984) (holding that the Dead Man's Act proscribed the testimony of the woman who claimed to be the common-law wife of the decedent and sought a spouse's elective share against the decedent's will devising his entire estate to his brothers); *Estate of Gavula* (holding that the petitioner claiming to be the common-law wife of the decedent who left the remainder of his estate to his two sisters was incompetent to testify under the Dead Man's Act). The protection under the Dead Man's Act may be waived by the representative of the decedent's estate. *Olson v. N. Am. Indus. Supply, Inc.*, 658 A.2d 358, 364-65 (Pa. Super. 1995).

In this matter, Employer did not raise the applicability of the Dead Man's Act before the WCJ and did not object to Claimant's testimony regarding the exchange of *verba in praesenti*. Employer, therefore, waived the issue due to failure to properly preserve it before the WCJ. *Clayton v. Workers' Comp. Appeal*

Bd. (Carpentry Concepts, Inc.), 881 A.2d 51, 53 n.7 (Pa. Cmwlth. 2005). Even had Employer properly preserved the issue, Claimant's testimony was not subject to the Dead Man's Act. Nothing in the record suggests that her interest was in any way adverse to the interest of Decedent's estate. Unlike in *Estate of Stauffer*, Claimant's testimony was not objected to by a representative of Decedent's estate or any other individuals at the hearing. She was later determined to be Decedent's surviving spouse and intestate heir. She was granted the letters of administration and became the representative of Decedent's estate. The record thus established that Claimant's interest was not adverse to the interest of Decedent's estate. Hence, her testimony was not proscribed by the Dead Man's Act, and she was competent to testify at the hearing.

Claimant testified as follows regarding the exchange of *verba in praesenti* during the marriage ceremony on June 12, 2004:

Q: Was anything said by you to confirm your commitment to Wayne as [your] husband?

A. Part of the ceremony involves us wrapping a native blanket around ourselves, which signifies us joining as one. And while we were wrapped, he asked me to be his wife.

Q. Did you say yes?

A. Yes.

Q. Did he also ask you the same thing?

A. No, I asked him ---

Q. Well, I meant ---

A. --- to be my husband.

N.T. at 13; R.R. at 40a.

When asked why she had the marriage ceremony in the woods behind her parents' home, rather than in "a more formal religious setting," Claimant

replied: "That was our religion. We practiced our culture. We were raised in our own culture, so that is how we saw fit. We did not see a reason to go to another church when that was our church," referring to "nature." N.T. at 10-12; R.R. at 37a-39a. She further testified that it was not necessary to have witnesses in a marriage ceremony or to have someone officiate a marriage in the Native American religion and that obtaining a marriage license or certificate was not part of Native Americans' customs. She stated: "Native Americans don't rely on paper It is seen through the public eye with the Native American community; it's accepted, it's witnessed. And they accepted us as a married couple, and they always have." *Id.* at 18; R.R. at 45a. Employer did not present any evidence to dispute Claimant's testimony.

In a workers' compensation case, credibility determinations and the evaluation of evidentiary weight are the province of the WCJ who may accept and reject the testimony of any witness in whole or in part. *Clear Channel Broad. v. Workers' Comp. Appeal Bd. (Perry)*, 938 A.2d 1150, 1156 (Pa. Cmwlth. 2007). Claimant's testimony accepted by the WCJ as credible constitutes clear and convincing evidence that she and Decedent exchanged *verba in praesenti* on June 12, 2004, and created their legal relationship of husband and wife. Her testimony met the definition of common-law marriage. She also presented the overwhelming evidence of constant cohabitation and a reputation of marriage, although she was not required to do so because she established the existence of a common-law marriage through the evidence of exchange of *verba in praesenti*. She established that she and Decedent continued to live together with their children after the marriage ceremony until Decedent's death and that they held themselves out as husband and wife and were recognized as such in the community and at work.

Contrary to Employer's argument, the documentary evidence post-dating the 2005 abolishment of common-law marriages was relevant to their constant cohabitation and the reputation of marriage following their 2004 exchange of vows.

In conclusion, Claimant established by clear and convincing evidence that she and Decedent entered into a common-law marriage contract on June 12, 2004, and that she was the common-law wife of Decedent at the time of his death. Therefore, she is entitled to death benefits under Section 307(3)(b) of the Act.

Accordingly, the Board's order is affirmed.

BONNIE BRIGANCE LEADBETTER,
Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Elk Mountain Ski Resort, Inc., :
 Petitioner :
 :
 :
 v. No. 1017 C.D. 2014
 :
Workers' Compensation Appeal :
Board (Tietz, deceased, and :
Tietz-Morrison), :
 Respondents :

ORDER

AND NOW, this 7th day of April, 2015, the order of the Workers' Compensation Appeal Board in the above-captioned matter is AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	: No. 1017 C.D. 2014
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BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

**CONCURRING OPINION BY
SENIOR JUDGE COLINS**

FILED: April 7, 2015

I concur with the erudite, well-crafted opinion of the majority. However, I must comment that I would find this to be a ceremonial marriage as well. The Workers' Compensation Appeal Board accepted all of the facts surrounding this beautiful marriage ceremony, which conformed to Native American cultural traditions. Any requirement that, under circumstances such as these, a marriage license be obtained from civil authority would be in violation of constitutionally guaranteed religious freedoms.

JAMES GARDNER COLINS, Senior Judge