

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F106668

BARBARA LOVELACE, WIDOW OF JEFFREY LOVELACE, DECEASED EMPLOYEE	CLAIMANT
DOLLARWAY SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT
BLUE CROSS/BLUE SHIELD,	INTERVENOR

OPINION FILED SEPTEMBER 18, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on June 20, 2003, at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE JOHN T. HOLLEMAN, IV, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROLL. WORLEY, Attorney at Law, Little Rock, Arkansas.

Blue Cross/Blue Shield represented by the HONORABLE CHET ROBERTS, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical and funeral expenses, dependency benefits, and attorney's fees.

At issue is whether or not the deceased sustained a compensable heart attack as defined by Ark. Code Ann. §11-9-114. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on February 16, 2001, at which time the deceased was earning sufficient wages to entitle the claimant to a compensation rate of \$410.00/\$308.00, in the event this claim is found to be compensable. Blue Cross/Blue Shield has paid some medical expenses and filed a lien for \$2,770.17. US Able paid life insurance benefits totaling \$75,000.00.

The claimant contends the deceased, acting in his capacity as school principal, suffered a heart attack on February 16, 2001, after he broke up a fight between two students. The claimant seeks payment of medical and funeral expenses, dependency benefits, and attorney's fees.

The respondents contend the claimant did not suffer a compensable heart attack as defined by Ark. Code Ann. §11-9-114.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript along with the May 30, 2003 deposition of Dr. Paul Robinson. Additionally, letter briefs were submitted by the parties after the hearing on the issue of respondents' entitlement to a credit in the event of an award of benefits.

Although a teacher, Bobby Lamb, was listed as a potential witness on the prehearing questionnaire of both parties, Mr. Holleman offered only Mr. Lamb's August 23, 2002 discovery deposition on the day of the hearing. Ms. Worley's objection was sustained and Mr. Lamb's deposition was submitted as a proffer.

The evidence of record must be formally accepted by the Administrative Law Judge and that is a matter of discretion, as the Commission is not bound by the rules of evidence Ark. Code Ann. §11-9-705, Brewer v. Tyson Foods, Inc., 10 Ark. App. 88, 661 S.W.2d 423 (1983), L. Henderson v. Compton's Oak Grove Lodge, Full Commission opinion of June 5, 1989 (D415390), Kendrick v. Peel, Eddy & Gibbons Law Firm, 32 Ark. App. 29, 795 S.W.2d 365 (1990) and Southwest Pipe & Supply v. Hoover, 13 Ark. App. 144, 680 S.W.2d 723 (1984).

While it is customary to rely on doctor's evidentiary depositions, lay witnesses are generally expected to attend the hearing. Because so many workers' compensation claims rely on medical records, we try to accommodate physicians as a professional courtesy. As a practical matter, allowing a physician to testify by deposition avoids scheduling conflicts and hopefully does not discourage physicians from accepting workers' compensation patients.

Lay witnesses, however, are generally expected to attend hearings to allow the Administrative Law Judge to assess their demeanor and give counsel an opportunity to cross-examine them. Discovery depositions are usually not accepted into the record unless the witness offers conflicting testimony at the hearing and the deposition is used for impeachment purposes.

In this case I was not advised that Mr. Lamb was unable to attend the hearing and needed special accommodations. Since the claimant is relying on his testimony, I think it was incumbent upon Mr. Holleman to either seek a stipulation from the respondents to substitute Mr. Lamb's deposition in place of his appearance, or subpoena the witness, or ask the Commission to reschedule the hearing at a time convenient for the witness. Mr. Holleman did none of the above nor did he offer an explanation for the witness' absence. Mr. Lamb's testimony has not been considered in this opinion. It is within the discretion of the Commissioners, however, to consider this testimony as their review of the evidence of record is de novo.

Mr. Holleman withdrew his objection to Dr. Robinson's deposition, however, I would point out that the claimant is the one relying on Dr. Robinson's January 13, 2003 report regarding

causation. If the claimant plans to offer a doctor's report into evidence, Commission Rule 20(4) gives the respondents the right of cross-examination. Neither party requested a subpoena for Dr. Robinson.

Mr. and Mrs. Lovelace had been married ten years prior to his death. Ms. Lovelace described her husband age 41 (D.O.B. January 19, 1960), as physically active (playing golf, basketball) with no prior history of heart problems. He began smoking cigarettes four years prior to his death. Mr. Lovelace's father died two years earlier of an apparent heart attack.

Mr. Lovelace was the principal at the Dollarway school. Ms. Lovelace did not attend school functions because her husband was concerned for her safety due to fights among the students.

On February 16, 2001 Ms. Lovelace called the school and spoke with her husband's secretary. She was informed that he had gone to the hospital. Ms. Lovelace contacted the hospital and learned of her husband's death.

Tom Gather, superintendent of the Dollarway School district testified the school dealt with fights on a regular basis, estimating three or four per week. The principal and assistant principal were in charge of student discipline. Although the school employed security personnel, they were not on duty at the time of the altercation. Neither Mr. Gather nor Mrs. Lovelace witnessed the fight at school.

MEDICAL RECORDS

Mr. Lovelace was found outside the emergency room (ER) on a bench. He was pronounced dead on arrival by emergency room physician, Dr. Paul Robinson, and efforts to revive him were unsuccessful. ER records indicate he was diagnosed with cardiac arrest based in part on consultation with the family. Dr. Robinson was informed that the deceased suffered chest pains and went to the ER. His report indicates, “(the family tells) me that there is a strong family history of heart disease but that Mr. Lovelace himself had no past history of such.” Dr. Robinson was unaware of the altercation at school until he subsequently spoke with Mrs. Lovelace and her attorney. He then issued a report on January 13, 2003 stating that the incident on February 16, 2001 caused the heart attack. He based his opinion on his knowledge, experience and training as a physician along with his physical examination of the patient and reports that the patient developed chest pain following an altercation on the same day he presented to the ER.

Dr. Paul Robinson’s deposition was taken by the respondents on May 30, 2003. Prior to this interview, Dr. Robinson met with Ms. Lovelace and her attorney and reviewed material supplied by Mr. Holleman (correspondence and a portion of Mr. Lamb’s deposition) along with medical records in preparation for the deposition. No doctor witnesses an accident. They rely on histories given by the patient and witnesses to answer hypothetical questions. Accordingly, I have considered Dr. Robinson’s responses to information provided by Mr. Lamb.

Dr. Robinson is not a cardiologist and he was unaware of the deceased’s medical history and physical condition prior to the date of death. He did not know the deceased’s specific job duties and he was not provided with Mr. Lamb’s complete deposition or the deposition of other witnesses. He did not know the activities of the deceased prior to the altercation and he did not know the duration of the altercation. Dr. Robinson did not know if the deceased smoked.

Dr. Robinson stated that if the claimant had any risk factors (family history, obesity, cigarette smoking, elevated cholesterol, hypertension, diabetes) it would increase the likelihood of preexisting

coronary artery disease but it wouldn't change his opinion that the altercation triggered the heart attack (Depo. 32-33). Dr. Robinson testified that based on the history he was given of an altercation followed by chest pains and a trip to the ER, there was a close temporal relationship between the incident at work and his heart attack, constituting major cause and making it more likely than not that the altercation triggered the heart attack, within a reasonable degree of medical certainty (Depo. p. 31-33).

Dr. Robinson signed a death certificate listing the immediate cause of death as cardiac arrest due to "probable" myocardial infarction. The claimant's cause of death was listed as "probable" because the only objective testing performed (laboratory tests) did not confirm the diagnosis, and no EKG or autopsy was performed. Dr. Robinson testified it takes some time after damage to the heart muscle before cardiac enzymes show up in lab tests to confirm a heart attack. Dr. Robinson conceded there was no objective medical evidence of a heart attack but the history of chest pain and ventricular fibrillation support his diagnosis (Depo. p. 25, 27-28). His letter of June 6, 2002 states that it is impossible to know if the heart attack was triggered by blood chemicals setting up an irregular heart beat or because preexisting plaque cracked and bled. But regardless of the mechanism, he felt the exertion triggered the cardiac arrest. I think the doctor was under the mistaken impression he had to be 100% certain and relying on autopsy results before he offered an opinion (Depo. p. 32).

Medical records show Mr. Lovelace presented to the ER in February 1996 with complaints of numbness and tingling on the right side of his face and shoulder. He was diagnosed with Bell's palsy after a negative CT scan of the head and discharged with instructions to follow a low cholesterol, low sodium diet and exercise after lab tests showed high levels of cholesterol and triglycerides. However, it does not appear that he was prescribed medication for this condition.

DISCUSSION

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed. Ark. Code Ann. §11-9-704, §119-717.

To qualify as a compensable injury, a work-related accident (specific event, identifiable by time and place of occurrence), must be the major cause of the myocardial infarction. The exertion associated with the accident had to be extraordinary and unusual compared to the employee's usual work or some unusual and unpredicted incident must have occurred that was the major cause of the physical harm, Ulibarri v. Jim Wood Company, 79 Ark. App. 354, 87 S.W.2d 846 (2002). I find that the altercation is an accident and according to Dr. Robinson, the altercation was the major cause of the heart attack. I find that the position of a principal is primarily administrative, and although they may be called upon to mete out punishment for misbehavior that has regrettably become commonplace in some schools, breaking up a fight is an extraordinary or unusual task in any profession except for possibly that of law enforcement.

The respondents seek a credit against any award pursuant to §6-17-1209 and rely on V. Johnson v. LRSD, Full Commission opinion of April 4, 2002 (E700511 and F011921).

In pertinent part, §6-17-1209 provides that a school teacher's absence for injury caused by assault or by a criminal act shall not be charged to sick leave and the school teacher is granted a leave of absence with full pay for one year. Intervening in student fights is specifically identified as an assault or criminal act. However, §6-17-1209 makes no mention of death or the rights of dependents. Mrs. Lovelace has a lawsuit pending over this provision and has not actually received any money. Therefore, I find this issue is not ripe for determination and the respondents are seeking an advisory opinion. I would however, point out that the respondents seem to be confusing disability benefits with dependency benefits. Disability is defined under Ark. Code Ann. §11-9-102 as the "incapacity because of a compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." The Johnson case supra, holds that an injured employee cannot receive disability benefits if he is still receiving a full salary pursuant to §11-9-807(b). It should be noted that payment of unaccrued weekly installments of disability benefits do not survive the death of the claimant, Ark. Code Ann. §11-9-704, McCaa Chevrolet v. Bounds, 207 Ark. 1043, 183 S.W.2d 932 (1944), Zuercher v. Emerson Electric

Company, 31 Ark. App. 124, 789 S.W.2d 467 (1990), Odom v. Tosco Corporation, 12 Ark. App. 196, 672 S.W.2d 915 (1984). Obviously, dependency benefits were created to survive to the employee's estate after death.

The respondents also seek a credit pursuant to Ark. Code Ann. §11-9-411 for benefits paid by a life insurance policy and rely on Dooley v. Automated, Full Commission opinion of January 8, 2003 (F100282).

In pertinent part §11-9-411 provides:

Any benefits payable to an injured worker... shall be reduced...dollar for dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability whether those benefits were paid by a group care, group disability, group loss of income, group accident and health, a self-insured health and welfare plan or group hospital or medical services contract.

There is no mention of life insurance, death or dependency benefits in Ark. Code Ann. §11-9-411. Therefore, I find that Ark. Code Ann. §11-9-411 applies only to medical expenses and disability benefits. It does not affect dependency benefits.

FINDINGS AND CONCLUSIONS

My review of the evidence shows that Mr. Lovelace sustained a compensable heart attack after an altercation at school. The extent and duration of the altercation is unknown without eyewitness testimony, however, there does not seem to be any dispute that the deceased was involved in breaking up a fight on the day of his death.

The deceased had some risk factors for heart disease (family history, smoking, elevated cholesterol levels) but his family physician prescribed no medication for his condition and he had not been ill.

The ER physician diagnosed a myocardial infarction based on his physical examination of the patient, reports of chest pain necessitating his trip to the ER, and ventricular fibrillation. Subsequently the ER physician learned of the altercation at school and opined that the exertion of breaking up the fight triggered the heart attack either by releasing chemicals in the blood which caused an irregular heartbeat or by cracking and bleeding of preexisting plaque in the arteries.

Because of the close temporal relationship between the incident at school, the trip to the ER, chest pains, ventricular fibrillation and cardiac arrest, Dr. Robinson opined that it was more likely than not that the altercation at work triggered the fatal heart attack.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on February 16, 2001 at which time the deceased was earning sufficient wages to entitle him to a compensation rate of \$410.00/\$308.00.
2. The claimant has proven by a preponderance of the credible evidence of record that her husband was injured in an accident at work which was the major cause of his myocardial infarction and death.
3. The accident at work, intervening in a student fight, is extraordinary compared to his regular duties as a principal.
4. The respondents are directed to pay medical expenses subject to Rule 30 and funeral expenses subject to §11-9-527.
5. Respondents are not entitled to a credit under Ark. Code Ann. §11-9-411 for life insurance proceeds.
6. Respondents are directed to pay dependency benefits.
7. Respondents are directed to reimburse Blue Cross Blue Shield in the amount of their lien of \$2,770.17.
8. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum

without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge