

APPEAL NO. 93948

On September 27, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act) (formerly V.A.C.S., Article 8308-1.01 *et seq.*). The parties stipulated that on (date of injury), (decedent) sustained a heart attack which resulted in his death on (date of injury). The parties agreed that if the decedent's death was found to be compensable, (claimant), surviving spouse of the decedent, was the only proper beneficiary for death benefits and also agreed on the period of entitlement to death benefits. The issue to be decided at the hearing was whether the decedent's heart attack was sustained in the course and scope of his employment with the employer, (employer). the hearing officer decided that the decedent did not sustain a compensable heart attack and denied death benefits. The claimant disagrees with the decision and requests that we reverse it and render a decision in her favor, or reverse and remand. The respondent (carrier) responds that the decision is supported by the evidence and requests affirmance.

DECISION

The decision of the hearing officer is affirmed.

Section 408.008 (formerly Article 8308-4.15) relating to the compensability of heart attacks provides as follows:

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 the 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 pre-existing 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.

The decedent, who was 57 years of age at the time of his death, had worked for the employer as a construction foreman for ten years. According to the claimant, prior to (date of injury), the decedent did not have any problems with his heart, blood pressure, or any "vascular disease." He had been treated for pneumonia a year before his death and had had a follow-up visit with his doctor three weeks before his death and was told he would not

have to be seen again for one year. The claimant said the decedent appeared to be in good health with no complaints other than occasional complaints concerning his back. He had had back surgery several years prior to his death. One of the decedent's brothers had a nonfatal heart attack around 1985 and the decedent was advised to have a stress test. In a "Treadmill Report" from (Hospital A) dated February 7, 1986, Dr. C gave a clinical impression of "possible coronary artery disease" and stated that "there is only about 15% probability of 50% narrowing of a major Coronary vessel."

(Mr. S), an estimator for the employer, testified that before the decedent left for the job site at (the plant) the morning of (date of injury), the decedent told Mr. S's father, who also works for the employer and who was in the office with Mr. S and the decedent that morning, that he, the decedent, "didn't feel good" and that if he did not feel better by midday would go home. Mr. S said it was uncommon for the decedent to complain about not feeling well. Mr. S could shed no light on what decedent meant by his statement concerning his health. Mr. S said the decedent was a good employee and that the decedent ran the crew, led the crew, and worked with the crew. Mr. S said the decedent always worked and probably worked harder than the men in his crew. Mr. S was not present at the job site on (date of injury).

(Mr. P), is the decedent's son and he worked for the employer. He testified that on (date of injury), he met the decedent at the employer's office about 6:30 a.m. and the decedent did not make any complaints or appear to have any "physical complaints." He, the decedent, and (Mr. B) went in a pickup truck to the job site at the plant arriving at about 7:30 a.m. The job consisted of cleaning out construction joints and caulking them. The work was done outside. Mr. P said the sun was out and it was warm and humid. Supplies were kept in a shack at the plant. When they got to the shack, cans of caulking, which Mr. P said weighed between 5 to 20 pounds, were put into the pickup along with hoses for the compressor which was pulled behind the pickup. Mr. P said the decedent helped load some of the hoses. The crew then drove to the job site at the plant. When they got to the job site, which was next to a road, Mr. P said the truck was unloaded and that the decedent "helped set some of the stuff up." Mr. P and Mr. B did the cleaning and caulking while the decedent was "flagging some traffic."

About 10:00 a.m., more caulking was needed so the decedent drove to the shack alone to get more. Mr. P had enough caulking left at the job site to continue working while the decedent was gone. The decedent was gone 15 to 20 minutes. When he returned he had six to seven cans of caulking in the truck. Mr. P said that there was no one at the shack to help load the cans of caulking so he believed the decedent must have loaded them himself. Mr. P said he thought that the decedent and Mr. B unloaded the caulking from the pickup, but when he was directly asked whether the decedent unloaded the caulking he said: "I couldn't say that he did. I was still caulking." However, it was his belief that the decedent helped unload the caulking because he said the decedent was not the type of person to simply watch and give orders. He said the decedent would do physical work if necessary to do the job. Mr. S testified that it would not have been an unusual task for the decedent to lift 6 or 7 cans of caulking.

After the truck was unloaded, Mr. P said that the decedent told him that his shoulder was hurting and he "even hurt in his teeth." The job was finished about 11:00 a.m. so the decedent backed the pickup over to the compressor. Apparently, Mr. P was at the compressor waiting to hook it up to the pickup. He turned and said something to Mr. B and when he turned back around he saw the decedent slumped over in the pickup. He said the decedent was turning red and was unable to talk so he sent Mr. B to call an ambulance. The ambulance came and took the decedent and Mr. P to Hospital A. Mr. P said that to his knowledge the decedent had never before had problems with his heart. He said the decedent smoked one to two packs of cigarettes a day.

Records from Hospital A revealed that the decedent was comatose on arrival. He was treated by several doctors. There was no testimony at the hearing concerning who provided the history of the incident to the doctors; however, since the decedent was comatose and Mr. P went to the hospital with the decedent, it is reasonable to infer that Mr. P provided the history. In a report dated (date of injury), (Dr. B) diagnosed acute myocardial infarction with probable arrhythmia and hypoxic episode and pulmonary arrest. The history recited by Dr. B was that several minutes after complaining of chest and arm pain, the decedent collapsed in the truck at work. In a report dated (date of injury), Dr. W diagnosed cardiopulmonary arrest with ventricular fibrillation. (Dr. H) stated in a report dated April 1st that the claimant had an acute myocardial infarction leading to cardiac arrest with coma secondary to anoxic brain damage. Dr. H said it was possible that the decedent had primarily a cerebral event with a cerebral hemorrhage causing the cardiac arrest. (Dr. S) reported that the decedent had an anoxic encephalopathy secondary to cardiopulmonary arrest which occurred at the time of an acute myocardial infarction. The history recited by Dr. S was that the decedent "was working but not doing anything strenuous this morning," complained of left arm pain which went up into his jaw and teeth, and about 20 minutes later Mr. P found him slumped over in the truck.

Radiology reports dated April 1st revealed that there was no radiographic evidence of active cardiopulmonary disease nor radiographic evidence of acute cardiopulmonary abnormality. An echocardiogram report also dated April 1st revealed that the left atrium, right atrium, right ventricle, and aortic root were all normal. The aortic valve, mitral valve, tricuspid valve, pulmonic valve and left ventricle were also reported as normal. However, there was abnormality reported in the left ventricular wall motion. On April 9, 1992, the decedent was transferred to the (Hospital B) where he died on (date of injury). In a report dated April 21st, (Dr. C) reported that the cause of death was "cardiopulmonary arrest, status post severe anoxic encephalopathy, status post myocardial infarction, probable aspiration pneumonia." An autopsy was not performed.

On May 21, 1993, (Dr. P), who is board certified in internal medicine and cardiovascular disease, gave a deposition on written questions wherein he was asked to give opinions based on "medical probability." Dr. P said he had reviewed medical records from Hospitals A and B. In giving his opinions, Dr. P was asked to assume that at the time the decedent left for the job site at about 7:00 a.m. he never mentioned anything about feeling bad, that he left the job site to get additional caulking and returned with "numerous

cans that he had loaded into the pickup truck," that the cans weighed between 20 and 30 pounds each, that the weather was hot, that around 10:00 a.m. the decedent was not feeling well and his shoulder was hurting, that around 11:00 a.m. he was to back up the truck to the air compressor, that it was at that time that he was found slumped over in the truck, that he was 57 years of age at the time of his death, that he smoked, and that there is no indication of previous heart condition or heart troubles. Based on the facts presented to him and his review of the medical records, Dr. P opined that the decedent's cause of death was acute myocardial infarction with consequences of cardiac arrest and subsequent brain damage. Dr. P was asked to give his opinion as to what caused or precipitated the decedent's heart attack. Dr. P stated:

While the underlying condition is likely to be coronary arteriosclerosis or cholesterol deposits in the arteries of the heart, the proximate cause or precipitating cause is in all probability physical exertion on a hot day causing increased stress to the heart.

Dr. P was also asked "is there anything about loading numerous cans of caulking weighing between 20-30 pounds a piece that would substantially contribute to [decedent's] heart attack?" Dr. P stated:

With underlying arteriosclerosis of the coronary arteries and inadequate reserve, the increased workload of physical exertion on a hot day caused increased requirements for more blood flow than could be attained resulting in the heart attack.

On September 13, 1993, Dr. P gave another deposition on written questions which contained, among other questions and answers, the following:

No. 3. Did [decedent's] underlying coronary arteriosclerosis or cholesterol deposits in the arteries of the heart reduce the blood flow to [decedent's] heart?

Answer: It is impossible to know for certain since he was not known to have any symptoms or other evidence of this and no objective testing was done, to my knowledge. Considerable reserve is present in many patients so that blood flow is adequate for normal activity but may not have enough reserve for increases with physical and mental stresses.

No. 4. Did this reduction in blood flow caused by [decedent's] underlying coronary arteriosclerosis or cholesterol deposits in the arteries of the heart play a role in causing [decedent's] heart attack?

Answer: Again, the answer is unknown, but it is possible.

No. 5.If so, please describe the role played by [decedent's] coronary arteriosclerosis or cholesterol deposits in the arteries of the heart?

Answer:It sets the stage for either sudden occlusion with clot formation on an irregular plaque in the coronary artery or for inadequate reserve when exertion combined with heat and humidity may increase requirements beyond the available flow.

No. 6.Was [decedent's] coronary arteriosclerosis or cholesterol deposits in the arteries of the heart a substantial factor or cause of his heart attack?

Answer:From a medical viewpoint, coronary arteriosclerosis is likely to be a substantial factor, but from a legal viewpoint the proximate cause is likely to be the exertion, heat and humidity.

No. 7.Is it your opinion that any physical exertion that [decedent] performed on the day of his heart attack precipitated the heart attack but that both the exertion and the natural progression of [decedent's] underlying heart disease were contributing causes to the attack?

Answer:Essentially the same as #6. Physical exertion combined with the stress, heat, and humidity probably precipitated the heart attack.

No. 8.Do you consider that a substantial contributing cause to [decedent's] heart attack was his physical exertion, the natural progression of this underlying disease, or both?

Answer:Same as above.

No. 9.Have all your answers been based upon reasonable medical probability?

Answer:Yes.

The only document offered into evidence by the carrier was a letter from Dr. Z to the carrier's attorney's office dated September 8, 1993. As previously noted, the hearing was held on September 27, 1993. The claimant objected to the document on the bases of hearsay and failure to timely exchange. As to the hearsay objection, the hearing officer noted that conformity to legal rules of evidence is not necessary in a contested case hearing held under the 1989 Act. Concerning the failure to timely exchange objection, the claimant's attorney said he received the document from the carrier's attorney on September 21, 1993. The carrier's attorney said he had reviewed his file and could not determine when his office received the document (there is no date stamp on the document). He noted that the document was dated September 8, 1993, and that as to the date of receipt by his office

said "it could have been two days later or it could have been a week later. I just don't know. I do know that it was sent out from our office by way of supplemental exchange on September 20th of '93." The carrier's attorney represented that Dr. Z was hired by the carrier when the claimant had Dr. P review the records. The hearing officer stated "I'm going to overrule the objection and allow it in." On appeal, the claimant asserts that the hearing officer erred in admitting the document into evidence because it was not timely exchanged.

In the September 8th letter, Dr. Z stated that he reviewed the records from Hospitals A and B and that according to records from Hospital A the decedent was not doing any strenuous work the morning of his heart attack. Dr. Z said he concurred with the diagnosis of acute myocardial infarction leading to cardiac arrest. Dr. Z further stated:

It is my opinion that [decedent's] myocardial infarction was likely due to underlying atherosclerotic heart disease and not precipitated by his work. He had significant cardiac risk factors. He had a family history of cardiovascular disease and smoked 1-2 packs of cigarettes per day. According to Dr. H's note the patient had not been doing any strenuous work the morning prior to his heart attack and cardiac arrest. There is nothing present in the medical records I reviewed to suggest that his heart attack was the result of some type of stress occurring on the job. Given his age, history of heavy smoking, and his significant family history of heart disease, the overwhelming likelihood is that the patient had significant pre-existing underlying atherosclerotic heart disease. On the morning of (date of injury) he had an ischemic episode which led to a cardiac arrest and his ultimate demise.

In the Statement of the Evidence portion of her decision, the hearing officer stated, among other things, that it was undisputed that the decedent had a family history of heart disease and was a smoker, but had never, prior to April 1st, been diagnosed with a heart problem. The hearing officer summarized the evidence, including the reports of Drs. P and Z, and stated as follows:

After a total review of the evidence, the record establishes that there was not a specific event at work causing the decedent's attack, and that the decedent's work, as opposed to the natural progression of a heart disease or condition, was not a substantially contributing or precipitating factor of the attack. The evidence credibly demonstrates that the decedent did complain, although vaguely, about not feeling well before preparing to go to the job site on (date of injury), and he planned to take off the remainder of the day after they were finished at [the plant]. This fact was not presented to Dr. P in the hypothetical. The fact that the only evidence of exertion or strenuous activity comes from the decedent's son, who accompanied the decedent to the hospital, whose records consistently reflect no strenuous activity on the part of the decedent that morning, in tandem with the fact of the decedent's earlier complaints, led to the ultimate conclusion that the decedent's work was not a substantially

contributing factor to his heart attack.

The following findings of fact and conclusion of law are challenged on appeal:

### **FINDINGS OF FACT**

4. The evidence failed to show that the decedent's heart attack on (date of injury) was caused by a specific event occurring while the decedent was engaged in an activity that originated in and had to do with the business of [employer] and was performed by the decedent in furtherance of the affairs of [employer].
5. The medical evidence failed to establish that the decedent's work rather than the natural progression of a pre-existing heart condition or disease was a substantial contributing factor of his heart attack on (date of injury).

### **CONCLUSION OF LAW**

3. [Decedent], deceased, did not sustain a compensable heart attack, as defined by the Texas Workers' Compensation Act, on (date of injury).

Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 142.13(c) (Rule 142.13(c)) provides that not later than 15 days after the benefit review conference (BRC) (in this case held on April 13, 1993) the parties shall exchange, among other things, all medical reports, and that thereafter, parties shall exchange additional documentary evidence as it becomes available. Section 410.161 provides that a party who fails to disclose documents when required may not introduce the evidence at a subsequent proceeding unless good cause is shown for not having disclosed the document. In the instant case, Dr. Z's letter is dated September 8, 1993, and the carrier's attorney represented that he didn't know when his office received it but that it could have been received two days later. The document was not sent to the claimant until September 20th and was received on September 21st, just seven days before the hearing. The hearing officer made no finding of good cause for failure to exchange when the document became available to the carrier, which, as noted, may have been by September 10th. Given the carrier's representation as to when the document may have been received and the date it was finally exchanged, we decline to imply a finding of good cause. In our opinion, the hearing officer erred in admitting Dr. Z's letter into evidence over the claimant's objection that it had not been timely exchanged. See Texas Workers' Compensation Commission Appeal No. 91064, decided December 12, 1991. We are also concerned that the hearing officer may have equated risk factors of family history and smoking to a pre-existing heart condition or disease. Dr. Z certainly appears to have done so. We have previously held that risk factors for heart disease such as family history, gender, smoking, cholesterol count, and hypertension may well contribute to a pre-existing heart condition or disease, but they do not, per se, equate to a pre-existing heart condition or disease. See Texas Workers' Compensation Commission Appeal No. 92501, decided November 4, 1992.

Despite our concerns and the hearing officer's error in admitting Dr. Z's report, all of which essentially involve the sufficiency of the admissible evidence to support Finding of Fact No. 5 (substantial contributing factor test), we nevertheless affirm the hearing officer's decision that the heart attack was not compensable because, having reviewed the record, we conclude that Finding of Fact No. 4 (heart attack not caused by specific event) is sufficiently supported by the evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). She resolves conflicts and inconsistencies in the evidence and we do not substitute our judgement for that of the hearing officer where there is sufficient evidence to support a finding. Texas Workers' Compensation Commission Appeal No. 92454, decided October 1, 1992. Section 408.008(1)(b) specifically requires that the heart attack be identified as caused by a specific event occurring in the course and scope of the employee's employment. There is evidence that the decedent did not feel well before going to the job site and that he was doing no more physical work than he would normally do. The hearing officer did not have to infer from the evidence presented that the decedent lifted cans out of the truck; however, it could reasonably be inferred that Mr. P, who was at the job site, observed the decedent, and went to the hospital with the decedent, thought the work the decedent was doing on the morning of his heart attack was not strenuous and reported the same to the doctors at Hospital A. Given the state of the evidence, we find no basis for disturbing the hearing officer's finding that the evidence failed to show that the decedent's heart attack was caused by a specific event in the course and scope of his employment. Finding of Fact No. 4 supports the hearing officer's conclusion that the decedent did not sustain a compensable heart attack. See Texas Workers' Compensation Commission Appeal No. 92212, decided July 6, 1992, and Appeal No. 92454, *supra*.

The decision of the hearing officer is affirmed.

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Robert W. Potts  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge