

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E209042

BETTY FRICKS, Widow of CHARLES P. FRICKS (Dec'd), EMPLOYEE	CLAIMANT
OSCEOLA FOODS, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT #1
DEATH & PTD TRUST FUND	RESPONDENT #2

OPINION FILED SEPTEMBER 18 , 2007

Hearing before Chief Administrative Law Judge David Greenbaum on July 27, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Phillip Wells, Attorney-at-Law, Jonesboro, Arkansas.

Respondents #1 represented by Mr. Michael E. Ryburn, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 represented by Ms. Judy W. Rudd, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 27, 2007, to determine whether the decedent's death was a compensable consequence of an admitted work-related injury.

This claim was the subject of a prehearing conference conducted on June 28, 2007. A Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the decedent, Charles P. Fricks, sustained a

compensable crush injury to his right lower extremity on May 22, 1992; that he was declared permanently totally disabled as the result of said injury; and that the decedent died on December 5, 2004. It was further agreed that the claimant, the widow and administratrix of the estate of the decedent was wholly and actually dependent upon the decedent and would be entitled to benefits at the rate of \$136.00 per week if the death was found compensable.

By agreement of the parties, the primary issue presented for determination was whether the decedent's death was directly and causally related to the May 22, 1992, compensable injury.

Claimant contended, in summary, that the decedent's death was directly related to the work injury on May 22, 1992; that the estate was entitled to payment of funeral expenses; that the widow was entitled to dependency death benefits beginning December 6, 2004, and continuing through the present, less a credit for any overpayment of permanent total disability benefits; and that a controverted attorney's fee should attach to any additional benefits awarded.

Both respondents #1 and #2 contended that the decedent's death was not the result of the admitted accident and injury. Alternatively, respondents #1 maintained that if the death was causally related, it is only responsible for funeral expenses. Respondent #2 also contended that since the injury occurred after July 1, 1991, it was not statutorily liable for any attorney's fee in the event compensability was found.

The widow, Betty Fricks, was the only lay witness to testify. The record is composed solely of the transcript of the July 27, 2007, hearing containing numerous exhibits, including medical records, as well as legal briefs addressing the attorney's fee issue, together with the evidentiary deposition of Dr. Christine L. Kasser, introduced as "Claimant's Exhibit A" and retained in the Commission file in bound form.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the evidence, that the decedent's death was directly and causally related to a May 22, 1992, crush injury to the right foot.
4. The claimant has failed to overcome the rebuttable presumption created by Ark. Code Ann. §11-9-527(b) (Repl. 2002).
5. Because the claimant has failed to prove that the decedent's death was

causally related to the May 22, 1992, injury, it is unnecessary to address the legal argument concerning liability for any attorney's fees.

DISCUSSION

_____The relevant facts in this case are undisputed. As reflected by the stipulations, Charles P. Fricks sustained a compensable crush injury to his right foot on May 22, 1992. Following extensive treatment, the decedent apparently developed reflex sympathetic dystrophy. The decedent was ultimately declared permanently totally disabled as the result of the work-related injury. Respondents #1 paid its statutory obligation for disability benefits. Thereafter, respondent #2 began paying permanent total disability benefits. The decedent died on December 5, 2004. As reflected by the testimony of the widow, the decedent sustained a sudden death on December 5, 2004. The death was unexpected. He was found dead in his bed by his widow. An autopsy was performed. The coroner's cause of death was listed as myocardial infarction resulting in immediate death. (Resp. Ex. B, pp.37-38)

The primary issue presented for determination concerns compensability of the decedent's death. One of the claimant's treating physicians, Dr. Christine L. Kasser, described the death certificate diagnosis as "a presumptive diagnosis," maintaining that, in her opinion, the exact cause of death could not be determined without an autopsy. Dr. Kasser, in her evidentiary deposition, attributed the decedent's death, in part, to chronic pain, stating that without any other evidence

to the contrary chronic pain would have caused his death. However, as set out further below, the decedent had a number of health problems which may have contributed to or caused his death. To attribute the decedent's death to chronic pain caused by the work-related injury would require sheer speculation and conjecture. In her evidentiary deposition, Dr. Kasser conceded that the cause of Mr. Fricks' death was unknown. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Construction Company v. Hearndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Portions of Dr. Kasser's evidentiary deposition are set out below:

BY MR. WELLS:

Q. And, Doctor, let me qualify that question, and I'll ask you your opinion based on your treatment, your knowledge of the conditions, your clinical evaluation, your review of other histories and treatments, and primarily your awareness of Mr. Fricks' condition. Based on the information you have from a treating physician and other sources – subject to any additional information you may receive here today, based on the information that you have, as his treating physician, do you feel that the pain problems and syndrome of Mr. Fricks from his initial on-the-job injury and the resulting worsening of his condition over time eventually represented the major cause of his ultimate death?

A. What I would say is that from the available information I cannot say nor do I believe anyone can say what the specific final event was in his death. What I can say – based on seeing him on a number of occasions over a number of years and from review of the records that I have available to me, I would say that the major health problem in Mr. Fricks' life was his injury and the resulting pain and other consequences, such as depression, sleep disturbance, loss of function, et cetera, and that that was really the primary medical problem known in his life and contributed the most to his overall health status.

And, furthermore, I would say that increasingly over the last several years the

scientific evidence, the medical evidence, and accordingly the medical and scientific characterization of chronic pain is that it is and should be perceived as a separate disease entity because of the increasing evidence that chronic pain results in physiologic changes in the nervous system, the endocrine system, and results in a number of adverse health consequences that are just now being increasingly appreciated.

Q. And, Doctor, just – go ahead. I'm sorry.

A. So, again, I can't say specifically what the final event was or was not, but I can say that his injury and the resulting pain and consequences were the primary negative health factor and disease problem in his life since I have seen him in 1998.

Q. And was it that ultimate health problem and condition that in your opinion led to his death?

MS. RUDD: I'm going to object. That's been asked and answered. She just said she could not determine the final event.

THE WITNESS: No one can determine the final event. From the available evidence and my knowledge of him and the available records, I would say that injury and the consequences were – would be the best known contributor to his death.

BY MR. WELLS:

Q. Okay.

A. Without having any other evidence to the contrary or any other problems that would have specifically caused his death. (Cl. Ex. A, pp.15-18)

However, on cross-examination, it was pointed out that the claimant had a strong family history of coronary artery disease. Further, it was pointed out that the claimant was a heavy cigarette smoker and suffered from chronic pulmonary obstructive disease. Finally, it was pointed out that the decedent had been hospitalized in July, 2004, for unrelated physical problems and that his physical condition had progressively deteriorated following said hospitalization. Dr. Kasser

candidly conceded that without an autopsy, it was impossible to determine the exact cause of death as reflected below:

Q. Okay. Would it be fair to state that without an autopsy it's absolutely impossible to determine the exact cause of death in this case?

A. I could say with no other information available and based on what I have read that it would be – that it would not be possible to determine the specific cause of death. (Cl. Ex. A, p.64)

Dr. Barry D. Baskin was furnished a copy of the decedent's medical records, as well as the evidentiary deposition of Dr. Kasser. Dr. Baskin issued a narrative report addressing a number of questions as set forth in his May 23, 2007, report below:

Dear Ms. Rudd:

I am in receipt of medical records pertaining to Mr. Charles Fricks, who is now deceased, versus Osceola Foods, Inc., WCC file #E209042. I have reviewed these records today including the deposition of Dr. Christine Kasser, dated April 16, 2007. I am familiar with Mr. Fricks' case, having seen him for an independent medical evaluation in 1997 and, again, in 2004. Having reviewed the records today, I am asked to address several questions.

1. Based on the medical records, Dr. Christine Kasser's deposition, testimony, and the death certificate, what was the cause of Charles Fricks' death? Based on the information provided, I don't think that an exact cause of death could be determined without an autopsy. It is apparent from Dr. Kasser's deposition that she is uncertain of the cause of Mr. Fricks' death.
2. If you are unable to narrow the cause of death to only one condition, can you state that the claimant's May 22, 1992 crushed right foot injury and consequences there from caused Mr. Fricks [sic] death to the exclusion of all other possible causes of death? No. Mr. Fricks' death could not be attributed to his 1992 crushed right foot injury and the consequences there from to the exclusion of all other possible causes of death. In fact, in my opinion, it is more likely than not that Mr. Fricks died from cardiac or pulmonary related issues. This gentleman had a strong family history of

coronary artery disease. He was a heavy smoker, which is a major risk factor for coronary artery disease, and he had interstitial pulmonary fibrosis and chronic obstructive pulmonary disease that can cause oxygen desaturation and lead to increased risk of cardiac related death. Mr. Fricks had been treated for multiple bouts of bronchitis and had in excess of a 60 pack per year smoking history. In my 17 years of medical practice, during which time I have taken care of well over 100 patients with suspected RSD, I have never had a patient to die from RSD.

3. Do I agree or disagree with Dr. Christine Kasser's state [sic] that, "I cannot say, nor do I believe, anyone can say what the final event was in his death," found at page 16 of her deposition testimony? I agree with that comment.
4. In her deposition Dr. Kasser opined, "From the available evidence and my knowledge of him and his available records, I would say that injury and the consequences were/would be the best known contributor to his death." Taking into consideration the decedent's medical, social, and family history, do I agree or disagree with this statement? I disagree with Dr. Kasser's statement that his injury and the consequences would be the best known contributor to his death.
5. What is the likelihood that Mr. Fricks died from conditions or causes unknown or undiagnosed prior to his death? In my opinion, from evaluated [sic] this gentleman and reviewed his medical records, I think that it is more likely than not that Mr. Fricks died from conditions or causes that are unknown or were undiagnosed prior to his death.
6. Is there any way to show with any degree of certainty whether Mr. Fricks [sic] crushed right foot injury and reflex sympathetic dystrophy actually contributed to his death? No.

Ms. Rudd this concludes my review of Mr. Charles Fricks' case. I have spent two hours reviewing this record and dictating this letter today. My opinions rendered in this letter are stated within a reasonable degree of medical probability, based on the records reviewed and on my previous evaluations with Mr. Fricks. My opinions are also based on my clinic experience in treating patients with RSD and related neuropathic pain disorders since 1988.

If you have any questions regarding the information in this letter, please contact me at your convenience. (Resp. Ex. 2, pp. 39-40)

Medical evidence is not ordinarily required to prove causation, *Wal-Mart v.*

Van Wagoner, 337 Ark. 443, 990 S.W.2d 522 (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

Further, I feel compelled to point out that A.C.A. §11-9-527 creates a rebuttable presumption which the claimant has failed to overcome in the instant case. It provides:

(b) TIME OF DEATH. If a death does not result within one (1) year from the date of the accident or within the first three (3) years of the period for compensation payments fixed by the compensation Order, a rebuttable presumption shall arise that the death did not result from the injury.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson v. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer v. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss v. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade v. Mr.*

C.Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that the death of Charles P. Fricks was related to his May 22, 1992, compensable injury. Even without the rebuttable presumption, the claimant has failed to prove her claim. The medical evidence does not support the claim. The credible evidence weighs heavily against any causal relationship between the decedent's May 22, 1992, injury and his death on December 5, 2004. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge