APPEAL NO. 91009

On July 2, 1991, a contested case hearing was held. The hearing officer determined that the respondent's deceased husband died of a heart attack while within the course and scope of his employment with Employer and that he suffered a compensable fatal injury within the meaning of the Texas Workers' Compensation Act of 1989 (1989 Act). Tex. Rev. Stat. Ann., art. 8308-1.01 et seq., (Vernon Supp. 1991). He ordered burial and death benefits to be paid by appellant to daughter and son, a minor child of the deceased. The appellant urges us to set aside the decision and order of the hearing officer and to enter an order that the evidence fails to establish that a compensable heart attack was suffered by the deceased.

DECISION

Finding the evidence insufficient to uphold the decision of the hearing officer, we reverse. The appellant is determined not to be liable for payment of any benefits in this case.

The respondent's husband had been employed by Employer for the past ten to eleven years. On _____, he was in the vicinity of (City 1), (State 1) drilling for a lost gold mine. His son, DA, also an employee of Employer, was with him on the job. DA testified that on _____, he and his father arrived at work about 9:00 to 9:30 a.m. On two occasions during the morning, the drilling pipes and joints got "hung up" in the drilling hole as they were being extracted. Breaking the pipes loose required a greater amount of physical labor, including using a monkey wrench and sledgehammers to break the pipe loose at the joints.

DA testified that when a pipe gets "hung up" it becomes a more strenuous activity than the ordinary course of drilling. They have had pipes get "hung up" before but his father never had shortness of breath in getting them loose as he did on the day in question. He stated his father, the deceased, became very agitated about the pipes being stuck on _____ and threw his hands into the air and cursed. They took a break for lunch at about 11:30 and finally got the pipes out at about 1:30 p.m. At this time they walked toward a cabin approximately half a mile from the drilling site; however, the deceased kept on resting as they walked to the cabin. After getting to the cabin and looking around, they decided to go over to a windmill about a quarter of a mile away for a drink. About half way to the windmill, the deceased laid down for about thirty minutes to rest and said that his chest hurt right in the middle and he was having shortness of breath. He finally got up and when he got to the windmill he fell to the ground and started vomiting. DA turned his father's head to the side and "started trying to give him CPR." Having no success, he ran to the pickup truck to get help. His father was subsequently pronounced dead.

During the one and a half years that DA worked with his father, he never had any problems doing the various drilling activities, never complained of any heart or other problems and didn't have any physical symptoms or signs of health problems. He described his father as strong-looking, not overweight and healthy prior to the _____ incident.

Mrs. A testified that her husband had not had any problems with his heart or complained of tightness in his chest prior to the heart attack and had not been under a doctor's care for his heart. She described his health as "wonderful" although he did have bursitis in one shoulder for which he got a yearly shot. Mrs. A also stated that although she and her husband had had financial problems leading to bankruptcy, the fact they had filed for bankruptcy was a relief to her husband and that he was not under any emotional stress or strain. She indicated that her husband smoked a pack to a pack and a half of cigarettes a day.

Mr. B testified that he owned Employer and was the employer of the deceased, who was also his brother-in-law. Mr. B had worked with the deceased many times. He stated that having a situation like the one the deceased and his son experienced on _____, can be a strenuous, stressful situation. He stated that the deceased was doing his job when the heart attack occurred and that the deceased was in charge and had discretion in how to accomplish the operation of the rig. He stated he was neutral on the matter of course and scope of employment. Other than a problem with one shoulder, he wasn't aware of any other physical problems experienced by the deceased.

Over an objection based upon timeliness of disclosure, a statement from a medical doctor, JD, was admitted into evidence. It provides as follows:

TO WHOM IT MAY CONCERN:

> According to events at the scene, JDA, deceased was under severe physiological stress and strain that would most likely produce a transitory hypertensive episode of increased intravascular pressure that could break off intracoronary arteriosclerosis plaque. That would occlude the coronary vessel to produce a myocardial infarction. This occurred in the Decedent based upon laymen observation with the signs and symptoms he complained of before death.
>
> It is my opinion that more likely than not, the occupational physical stress experienced by JDA was a contributing cause of his myocardial death.

A death certificate was also admitted listing as the cause of death as "ASCVD" which stands for Atherosclerotic Cardiovascular Disease.

The appellant's evidence at the hearing consisted of a statement from Dr. S, M.D., explaining what "ASCVD" stands for and identifying Harrison's Principles of Internal Medicine as a reliable authority, and an eleven page excerpt from Harrison's explaining atherosclerosis and other forms of arteriosclerosis.

Much of the appellant's request for review revolves around the statement of Dr. JD. Although the basis for his objection is expanded in the brief accompanying the request for review, we will only address the objection made at the contested case hearing. PEP Gas

Products, Inc. v. Farris, 620 S.W.2d 559 (Tex. 1981), Texas Municipal Power Agency v. Berger, 600 S.W.2d 850 (Tex. Civ. App.-Houston 1980, no writ), Winkel v. Hankins, 585 S.W.2d 889 (Tex. Civ. App.-Eastland 1979, writ dism'd).

As indicated above, the appellant objected to Dr. JD's statement on the basis that it was not timely furnished to the appellant as required by the exchange of information rules. (Texas Workers' Compensation Commission Rule 142.13) and Tex. Civ. Stat. Ann., art. 8308-6.33(d) (Vernon Supp. 1991). The statement was given to the appellant the same day as the hearing. Appellant also stated ". . . that had they received it in a timely manner, they might have had an opportunity to come forward with some evidence from Dr. S or somewhere else to challenge or rebut the Dr. JD statement."

To show good cause for not complying with the requirements for exchange of information, the respondent stated to the hearing officer that Dr. JD, who had been a medical examiner for the county for a number of years, was presently living in (City 2). The respondent stated he had been trying to get Dr. JD and to get him acquainted with the facts of the case. After finding out Dr. JD would not be available to testify, the respondent requested a narrative report which only arrived the day of the hearing and that is why it was not exchanged earlier.

The hearing officer admitted the statement but stated he was going to restrict its scope. When asked what he meant, the hearing officer indicated "the presumption is I won't give it any more credibility than it's due" and that he would rely on his presumption. The appellant did not request a continuance or additional time to study or respond to Dr. JD's statement.

The 1989 Act and the implementing rules require early disclosure of evidentiary items such as Dr. JD's statement, under penalty of exclusion, unless good cause is shown. (Art. 8308-6.33(e)). The first time factor for exchange of documents and witness information is, "no later than 15 days after the benefit review conference" and thereafter they are to be exchanged as they become available. (TWCC Rule 142.13(c)(1) and (2)). The rules further provide that all documentary evidence not previously exchanged shall be brought to the hearing in sufficient copies for exchange and that the "hearing officer should make a determination whether good cause exists for a party not having previously exchanged such information or documents to introduce such evidence at the hearing" (TWCC Rule 142.13(c)(3)).

The hearing officer apparently determined good cause had been shown as Dr. JD's statement was considered. The appropriate test for the existence of good cause is that of ordinary prudence; that is, that degree of diligence as an ordinarily prudent person would have exercised under the same or similar circumstances. Hawkins v. Safety Casualty Co., 207 S.W.2d 370 (Tex. 1948), Employers' Insurance of Wausau v. Shaefer, 662 S.W.2d 414 (Tex. Civ. App.-Corpus Christi 1983, no writ). The determination of good cause is a decision best left to the discretion of the hearing officer at the contested case hearing as is the case of a trial judge at the trial level. See Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986),

Farah Manufacturing Co., Inc. v. Alvarado, 763 S.W.2d 529 (Tex. Civ. App.-El Paso 1988, writ granted). Although the showing in this case appears minimal at best, we do not find it so lacking as to conclude the hearing officer abused his discretion in accepting the evidence. See Yeldell v. Holiday Hills Retirement and Nursing Center, Inc., 701 S.W.2d 243 (Tex. 1985), National Standard Insurance Co. v. Gayton, 773 S.W.2d 75 (Tex. Civ. App.-Amarillo 1989, no writ), Stiles v. Royal Insurance Co. of America, 798 S.W.2d 591 (Tex. Civ. App.-Dallas 1990, no writ).

The appellant urges that the evidence introduced at the contested case hearing is insufficient to establish that the deceased suffered a compensable heart attack. We agree. The respondent has not met her burden of proving a compensable injury in this case.

There was no specific article or section concerning compensability of heart attacks under the Texas Workers' Compensation statutes prior to the 1989 Act. However, a number of cases established guidelines and principles on compensability in heart attack situations. A key issue is whether a heart attack is caused by work activities even though there was a preexisting heart condition and, if caused by on the job strain or overexertion, it has been held to be a compensable, accidental injury and that a pre-disposing bodily infirmity will not preclude compensation. Texas Employers Insurance Co. v. Hayes, 654 S.W.2d 804 (Tex. Civ. App.-Houston [14th Dist.] 1983, no writ). An employee need not be a perfect specimen of health and prior blood pressure and health problems have been held not to deny recovery. Pacific Employee Insurance Co. v. Solomon, 488 S.W.2d 189 (Tex. Civ. App.-Texarkana 1972, no writ) (a case involving heavy lifting), Mueller v. Charter Oak Fire Insurance Co., 533 S.W.2d 123 (Tex. Civ. App.-Tyler 1976, writ ref'd n.r.e.) (diseased arteries). A great degree of stress, strain or exertion is not necessary for recovery in a heart attack case, Kiel v. Texas Employees Insurance Co., 679 S.W.2d 656 (Tex. Civ. App.-Houston [1st Dist.] 1984, no writ) (stress from other employee attacking claimant and his car), Texas Employers Insurance Co. v. Jackson, 719 S.W.2d 245 (Tex. Civ. App.-El Paso 1986, writ ref'd n.r.e.) (jerking hard on a door), Texas Employers' Insurance Co. v. Courtney, 709 S.W.2d 382 (Tex. Civ. App.-El Paso 1986, ref'd n.r.e.) (lifting a 2-1/2 pound tool box lid), however, claimant must prove some causal connection between the strain or exertion and in the heart attack itself, i.e. stress, strain or exertion must be either the sole or contributing cause of heart attack. Northbrook National Insurance Co. v. Goodwin, 676 S.W.2d 451 (Tex. Civ. App.-Houston [1st Dist.] 1984, no writ), Mueller, supra. Medical testimony on reasonable medical probability that an occurrence caused a heart attack has been held to be unnecessary. Insurance Company of North America v. Kneten, 430 S.W.2d 565 (Tex. Civ. App.-Waco 1968, aff'd 440 S.W.2d 52). The existence of predisposing bodily infirmity will not preclude recovery if work itself is also a cause of the heart attack. Western Casualty and Surety Co. v. Dickie, 609 S.W.2d 874 (Tex. Civ. App.-Waco 1980, ref. n.r.e.), Blair v. INA of Texas, 686 S.W.2d 627 (Tex. Civ. App.-Corpus Christi 1984, ref'd n.r.e.).

In sum, case law developed under the prior legislation teaches that: (1) medical testimony is not necessarily required in every heart attack case; (2) when medical testimony is needed to establish a causal relationship between the employment and the attack, other evidence together with the medical evidence can reach the preponderance standard

necessary for proving a claim for benefits; and, (3) the employment only had to be a contributing factor to an attack regardless of the degree.

The 1989 Act, in specifically providing for recovery in heart attack situations, set forth new and more demanding standards for compensability and, it is in measuring up to these new standards that the case before us fails. The legislature has provided that before a heart attack is compensable, ". . . the preponderance of 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. . ." Not only must there now be medical evidence, such evidence must measure up to a preponderance level. And, the medical evidence must be compared or weighed as to the effect of the work and the natural progression of a preexisting heart condition. Further, the employee's work must be more than a contributing factor of the attack, it must be a substantial contributing factor.

The evidence in this case is, in our opinion, insufficient to meet the requirements of the 1989 Act. The only medical evidence proffered by the respondent was the short statement of Dr. JD. He does not indicate his source for the background information on the deceased's activity on the day of the attack. According to the record, he apparently resided in (City 2). Also, DA, the only witness to the deceased's activity, never spoke with Dr. JD and DA's prehearing statement did not mention any physical stress or strain. Nonetheless, he determined that the deceased was under severe physiological stress and strain "that would most likely produce a transitory hypertensive episode of increased intravascular pressure that could break off intracoronary arteriosclerosis plaque" leading to coronary vessel occlusion and a myocardial infarction. Based upon lay observation with the signs and symptoms deceased complained of before death, he opines this occurred in the decedent. In his opinion, it is more likely than not that the occupational physical stress experienced by the deceased was a contributing cause of his myocardial death.

The deceased apparently was not under any physician's care for coronary disease and there is no indication either he or his family was aware of any atherosclerosis condition. The (State 1) death certificate lists the immediate cause (final disease or condition resulting in death) as "ASCVD" which is an abbreviation for Atherosclerotic Cardiovascular Disease. This is not competent evidence, in and of itself, that the deceased had or died from "ASCVD." Employers Mutual Liability Insurance Co. of Wisconsin v. Hunter, 503 S.W.2d 820 (Tex. Civ. App.-Beaumont 1973, writ ref'd n.r.e.).

In Respondent Exhibit D at the hearing, a medical article on "Atherosclerosis and Other Forms of Arteriosclerosis," it is stated that "[p]ractically all patients with myocardial infarction, as defined by electrocardiographic and enzyme changes, have coronary atherosclerosis." Therefore, the conclusion of all parties appears to be that the deceased had this condition. However, the evidence is lacking as to what degree or how advanced the disease was in the deceased.

While Dr. JD's written statement is some medical evidence that respondent's work was a contributing factor in his heart attack, it is also some medical evidence that a

preexisting heart condition was a contributing factor in the heart attack. In a case such as this, where the medical evidence tends to show that both the work and a preexisting heart condition were contributing factors in a heart attack, we believe the legislature intended that the claimant produce medical evidence which would, by a preponderance of such evidence, show that the work rather than the preexisting heart condition was a substantial contributing factor in the heart attack. The record in this case contains no medical evidence from which the finder of fact could compare or weigh the work conditions to the preexisting heart condition contributing to the heart attack.

In our assessment, the respondent's evidence fails to meet the burden of establishing those factors required under the 1989 Act for compensability. Not only does the medical evidence fail to show a degree or natural progression of the deceased's preexisting heart condition as it relates to the employee's work, it indicates that the work was no more than a contributing factor of the attack rather than the statutorily imposed higher standard of a substantial contributing factor. While we do not hold that the 1989 Act places a burden on a claimant of proving the negative, that is, that a preexisting heart condition was not a substantial contributing factor, such preexisting condition must be weighed or compared with the employee's work preceding the attack. The 1989 Act does not, in our view, preclude there being more than one substantial contributing factor in a heart attack case. Here, however, the evidence falls short in meeting the requirements of the 1989 Act.

The meaning of the word "substantial" is not defined in the legislation enacting the new standard for determining compensability in heart attack cases. It has been defined as more than "insubstantial" or "slight" but not "predominance" in Skyview Cooling Co. v. Industrial Commission of Arizona, 142 Ariz. 554 (App.), 691 P.2d 320 (1984), where the Arizona Appeals Court was defining the term "substantial contributing cause" in Ariz. Rev. Stat. Ann. ' 23.1043.01 (Supp. 1980). The Arizona statute provided that "a heart related or perivascular injury, illness or death shall not be considered a personal injury by accident out of and in the course of employment and is not compensable pursuant to this chapter unless some injury, stress or exertion related to the employment was a substantial contributing cause of the heart related or perivascular injury, illness or death." The court also noted that while it is better practice to ask the specific question as to substantial contributing cause, it is not fatal as proof does not require "magic words", but the testimony and evidence must establish substantial contributing cause.

Contrary to the assertions of the respondent that lay persons may provide probative medical testimony, we do not find any case law to support this position. Respondent argues that the testimony of DA is apparently medical testimony and would in and of itself or in conjunction with Dr. JD's statement support the hearing officer's determination of compensability. He also urges that we uphold the hearing officer's Decision and Order which took official notice that a lay person can provide credible medical evidence. The cases cited, Houston General Insurance Company v. Pegues, 514 S.W.2d 492 (Tex. Civ. App.-Texarkana 1974, writ ref'd n.r.e.) and Reina v. General Accident Fire and Life Assurance Corp., 611 S.W.2d 415 (Tex. 1981), do not stand for nor support this proposition. Pegues, in this regard, only holds that medical testimony is not binding on the trier of fact

and that lay testimony may be accepted over medical testimony in showing injury and disability where medical testimony contradicts the lay testimony. The court did state an exception to this where the case involves a matter that is so scientific that medical or scientific evidence is necessary for a determination. Reina, holds only that the trier of fact can find disability from circumstantial evidence produced by a lay witness even if contradicted by medical evidence. Neither case stands for a lay witness providing probative medical evidence.

Under the circumstances present, we find the evidence insufficient to uphold the conclusions that [t]he preponderance of medical evidence shows that Mr. A's work, rather than the natural progression of atherosclerosis, was a substantial contributing factor to his heart attack" and that "Mr. JDA suffered a compensable fatal injury within the meaning of the Act, on _____, while working for Employer." Accordingly, the decision and order of the hearing officer cannot stand.

As a result of our decision on this issue, the remaining issues raised in the appellant's brief are rendered moot.

The decision and order are reversed. The Employer's (carrier) is liable to pay no burial or death benefits in this case.

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Joe Sebesta
Appeals Judge