APPEAL NO. 931003

This appeal is considered in accordance with the Texas Workers' Compensation Act (1989 Act), TEX. LAB. CODE ANN. § 401.001 *et seq.* (formerly V.A.C.S., Article 8308-1.01 *et seq.*). On October 5, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. The issues determined at the contested case hearing were whether the decedent, CW, whose wife and son were claimants and appellants herein, sustained a compensable heart attack on (date of injury), while employed by the (employer), and whether timely notice of injury was given to the employer. The hearing officer determined the notice issue in favor of the claimants, finding that the employer had actual knowledge of injury, and this was not appealed.

The hearing officer determined that the decedent had not sustained a compensable heart attack, in that it was not shown, through a preponderance of the medical evidence, that the work, rather than the natural progression of a pre-existing heart disease, was a substantial contributing factor of the heart attack.

The claimants have appealed, arguing that the great weight of evidence is against the hearing officer's determination, noting specific factual findings that claimants feel are against the evidence in this case. The claimants argue that no "natural progression" of a heart condition was proved. The claimants argue further that the hearing officer failed to apply the proper legal standard in analyzing the facts and failed to weigh the work-related factors against the pre-existing disease as required by previous opinions of the Appeals Panel. The carrier responds, citing reasons why the hearing officer was correct in determining that this heart attack was not compensable, noting that there was no physical exertion leading to the attack, and noting further that the evidence to the extent it indicates that mental stress was a factor fails to prove the occurrence of a sudden stimulus the morning of the decedent's heart attack.

DECISION

We affirm the hearing officer's decision.

We note at the outset that this was a well-tried case from both the claimants' and carrier's side, and that well-thought out briefs have been filed by both sides.

The decedent, CW, was 47 years old and the senior loan officer and vice-president for the employer, for whom he had worked for 20 years. The decedent died of a heart attack on Monday, (date of injury), after being stricken initially during a morning meeting with an FDIC bank examiner, (Ms. S). The cause of death is listed on his death certificate as myocardial infarction and coronary atherosclerotic heart disease.

Ms. S, the bank examiner, was there to perform a review in accordance with the Community Reinvestment Act (CRA). The record (primarily through the testimony of Ms. S) indicated that this was an act passed in 1987 to encourage certain social objectives, notably community involvement and loans to minority applicants. The bank had previously

received a "needs improvement" rating on its previous audit. According to Ms. S, there were no sanctions or enforcement provisions that could be taken against an institution even if its rating were unsatisfactory. The report issued by FDIC was available to members of the public.

According to Ms. S's deposition testimony, she had arrived the week before at the bank to conduct her audit. She believed that this may have been an unannounced audit. She dealt primarily with the decedent, because he was the CRA officer, and met with him a number of times briefly the week of March 4th to obtain information for her review. Ms. S stated that she was leaning toward giving the bank a satisfactory rating because its performance had much improved, although she did not think that she let decedent know the progress of her audit the week before. Ms. S testified that her meeting for Monday morning was scheduled for ten o'clock, and was considered to be a "wrap-up" in which she would ask some final questions of decedent before issuing her report. She stated that the meeting was non-confrontational and from her perspective, routine. She stated that her mission was the CRA audit only; she was not there to investigate or to inquire about any questionable loans or uncover fraudulent activity. She stated that she and decedent were reviewing a list of community organizations about whose purpose she needed more information, and decedent was answering when he suddenly stopped responding about 15-20 minutes into the meeting. It became evident to her that he was stricken, and she summoned help. The decedent was thereafter taken to the hospital, where he died.

The claimants' theory as to why this meeting caused sudden stress to the decedent was based primarily on evidence that the bank's president, Mr. E, allegedly assisted a local businessman, (Customer X), with fraudulent loans. The record does not implicate the decedent in any way as a participant in such conduct. The record indicates that most facts concerning the loans became known to most of the witnesses after decedent's death. Customer X subsequently pleaded guilty to charges that resulted from this conduct. The claimants argued that decedent had found out about Customer X's loans during the week previous to his death and was under extreme stress as a result, which was exacerbated by the presence of federal bank examiners.

Ms. S stated that the week of March 4, 1991, another FDIC examiner also came to the employer. This examiner, (Mr. K), was a senior examiner of higher rank than she was. Ms. S stated that it became her understanding that Mr. K was there to look into an anonymous complaint that had been filed concerning Customer X's loans. She otherwise knew nothing about Mr. K's examination, and results of it, or whether he met with decedent other than a brief meeting with her that he attended which dealt with the CRA audit. Ms. S believed Mr. K had been there only two days. It was her understanding that persons with whom Mr. K would have been likely to meet about such an allegation would be the bank president or senior loan officer.

Claimant (Mrs. W) indicated that in 1980, the decedent had first sought treatment from (Dr. A), a cardiologist, because he had a retinal arterial occlusion. Mrs. W indicated that he stopped smoking at that point and undertook to get more exercise. She stated that he had only seen Dr. A once or twice before the week of March 4, 1991. That week, the

decedent had back and shoulder pain and said he was going to see Dr. A. She understood that he did and that Dr. A's testing was normal. Mrs. W stated that during a walk that week he told her that things were bad at the bank but that he could not talk to her about it. Mrs. W testified as to a relaxing weekend of March 9th and 10th, in which the decedent participated in family activities, and that he seemed fine when he went to work Monday morning. Claimant TW indicated that his father was not upset and in fact excited because he was winning the golf game they played Sunday afternoon.

(Mr. C), another officer of the bank, testified that he first found out about fraudulent loan activity in May 1991. He stated that officers during March 1991 were generally concerned about the frequency of loans to Customer X but that fraud was not known at that point. He stated that he disagreed that Mr. K had been there to audit Customer X's loans, and he did not have a conversation with the decedent the week before his death about any questionable loans. As a result, he could not say what the extent of decedent's knowledge about such loans would be, if any. Mr. C characterized a CRA audit as very low stress, compared to another type of audit that would be concerned with the financial security of the bank. Mr. C opined that the decedent had probably been through approximately 40 bank examinations of various kinds during his service with the employer.

A transcript of an interview with decedent's secretary, (Ms. H), is to the effect that decedent did not seem under stress nor preoccupied either the week before or the morning of his death. She stated that she knew he had had chest pains the week before and asked him how he was Monday morning and he responded that he was fine. She stated her understanding that claimant had been having problems for which he'd consulted Dr. A few weeks before. Ms. H stated that, in retrospect, after the story about Customer X's loans came out, she thought he may have known something about it. However, Ms. H said that they had nothing to do with Customer X's loans and she did not talk with decedent regarding any concerns he might have had. Transcripts with two other bank employees, however, indicate a belief that decedent had knowledge and concern about the loans, and that he was an intense or nervous person.

There was conflicting medical evidence as to whether the decedent's work, rather than the progression of a pre-existing disease, caused his heart attack. No autopsy was performed. However, evidence relating to the existence of a pre-existing disease of some sort was not conflicting. The doctors who testified (in person or through deposition) were the decedent's cardiologist, Dr. A, and a board-certified cardiologist for the carrier,(Dr.Y), who had not personally examined the decedent but reviewed his medical records and the deposition of Dr. A and Ms. S, the bank examiner.

Dr. A said in 1980 the decedent had a retinal arterial occlusion of unknown etiology, although it was suspected a plaque broke loose. The decedent underwent an arteriogram which showed early heart disease; the radiologist opined a 50% stenosis, but Dr. A disagreed and stated it was more like one to two percent. Small atherosclerotic plaques were observed. The next year, a blood analysis yielded an observation of Type IV Endogenous Hyperlipemia. The next time decedent saw Dr. A appears to be November 1987, when he came in to be treated for a dizzy spell. At the time, Dr. A's notes document

that decedent was overweight but otherwise his physical examination was within normal limits. A treadmill stress test resulted in mild hypertension, dizziness and nausea but no specific concern is documented. On March 7, 1991, Dr. A's testimony and notes state that decedent came in because he was experiencing great back pain and some midchest discomfort. Dr. A's notes indicate that "patient has had this same symptom complex perhaps once a year for the past ten years and the only thing different now is that there has never been this much discomfort in midchest. The last time this occurred was a few weeks ago." Dr. A testified that this note did not necessarily mean that decedent had experienced cardiac chest pain before, because chest pain can be muscular in origin. The decedent had an EKG, which was normal, and was scheduled for a stress test that Friday, but it was postponed at his request until the following Monday the 11th. Dr. A stated that decedent's chest pain was an event he could not just "sit on" and that, in the world of cardiology, he had a cloud hanging over his head that needed further investigation. Dr. A stated that he had no reason to suspect at this time that decedent would be stricken within a few days. He stated that decedent returned on March 8th and told him he felt good at that time.

Dr. A testified that decedent's myocardial infarction in medical probability resulted from a combination of formation of a blood clot and narrowing of the vessel. On the other hand, Dr. A also testifies that there were unusual and "emotionally powerful" factors of the work place that could have played an important role in the heart attack. Dr. A stated that facts of the questionable loans were not in his medical records and were subsequently discovered. He stated that he did not know for a fact if the decedent knew of the loans. Dr. A stated that he did not know the physical mechanics of how stress could translate into a myocardial infarction. He characterized the decedent's underlying heart condition as a substantial contributing factor of the heart attack. Dr. A stated that any chronic job related stress would be a "drop in the bucket" compared to what happened the day of the heart attack. Dr. A conceded that he had never heard the exact sequence of events that transpired on (date of injury). He nevertheless characterized the Monday meeting with the bank examiner would be "the event which was going to blow open the situation" and affirmed his understanding that this was the bank examiner who was there for the purpose of checking on illegal loans. These were identified as assumptions underlying his opinion that the events in his work place were a substantial contributing factor to decedent's heart attack, although he then stated that the presence of a bank examiner on any business would be a very strong stimulus.

When ultimately asked to compare the factors of work against natural progression of a pre-existing heart disease as a substantial contributing factor of the attack, Dr. A stated:

> Well, I think they both were. I think he very probably had preexisting heart disease, but I think the occurrence of his myocardial infarction was clearly precipitated by the events of that morning at work.

Dr. Y, testifying for the carrier, also indicated that he relied to some extent on information about the facts as supplied by the carrier. He stated his opinion that somewhat paralleled Dr. A's conclusion, that the heart attack occurred as a result of a plaque that broke off and lodged in a narrowed vessel. He felt that the sequence of events had manifested

itself the week before the attack, and affirmed his understanding that there was no emotional or mental trigger precipitating the attack, and for that reason did not believe the heart attack to be work related.

Section 408.008 (previously Article 8308-4.15) provides:

Sec. 408.008 Compensability of heart attacks

A heart attack is a compensable injury under this subtitle 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 employee's 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.

These "new and much more demanding standards" (Texas Workers' Compensation Commission Appeal No. 92460, decided October 12, 1992), have been discussed at length in a series of Appeals Panel decisions beginning with Texas Workers' Compensation Commission Appeal No. 91009, decided September 4, 1991. The medical evidence in Section 408.008(2) must indicate that the effect of the work being performed by the employee was a substantial contributing factor when balanced against the natural progression of a pre-existing heart condition or disease. There can be more than one substantial contributing factor, so long as the work is a greater factor than the natural progress of any underlying heart condition or disease. Appeal No. 91009, *supra*. We would note that medical evidence is not restricted to direct proof, through objective tests or an autopsy, that a pre-existing disease or a work-related activity caused the attack. "Medical evidence" which a trier of fact may weigh includes expert opinion as to causation based upon reasonable medical probabilities, from known or assumed facts. *See* Schaefer v. Texas Employers' Insurance Ass'n , 612 S.W.2d 199, 202 (Tex. 1980). A trier of fact is entitled to consider the extent to which an opinion depends upon assumptions which are, in turn, not supported or only weakly supported by other evidence. It is the substance of the testimony, and not the words used, that determine whether it rises to the level of reasonable medical probability, as opposed to speculation and surmise. Id.

In this case, Dr. A's strong opinion that the decedent's meeting with the bank examiner the morning of (date of injury) was the precipitating event for his heart attack is

clearly based upon the assumption that a topic of conversation at that meeting would be the questionable loans. This in turn is premised upon an assumption that the decedent knew that questionable loans were being made. However, by his own admission, Dr. A did not know the sequence of actual events that morning.

Ms. S testified that the meeting did not, and would not have, involved any questionable loans, and was not a confrontational meeting. Decedent's secretary indicated decedent was not preoccupied or upset, and said he felt fine that morning. Decedent's wife and son painted a picture of a gentleman whose weekend before his tragic death was relaxed and involved family activities. The hearing officer evidently considered that as strong as Dr. A's testimony was, it was premised on an assumption about the Monday morning meeting and decedent's frame of mind that is not supported by other evidence in the record, and therefore was more in the nature of speculation or surmise. The evidence against Dr. A's assumptions is not so weak as to be beyond reasonable belief by the trier of fact.

Even if one accepted that decedent was under mental and emotional stress beginning the week preceding his death because he suspected fraudulent loans, Section 408.008(3) states that compensability is precluded where emotional or mental stress triggers a heart attack unless there has been a sudden stimulus. Although the hearing officer determined that the requirements of Section 408.008(2) were not met, he also found that there was no untoward event on (date of injury), or no unusual mental or emotional stress immediately prior to his death. We do not agree with claimants that this indicates application of an incorrect legal standard. Rather, it seems to echo the court's determination in Brown v. Texas Employers' Insurance Ass'n, 635 S.W.2d 415 (Tex. 1982), in which a finding that a stress-related death was compensable was reversed, because the evidence did not point to a particular event that caused the heart attack, and that such was not proven by evidence of generalized stress coupled with a particularly difficult task assigned to Mr. B on the day of his death.

We have held that evidence that an employee who sustained a heart attack and who had a pre-existing heart disease or risk factors does not, in and of itself, preclude compensability, as the carrier argues. Texas Workers' Compensation Commission Appeal No. 93582, decided August 23, 1993. As noted in that decision, such an interpretation would cast aside the use by the legislature of the phrase "natural progression." However, we do not believe that the record here or the decision itself indicates that the mere fact of pre-existing disease led the hearing officer to find against the claimants. We believe that in this decision, the hearing officer has performed the required comparison in determining the preponderance of the medical evidence.

Section 410.165 provides that the hearing officer, as fact finder, is the sole judge of the weight and credibility to be given the evidence. He may believe all, part, or none of the testimony. The Appeals Panel will reverse a finding of fact of the hearing officer only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong

and unjust. Cain v. Bain, 709 S.W.2d 175,176 (Tex. 1986). We do not believe that this was the case here, and affirm the hearing officer.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Gary L. Kilgore
Appeals Judge