APPEAL NO. 92460

A contested case hearing was held in (city), Texas, on June 22, 1992, (hearing officer) presiding as hearing officer. She determined that the respondent had sustained a compensable heart attack in the course and scope of his duties with the (city), Texas, Police Department. She awarded benefits in accordance with the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN., art 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). Appellant urges error in several conclusions of the hearing officer: that the claimant carried his burden to identify a definite time, place and causal event within the course and scope of employment; that the claimant had presented the necessary medical evidence to establish compensability under the Act; that the heart attack was triggered by emotional or mental stress; and that the respondent's racquetball game during a lunch period was an activity within the course and scope of employment. Respondent argues the evidence supports the determinations of the hearing officer and asks that the decision be affirmed.

DECISION

Determining the medical evidence in this case does not meet the particular requirements imposed by the 1989 Act for injuries involving heart attack, we reverse and render.

This case involves an unfortunate incident in which a 36-year-old police officer with the (texas) Police Department suffered a heart attack on (date of injury). Fortunately, he survived and was restored to light duty on January 21, 1992, and to full duty on February 3, 1992. The issue reported out of the benefit review conference and agreed to by the parties at the contested case hearing was whether or not the respondent sustained a compensable injury on (date of injury).

The respondent played racquetball during his off-duty lunch hour on the morning of (date of injury). The racquetball game was at a private facility away from the duty location. He states he tired during the play and had to take a break, that he experienced shortness of breath and light-headedness. He returned to his duties and went through some case records and took several phone calls, one of which was from an angry elderly crime victim who shouted at the respondent and hung up on him. This call made the respondent somewhat angry and upset. At this time, he was sweating and experiencing pressure in his shoulder. He was subsequently taken to the hospital where he was determined to be suffering a heart attack.

There was considerable evidence and testimony concerning a physical fitness program that was under development and proposed for implementation in the police department at the time of the respondent's heart attack. He testified that he had started playing racquetball in September to get in shape for the physical fitness program that apparently would be fully implemented by 1995. Although the respondent had successfully accomplished physical agility tests which he states they had been doing for "approximately 3 1/2 years," he testified he was not in condition to accomplish the mile and a half run within

the time allotted. There was no on-duty time allocated for physical training and, according to the training coordinator, off-duty time would be necessary to accomplish physical training to meet the new standards. Ultimately, being unsuccessful in meeting the standards could result, under some of the recommendations, in various sanctions. Although recommended at the time, termination was not adopted as a sanction. In (month year), the program of physical education and medical screening was explained to acquaint the police officers with the new program and some medical screening was done. Part of the program was to stress that the police officers who follow a healthy diet and physical exercise program are healthier and live longer--this was one of the messages of the program.

The respondent had not experienced any previous heart-related problem, at least to his knowledge, at the time of his attack on (date of injury). During the course of his hospitalization and subsequent treatment, it was revealed that he had longstanding coronary artery disease. A heart catheterization subsequently disclosed that there was an area of "approximately 95% stenosis" or blockage in one of the main heart arteries, the left anterior descending coronary artery.

There was extensive medical evidence offered regarding the respondent's heart attack and the causes thereof. The pertinent evidence, for purposes of this decision, came from two eminently qualified cardiologists, (Dr. T), who treated the respondent, and (Dr. N), who reviewed the various medical records and background material enabling him to express an opinion on the cause of the attack. Set out below are the various opinions expressed.

In a letter dated November 25, 1991, Dr. T states:

> (Mr. S) is currently hospitalized at (texas) Memorial Hospital after having had an acute anterior myocardial infarction (heart attack). I feel that this heart attack was probably at least partially due to the stress of the patient's job (he is a police officer), and it is my judgement that the preponderance of medical evidence indicates that his work was a substantial contributing factor.

In a letter dated December 5, 1991, Dr. T states:

> I have received a letter from the Excell Rehabilitation Consultants claiming that in order for a heart attack to be considered compensable under Texas law, it must meet certain specific criteria.
>
> It is my feeling that the heart attack suffered by (Mr. S) does in fact meet these criteria. The acute onset of his symptoms occurred while he was working, reviewing his cases. It is my feeling, as I mentioned in my previous letter, that his work was a substantial contributing factor to the attack, and <u>he</u> feels that his heart attack was triggered by the fact that he was engaging in a stressful discussion with a crime victim at the time his

symptoms started (emphasis ours).

In a letter dated January 28, 1992, Dr. T states in reply to an inquiry as to exactly what happened at the time of respondent's heart attack:

> In any case, I really don't think it matters that much. If you understand the pathophysiology of coronary artery disease and heart attacks, the exact activity at the time of the acute myocardial infarction is immaterial.
>
> What happened to (Mr. S's) heart is the result of a process which took place over many years. On the day his heart attack occurred, it simply got to the point where the blockage in his arteries became complete, but this could just as easily have occurred the day before or the day after.
>
> It is my opinion that the stress of being on the Police Department contributed significantly, over a long period of time, to the process which ultimately led to this patient's acute myocardial infarction (emphasis his).
>
> In regards to the specific onset of (Mr. S's) symptoms, as best I can recall, he indicated to me that he had had some chest pain while playing racquetball earlier on the morning of his heart attack, but then had stopped playing racquetball and returned to his office. While in his office he apparently developed more severe pain, while discussing police matters with a crime victim. I was not there, and I have to rely on what (Mr. S) tells me, but I have no reason to doubt the accuracy of his report. Once again I would suggest you discuss this with (Mr. S).

In a video statement presented at the contested case hearing, Dr. T states his opinion that the underlying problem is the artery blockage which is a common history preceding a heart attack. He states respondent's work was a substantial contributing factor to his heart attack and that his heart attack was precipitated by a call from a crime victim from what was told to him by the respondent. He stated he did not discuss the case with or receive a call from Dr. N. He states that if there is coronary artery disease, it makes the heart more susceptible to a heart attack and that both mental and physical stress affects the heart. He opined that the racquetball and phone call were substantial contributing factors to the heart attack. He did not state the relationship or degree the coronary artery disease related to the heart attack vis-a-vis the respondent's work.

Dr. N submitted a report on his evaluation of the various medical records and background information. His report provides as follows:

> I believe that the records provided to me are sufficient to establish the following facts:

1.The diagnosis of acute myocardial infarction.

2.The time of onset, somewhere between 10 AM and 12:35 PM on (date of injury).

3.The requirements of the job, and the actual activity of the individual at the time of onset of symptoms.

Based upon my review of these records, it is my opinion that (Mr. S) did in fact experience an acute anterior myocardial infarction on (date of injury). The exact time of onset of symptoms cannot be established with absolute certainty, although the weight of the available evidence indicates that the first symptoms occurred during a racquetball game, may have subsided or plateaued for a time, but finally recurred or became sufficiently severe that the patient was driven to the hospital by his co-workers in the early afternoon, being logged into the Emergency Room of (texas) Memorial Hospital at 12:35 PM.

According to the evidence, the first observable change in (Mr. S's) behavior, and any complaint he offered, took place while he was playing racquetball, sometime between 10 and 11 AM, (date of injury). At this time he complained of chest pressure radiating through to his back that forced him to cease the activity and rest for a time. It appears that he later returned to his regular job, which included reviewing records and talking to crime victims on the telephone. Soon after his return he was observed by co workers (sic) to be in some distress, putting his head down on the desk, either pale or flushed, sweaty, complaining of "not feeling good," chest pain, and nausea. After various attempts to deal with this problem with wet towels, rest and other means, (Mr. S) was taken to the hospital. His initial evaluation there was entirely consistent with acute anterior myocardial infarction. He was treated with a thrombolytic agent, and admitted. Serial electrocardiograms and laboratory studies confirmed the diagnosis. An echocardiogram of "less than optimal technical quality" performed on (date) suggested a possible thrombus, or blood clot, within the left ventricle, a main pumping chamber of the heart. This possibility was not confirmed, but (Mr. S) was appropriately treated with anticoagulants. If such a thrombus were in fact present, it would have been a consequence of the myocardial infarction, and not a cause. (Mr. S) was readmitted to the hospital on January 9, 1992 for heart catheterization and coronary arteriography. This examination may be summarized as showing normal heart pressures and work output at rest, but a high grade occlusive lesion in one of the coronary arteries supplying a region of heart muscle that showed evidence of previous damage. All this is consistent with the original diagnosis, and does nothing to alter the

diagnosis.

It is my opinion that the acute myocardial infarction sustained by (Mr. S) on (date of injury) was entirely due to the natural history and progression of his underlying coronary artery disease. There is no evidence in these records to support or suggest that there was any aggravation by his job, or the particular work he performed on the day in question, of this underlying disease beyond its normal and expected course.

Whatever emotional or social stress (Mr. S) was exposed to in the course of his work on that date, it must be surely considered to be a normal, expected, recurring and routine part of his work. Reviewing records or talking on the telephone to a crime victim can hardly have been a new experience for him, or one that would reasonably be expected to occasion any extreme fear, anger or other emotion. Even it there were some unusual degree of emotion involved, this is not the sort of extreme emotional stimulus that may on rare occasions be directly associated in time with the onset of cardiac symptoms in individuals with underlying cardiac disease, and cannot be considered to have been a factor that would aggravate that disease beyond its natural course. In point of fact, the actual onset of symptoms, or observable change in behavior, that might identify the initial cardiac event, occurred during a racquetball game. Instead, the entire course of his disease is very typical of the unmodified natural history of coronary artery disease. Myocardial infarction, unlike some other manifestations of coronary artery disease (e.g., angina pectoris, or cardiac rhythm disturbances) is not statistically or causally related to exertion or any kind of ordinary emotional or social stress of daily living or work.

Article 8308-4.15(2) provides:

Art. 8308-4.15. Compensability of heart attacks

A heart attack is a compensable injury under this Act only if:

(1) the attack can be identified as:

(A) occurring at a definite time and place; and

(B) caused by a specific event occurring in the course and scope of employment.

(2) the preponderance of the medical evidence regarding the attack

indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack; and

(3) the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus.

We have previously stated that the 1989 Act imposes new and much more demanding standards in establishing the compensability of heart attacks. Texas Workers' Compensation Commission Appeal No. 91009 (Docket No. redacted) decided September 4, 1991. In that decision we emphasized that there must not only be a preponderance of medical evidence, but that the medical evidence must be compared or weighed as to the effect of the work and the natural progression of a preexisting heart condition or disease. *See also* Texas Workers' Compensation Commission Appeal No. 92115 (Docket No. redacted) decided May 4, 1992, where we observed:

It is not enough, as we view the legislative language, to show by some evidence that some work-related stress was a substantial contributing factor of the attack. The preponderance of the medical evidence regarding the attack must indicate that the work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack. By its very terms, Article 8308-4.15 requires this weighing or comparison. *See* Texas Workers' Compensation Commission Appeal No. 91046 (Docket No. redacted) decided December 2, 1991. The term "rather than," it is suggested in 1 Montford, Barber, Duncan, A Guide to Texas Workers' Comp Reform, Sec. 4A 15, page 4-78 (1991), can be read as "as opposed to." In a footnote on page 4.78 it is stated that "[t]his requirement places the burden of proof on the claimant to establish within reasonable medical probability that the work was a substantial contributing factor as opposed to a preexisting heart condition.

There is recognized authority that a claim will not be defeated by showing an injured party was not a well person at the time of the injury and that an employer takes an employee as he finds him at the time he hires him. Gill v. Transamerica Insurance Company, 417 S.W.2d 720 (Tex. Civ. App.-Dallas, 1967, no writ). This, however, is not the situation in heart attack cases by virtue of the specific provisions of Article 8308-4.15(2). As we review the various letters and statement rendered by Dr. T, we do not find a definitive indication that work, being in his opinion a substantial contributing factor, was compared with or weighed against the respondent's significant coronary artery disease. Rather, his January 28, 1991 statement reflects his opinion that the stress of respondent's job, over a long period of time, contributed significantly to the process leading to his ultimate heart attack. The hearing officer, in Conclusion of Law No. 4, only states that work was a substantial factor. She, too, does not make the statutory comparison and does not conclude that the work, rather than the natural progression of the disease, was a substantial contributing factor.

Of course, Article 8308-4.15(1) requires that the attack be caused by a specific event occurring in the course and scope of employment. Even if some level of stress on the job, over a long period of time, may have an effect in developing coronary artery disease, as Dr. T opines occurred in the respondent's case, this alone would not support benefits under the Act. This factual setting differs from the situation in Texas Workers' Compensation Commission Appeal No. 91046 (Docket No. redacted) decided December 2, 1991, where, in addition to looking to work as the claimant's chosen field of endeavor, the doctor's report linked the heavy work on the day of the heart attack as the precipitating factor, in effect ruling out any other substantial contributing factor in the view of the majority. In final analysis, considering all the medical evidence offered in this case from Dr. T, together with the unequivocal report rendered by Dr. N, and applying the stringent requirements of Article 8308-4.15(2), we are precluded from holding that the statutory requirements have been met to establish a compensable claim.

Although the remaining issues become moot because of our decision on the failure of the medical evidence to satisfy the requirements of Article 8308-4.15(2), we make several observations regarding these matters. The hearing officer considered a great deal of evidence involving the physical standards imposed as a result of a police department "Total Fitness Program" which was in the process of implementation. At the time of the respondent's heart attack there had been considerable discussion of the new program and potential future sanctions as the program phased in over the next several years to 1995. As indicated earlier, the respondent and others had undergone physical assessments or agility assessments for some 3 1/2 years. However, in preparation for the new program, respondent began a program of physical conditioning in September 1991 which included playing racquetball during his off-duty lunch hour. It was clear from the evidence that no duty time was provided for a physical conditioning program or workouts even though personnel would be expected to meet the new physical standards as they phased in. There was some discussion and it appeared that part of the program would involve various sanctions for personnel not ultimately successful in meeting the standards, standards that were described by the Chief of Police to be low or minimal.

The hearing officer found that the respondent's participation in an off-duty physical conditioning program was a reasonable expectancy of, or was expressly or implicitly required, by his employer. Article 8308-3.02 provides as follows:

An insurance carrier is not liable for compensation if:

* * * *

(5) the injury arose out of voluntary participation in an off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of or are expressly or impliedly required by the

employment.

It is clear from the evidence that the racquetball game occurred during off-duty time and that a decision was made not to provide on-duty time for physical training under the police department's physical fitness program. There is also evidence that some physical conditioning would be necessary by various police officers to meet the standards.

We are not aware of Texas case authority directly on point on this issue. However, in discussing an injury from a recreational, athletic activity at a company-sponsored event, the Court of Appeals of Texas, (city), observed that the claimant had to show not only that the injury was received in the course of employment, but also that the injury was of a kind and character that had to do with and originated in the work. Mersch v. Zurich Insurance Co., 781 S.W.2d 447 (Tex. App.-Fort Worth 1989, writ denied). The court went on to state that to be in the course and scope of employment, participating in such activity is expressly or impliedly required by the employer; or the employer derives some benefit from the activity, other than the health and morale of the employee; or where the injury takes place at the place or immediate vicinity of employment while the employee is required to hold himself in readiness for work, and the activity takes place with the employer's express or implied permission.

There is limited, split authority in other jurisdictions as to whether an injury resulting from physical activity under circumstances similar in nature to this case is compensable. *See generally* 1A Larson, Workmen's Comp Law §§ 22.21 and 27.31(a). A claimant's exhibit in the record of hearing is a California case (Wilson v. W.C.A.B., 239 Cal. Reptr 710 (Cal. App.-5 Dist, 1987)) which, in applying a two-prong subjective/objective test, held an off-duty ankle injury of a police officer who was running to condition himself for continued membership on a voluntary special emergency reaction team, to be in the course and scope of employment and compensable. The court stated the officer believed that participation in athletic activity was expected by the city and that his belief was objectively reasonable. Counsel for the appellant cites an Oregon case, Haugen v. State Acc. Ins. Fund, 588 P.2d 77 (Or. App. 1978), where the court held a police officer was not in the course and scope of employment when he injured himself at home while engaging in activity to meet job requirements for maintaining good physical conditioning and a subsequent physical examination. The court observed the employee assumes the responsibility and corresponding risks in meeting job qualifications and he chooses the program he follows; under these circumstances, the activity and resultant injury is not in the course of, nor does it arise out of, the employment.

We note that the activity involved here was undertaken in an off-duty status, was away from the employer's premises, was not directed or otherwise controlled by the employer, was voluntarily performed by the respondent, although he may well have thought it necessary or expected that he engage in some physical training, was of unclear benefit to the employer aside from the health of the employee and, finally, the employer was not involved in giving or restricting any permission for the activity. Under these circumstances,

it is questionable that the heart attack was compensable under the exceptions to Article 8308-3.02(5). However, the issue not being necessary to our decision, we do not resolve, as a matter of law, the compensability of the heart attack on this ground. We also do not place our imprimatur on any particular authority from other jurisdictions on this issue.

The hearing officer also concluded that the respondent's "heart attack was not triggered solely by emotional and mental stress factors; however, if it were triggered solely by emotional and mental stress factors, it was precipitated by a sudden stimulus." Without deciding the matter, we observe there is a very tenuous basis for this conclusion. The evidence was clear that the respondent, as a police officer, performed in an environment that could become stressful to a degree. Indeed, he testified that in working his cases he is in contact with crime victims and that it is not unusual to find them upset. Respondent stated that this wasn't the first time this type of thing (the phone call) happened to him and that "it's part of the job more or less." He also stated that nothing in the phone call startled him or put him in fear, but that he was angry because the caller shouted and hung up on him.

We have some difficulty in accepting, under the circumstances, that this measures up to the requirement of Article 8308-4.15(3) which provides: "the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus." It would seem that the phone call here, which, admittedly was not the first time that type of phone call had been received by the respondent and such being a "part of the job," would be insufficient to involve the sudden stimulus exception. *See* Hartford Accident & Indemnity Co. v. Olson, 466 S.W.2d 373 (Tex. Civ. App.-El Paso 1971, aff'd 477 S.W.2d 859 (Tex. 1972)). *Compare* Aetna Insurance Co. v. Hart, 315 S.W.2d 169 (Tex. Civ. App.-Houston 1958, writ aff'd n.r.e.) on the matter of sudden stimulus.

For the reasons set forth above that the stringent requirements of Article 8308-4.15(2) have not been met in this case, we reverse and render a new decision that the respondent has not sustained a compensable heart attack in the course and scope of his employment.

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Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge