

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, INSURANCE CARRIER	RESPONDENT
BLUE CROSS/BLUE SHIELD	INTERVENOR

OPINION FILED MARCH 3, 2004

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by the HONORABLE JOHN T. HOLLEMAN,  
Attorney at Law, Pine Bluff, Arkansas.

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

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

Decision of administrative law judge: Affirmed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative  
Law Judge filed September 18, 2003, in which the  
Administrative Law Judge found that the claimant sustained a  
compensable heart attack injury after an altercation at the  
school where he was the principal. The Administrative Law

Judge awarded death benefits to the claimant's dependents. These include: medical and funeral expenses, dependency benefits and attorney fees. The Administrative Law Judge also denied the respondents' request for a credit against these benefits for life insurance proceeds and for sick leave benefits.

Based upon our de novo review of the entire record, we find that the claimant sustained a compensable injury. Therefore, we find that the decision of the Administrative Law Judge should be affirmed on this issue. We also find that the Administrative Law Judge correctly denied the respondents a credit for the life insurance proceeds and the sick leave benefits. Therefore, we affirm the decision of the Administrative Law Judge on this issue.

The claimant was employed as a principal at Dollarway Junior High School. On February 16, 2001, there was an altercation between two female students and the claimant was involved in breaking up the fight. Shortly after this incident, he was at the hospital where he ultimately died. Dr. Paul Robinson was the attending physician at the hospital who tried to revive the claimant. The claimant was 41 years old and physically active with no prior history of

heart problems. He had begun smoking a few years before this incident. There were fights at the school previously and while the claimant had been involved in dealing with those fights, he had assistance from the school resource officer, the assistant principal or a teacher. The school resource officer was not at school that day.

Dr. Robinson found that claimant suffered cardiac arrest because of a probable myocardial infarction. He was unaware of the incident at school until later in the process. He knew that the claimant showed up at the hospital suffering chest pains and was found unresponsive by hospital personnel. He determined that the incident on February 16, 2001 caused the claimant to suffer cardiac arrest. While Dr. Robinson is not a cardiologist and he didn't know in February of 2001 about the altercation, claimant's medical history or lack thereof, claimant's smoking, he still testified in his deposition that his opinion about the altercation triggering the cardiac arrest was the correct one. He testified that based upon what he learned later, i.e., the close temporal relationship between the altercation at work and his death, that this constituted the major cause of claimant's cardiac arrest. He testified

that the incident at work made it more likely than not that he could state within a reasonable degree of medical certainty that the altercation was the major cause of the cardiac arrest. He also testified that regardless of the exact mechanism which caused the myocardial infarction, he felt that the exertion triggered the cardiac arrest.

In a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that the claim is compensable, i.e., that her injury was the result of an accident that arose in the course of her employment, and that it grew out of, or resulted from the employment. Carman v. Haworth, Inc., 74 Ark. App. 55, 455 S.W.3d 408 (2001). For the claimant to show compensability here, he must show under A.C.A. § 11-9-114 that the exertion associated with this accident was extraordinary and unusual compared to the employee's usual work or some unusual and unpredicted incident occurred that was the major cause of the physical harm. Mountain Home Manufacturing v. Hafer, 66 Ark. App. 127, 991 S.W.2d 127 (1999); Ulibarri v. Jim Wood Company, 79 Ark. App. 354, 87 S.W.2d 846 (2002). Here Dr. Robinson found that the altercation at the school experienced by the claimant was the major cause of his

cardiac arrest and ultimate death. The evidence shows that the claimant in the position of the principal was involved in these altercations sometimes, he normally would have the school resource officer, or assistant principal or even a teacher at the scene as well. This altercation was unpredicted and unusual in the sense of his direct involvement without other assistance. We find that the fact that the claimant had no real history of heart problems, was not on medication and was active. While he had participated in altercations/incidents in the school before, he did so here without assistance and thus, an unusual and unpredicted incident occurred. We agree with the Administrative Law Judge that this meets the requirements of the statute and thus, affirm.

The respondents seek credit against the awarding of dependent death benefits here because of a potential for benefits to the claimant under A.C.A. § 6-17-1209. That statute provides that a school teacher who is injured as a result of a criminal act in the course of their employment, can be granted a leave of absence for up to one year. Claimant's family apparently has an action pending against respondents seeking benefits pursuant to this statute.

While that suit has not been decided as far as we are aware, nonetheless, we find that this credit is not warranted.

An injured employee cannot receive disability benefits if he is still receiving full salary. A.C.A. § 11-9-807(b). Johnson v. LRSD, Full Commission opinion of April 4, 2002 (E700511 and F011921). Disability is the incapacity to earn the amount of wages in the same employment or any other employment which the employee was receiving at the time of the compensable injury. A.C.A. § 11-9-102. Payment of unaccrued disability benefits do not survive the death of a claimant under A.C.A. § 11-9-704. Zuercher v. Emerson Electric Company, 31 Ark. App. 124, 789 S.W.2d 467 (1990). Dependency benefits were created to survive the death of the claimant and are for his estate. Disability benefits under § 6-17-1209 and under our workers' compensation statutes, are not the same as dependency benefits. Thus, there is no basis for a credit here even if claimant's estate is successful in the other suit.

The respondents also seek a credit under A.C.A. § 11-9-411 for proceeds claimant received from a life insurance policy. Ark. Code Ann. § 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.

Since there is no mention of life insurance, or death or dependency benefits in this statute, we find that this only applies to medical expenses and disability benefits. Our statutes are to be strictly construed and the plain meaning of this section compels us to affirm this decision of the Administrative Law Judge. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full

Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

\_\_\_\_\_IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury, and that the respondent should be denied a credit for life insurance proceeds and sick leave benefits. Based upon my de novo review of the record, I find that the claimant fails to prove by a preponderance of the evidence that an "accident" was the major cause of the claimant's fatal heart attack of February 16, 2001. Specifically, the exertion of work necessary to precipitate the claimant's death was not "extraordinary and unusual" in comparison to the

claimant's regular work, and the incident preceding the claimant's death was not "unusual and unpredicted." Consequently, the claimant's widow is not entitled to compensation and benefits.

Heart cases are among the most difficult in Worker's Compensation law. C.J. Horner Co. V Stringfellow, 286 Ark. 342, 691 S.W. 2d 861 (1985) Heart attacks (myocardial infarctions) are governed by A.C.A § 11-9-114, which states, in relevant part, that a heart attack which, as in this case, causes death, is compensable "only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm." Furthermore, unless there is a showing that the exertion of work necessary to precipitate the death was "extraordinary and unusual in comparison to the employees's regular work," or that some "unusual and unpredicted incident occurred which is found to be the major cause of the physical harm," then the heart attack is not compensable. Id. It is the latter part of the governing code that is not supported by the preponderance of the evidence in this case. According to the facts presented in this case, the

exertion of work which precipitated the claimant's heart attack was not "extraordinary and unusual" in comparison to the claimant's regular work, nor was the incident preceding the claimant's heart attack "unusual and unpredicted." Id. On the contrary, the superintendent of the Dollarway School District, Mr. Thomas Gathen, admitted in his testimony at the hearing of June 20, 2003, that fights among students at the Dollarway Middle School are an expected occurrence. According to Mr. Gathen, "At a junior high, we're going to have fights, - probably three (3) or four (4) a week." Mr. Gathen also testified that, although the principal's job is primarily administrative, the responsibility of intervening in fights sometimes rests with the principal. More specifically, Mr. Gathen stated that the principal is required to intervene in altercations between students, "If the resource officer or dean of student (sic) is not present... ." Id. Mr. Gathen testified that he had no personal knowledge of the particular fight in which the claimant intervened prior to his heart attack, and he could not testify to its duration or severity. The only specific information that

Mr. Gathen offered regarding this particular altercation was that it *reportedly* occurred between two (2) seventh (7<sup>th</sup>) grade girls as they were leaving their classroom, and that at some point the claimant intervened, broke the girls up, and sent them to their respective buses. Mr. Gathen testified that he obtained his information concerning the fight from a classroom teacher whom supposedly witnessed at least part of the incident, and whose testimony was offered as a proffer at the hearing. Id. This eyewitness to the fight, Mr. Lamb, was not present at the hearing, nor was the Administrative Law Judge offered any explanation concerning Mr. Lamb's absence therefrom. The claimant's counsel did not subpoena Mr. Lamb to this hearing, seek to have the hearing rescheduled, or offer to seek a stipulation from the respondent to substitute Mr. Lamb's deposition testimony in place of his appearance. Subsequently, the Administrative Law Judge exercised her due discretion to decline to consider Mr. Lamb's deposition testimony in her decision pursuant to case law which states, in relevant part, that "the Commission is not bound by technical rules of evidence or procedure, but may

'conduct the hearing in a manner as will best ascertain the rights of the parties.'" St. Paul Ins. Co. Et Al v. Touzin, 267 Ark. 539, 592 S.W.2d 447 (1980); See also, Southwest Pipe & Supply v. Hoover, 13 Ark. App. 144, 680 S.W.2d 723 (1984; Brewer v. Tyson Foods, Inc., 10 Ark. App. 88, 661 S.W.2d 423 (1983). Moreover, although the "fact-finder" is expected to "adhere to the rules of fair play," it has been said that the Commission has "broad discretion" regarding admission of evidence and "superior expertise in weighing the testimony." Southwest Pipe, supra. Pursuant to this same authority, Mr. Lamb's deposition was reviewed for this dissent, but it was not considered.

The testimony by deposition of emergency room physician, Dr. Paul Robinson, taken on May 30, 2003, was admitted with attachments without objection at the hearing of June 20, 2003. Throughout his deposition, Dr. Robinson stood firm in his testimony that, in his opinion, exertion from the altercation at school was the apparent catalyst for the claimant's fatal heart attack. However, the totality of the evidence indicates that Dr. Robinson's opinion was biased by information provided to

him by the claimant's widow, claimant's counsel, and excerpts from Mr. Lamb's deposition, which as previously noted, was not permitted into evidence at the hearing. (Dep. of Paul Robinson, M.D., throughout) For example, Dr. Robinson stated, "From the deposition of Mr. Lamb, I know that the Mr. Lovelace became physically involved in breaking up the altercation and that this happened on the day of his death." (Emphasis added) When respondent's counsel asked Dr. Robinson if he had any knowledge as to whether Mr. Lamb actually witnessed the altercation, Dr. Robinson answered, "The information that I have is in a deposition." As to the information that he received from the claimant's widow, (hereinafter "widow") Dr. Robinson testified that he had no knowledge of a possible cause of the claimant's heart attack prior to speaking to her. Regarding his meeting with the widow and claimant's counsel, Dr. Robinson denied having any specific recollection of their discussion, but stated, "Again, the altercation was reiterated." Finally, when posed with the following question from respondent's counsel, Dr. Robinson's response confirmed that his opinion was based primarily upon information received

from other sources, and was not supported by objective medical evidence. In his deposition, Dr. Robinson testified as follows:

- Q. You have indicated in your letter of January 13<sup>th</sup> that, in your opinion more likely than not, Mr. Lovelace's cardiac arrest and death were related to the physical altercation he became involved in. How do you come to that opinion?
- A. There is the deposition of the altercation. There is the information that I was provided by Mrs. Lovelace that he subsequently complained of chest pain.

Upon reviewing the doctor's testimony, the following facts speak for themselves:

- 1) Dr. Robinson is not a cardiac specialist and was not offering his testimony as an "expert witness."
- 2) Dr. Robinson had no personal knowledge of the altercation that supposedly precipitated the claimant's heart attack.
- 3) Other than his attempts to resuscitate the claimant in the emergency room, Dr. Robinson had no prior contact with the claimant in any way, nor had he knowledge of the claimant's physical health, habits, history, or otherwise.

4) There is no conclusive, objective medical evidence in this case to prove that the claimant actually died from a heart attack. No autopsy was performed and the results of blood-work taken from the deceased were inconclusive. Id. Even the death certificate, which was signed by Dr. Robinson, states the claimant's cause of death to be "probable myocardial infarction." (Emphasis added)

In a prior decision, the Court of Appeals has stated that "The Commission is not bound by a doctor's opinion which is based largely on facts related to him by the claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim." Roberts v. Leo Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983) Unfortunately in this case, Dr. Robinson did not have the opportunity to base his opinion ,even in part, upon claims made by the claimant because the claimant had deceased outside of the ER and could not be resuscitated. Instead, he relied primarily upon information provided by the claimant's widow, her attorney, and parts of a deposition that was not even allowed into evidence. As previously mentioned, throughout his testimony Dr. Robinson stood by his opinion that the claimant's involvement in an altercation at school was the major cause of the "probable

myocardial infarction" which later resulted in cardiac arrest. To further illustrate, at one point Dr. Robinson stated, "Based upon the information and the deposition of Mr. Lamb, assuming that's correct, and his [claimant's] subsequent presentation to the hospital, intraventricular fibrillation, it is more likely than not that there is a relationship between the altercation and the probable heart attack." Dr. Robinson ultimately admitted, however, that he could not state within a reasonable degree of medical certainty that the altercation at school was the major cause of any unknown physical condition or problem from which the claimant may have suffered, and which may have in fact caused or contributed to his "probable" myocardial infarction. When asked why he could not make such a statement, Dr. Robinson responded, "Because I have no information about the degree of preexisting coronary artery disease, if any. There is no autopsy. I cannot be certain therefore."

As a final point, it is noteworthy that the claimant did not arrive at the emergency room on the afternoon of his death by ambulance, as one would have perhaps expected under these circumstances. The record is

devoid of any evidence that would explain the claimant's whereabouts and/or activities during that time subsequent to his having left the school and prior to his having arrived at the emergency room.

From the above and foregoing it is clear that Dr. Robinson's opinion is based largely on facts related to him by the claimant's widow and/or her representative, and the Commission, therefore, is not bound by it. There is no sufficient independent knowledge presented in this case upon which to corroborate the claimant's claim, thus the Commission should deny its compensability altogether.

To briefly address the issue of credit to the respondent for life insurance proceeds paid to the claimant's widow, and for any benefits the widow may receive from her §6-17-1209 lawsuit, evidence reveals that life insurance proceeds were paid by USABLE Life insurance company to Barbara Lovelace in the total amount of (\$75,000.00) Seventy-Five Thousand Dollars. Based upon letters to Superintendent Gathen from USABLE Claims Analyst, Ms. Ann Beasley, it also appears that these life insurance proceeds were paid from a policy furnished through the claimant's employer. Because it appears that this group-

type, health/life insurance coverage policy does fall within the provisions set forth in A.C.A § 11-9-114(a), I would agree that the respondent is entitled to an offset "in an amount equal to, dollar-for-dollar,..." any amount that the claimant's estate received or shall receive as a result of the claimant's injury and death.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner