

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706992

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| DONALD POTEETE (DEC'D.), EMPLOYEE | CLAIMANT |
| J MAR EXPRESS, INC., EMPLOYER | RESPONDENT NO. 1 |
| RETENTION MANAGEMENT SERVICES, INC., INSURANCE CARRIER/TPA | RESPONDENT NO. 1 |
| DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND | RESPONDENT NO. 2 |

OPINION FILED JULY 20, 2010

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

Claimant represented by the HONORABLE JIM R. BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by the HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas, excused from participation.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed April 9, 2010. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant's Proffered Exhibit 2, a payroll stub and Payroll Driver Settlement Report, created by Respondent J Mar Express, Inc., will be admitted into evidence and given due weight.
4. Claimant's Proffered Exhibit 3, Claimant's Medical Examination Report for Driver's Fitness Determination, will not be admitted into evidence.
5. Claimant's counsel did not produce Claimant's Proffered Exhibit 4, a transcript of the deposition of Jane Poteete, after the hearing as proposed. Hence, it will not be admitted into evidence.
6. Claimant's estate has proven by a preponderance of the evidence that claimant sustained a compensable injury under Ark. Code Ann. § 11-9-114 (Repl. 2002) on June 20, 2007.
7. Claimant's widow, Jane Poteete, has proven by a preponderance of the evidence that she was wholly and actually dependent on him-and had some dependence on him-under Ark. Code Ann. § 11-9-527(c) & (c) (1) (A) (ii) (Repl. 2002).
8. Claimant's widow, Jane Poteete, has proven by a preponderance of the evidence that she is entitled to widow benefits at the stipulated rate of \$220.00, under Ark. Code Ann. § 11-9-527(v) (a) (A) (i) (Repl. 2002).
9. Claimant's attorney is entitled to a controverted attorney's fee under Ark. Code Ann § 11-9-715(a) (1) (B) (i) (Repl.

2002), one-half of which is to be paid by Jane Poteete and the other half by Respondent No. 1.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the April 9, 2010, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as

amended by 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 \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's findings that the claimant's widow proved by a preponderance of the evidence that the claimant sustained a compensable injury under Ark. Code Ann. § 11-9-114 and a finding that she was wholly dependent on him, pursuant to Ark. Code Ann. § 11-9-527. Based upon my de novo review of the record, I find that the claimant has failed to meet the burden of proof.

The claimant was employed by the respondent employer as a truck driver. The claimant and his wife, Jane Poteete, were a truck-driving team. It is undisputed that on June 20, 2007, the claimant and his widow were in California making a run. Mrs. Poteete testified that on that date, she and the claimant arrived in Tracy, California around 1:30 a.m. They slept until their scheduled unloading time at 6:00 a.m. They did not participate in the unloading. After the trailer was unloaded, they traveled approximately 60 miles to Santa Nella, California and took a shower. Thereafter, they drove 112 miles to Dinuba, California to pick up another trailer. They hooked up a refrigerated trailer to the truck, but the unit ceased working so they were given another trailer. According to Mrs. Poteete, this trailer was missing a mud flap. She stated that the flap had to be replaced or they would have been fined. They then traveled to the truck scales and then traveled two hours to Bakersfield, California. The claimant was driving and Mrs. Poteete went to sleep in the sleeper portion of the cab about 1:30 p.m. She was not aware of what time they arrived, but she knew that she woke up about 3:30 p.m. When she woke up, she saw the emergency

vehicles and the claimant had been taken to the emergency room.

The claimant was taken to the emergency room where he was pronounced dead. The respondent employer flew a driving team to California to recover the truck and Mrs. Poteete rode back to Arkansas with them. She has not worked for the respondent employer since that time. Mrs. Poteete works for a medical transport company now.

The claimant asserts that the provisions of Ark. Code Ann. §11-9-114 are applicable to this case. Ark. Code Ann. §11-9-114, (Repl. 2002) provides as follows:

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b) (1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's

regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his or her burden of proof.

The claimant contends that the work activities were the major cause of the heart attack that he suffered and that he was engaged in work activities that required exertion or were extraordinary and unusual. The respondents contend that the claimant did not suffer a compensable injury. I agree with the respondents.

In my opinion, the events fail to establish that the claimant's work activities were the major cause of his heart attack. The record does not contain any proof that the claimant performed strenuous job duties or that he exerted himself over and above over what he would normally do. Witnesses dispute what the claimant was doing immediately before he died. The only people who witnessed the claimant's activities between the time his wife went to sleep and he passed away indicated that they did not actually see him do any work involving the mud flap. Mrs. Poteete contended that the claimant was trying to change the mud flap himself and he, indeed,

did change that mud flap. She stated that she saw a new mud flap on the truck at the time and that she picked his tools up before she went to the hospital. She did not go with the claimant to purchase a new mud flap. However, she said that she had noticed that one had been installed on the trailer.

Three witnesses testified regarding what they saw the claimant doing before he passed away. Mr. John Cinecoe, the manager for the truck stop where the claimant suffered his heart attack, was the one that called 911. Mr. Cinecoe stated that he saw the claimant get up for a minute and then fall down again. Mr. Orozco, an employee of Idle Aire, testified that he saw the claimant falling to the ground after standing near the tool box on the side of his truck. Mr. Martin Camarena had the best view of the claimant at the time he suffered the heart attack. Mr. Camarena testified as follows:

Q Okay. Can you explain what you saw that day?

A I was working next to his truck on the idle air equipment that's provided for the truck drivers 30 minutes prior to him coming out of the truck. I was already there. I just saw him step out of his truck and he caught my attention simply because he was only in shorts
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Q Okay.

A -- in boxers. He seemed to be wearing only boxers and no shirt, no shoes. It was a very, very hot day. He went over to reach to the side of his -- his cab to open a compartment, the driver's side I believe door where tools are kept.

Q Uh-huh.

A He was able to open it. When he reached his hands in there, he just started stumbling backwards and fell to the ground.

Q Okay. How long was it between the time you saw him get out of the cab and when he actually fell to the ground roughly?

A I'm gonna say no more than a minute.

Mr. Camarena went on to explain that in the 30 minutes he had been outside working next to the claimant's truck, he did not see the claimant do anything outside the cab of the truck.

In my opinion, a review of the evidence demonstrates that there is nothing to prove that the claimant did anything unusual or extraordinary. The only evidence regarding the claimant's activities establishes that he had not been outside of the truck for 30 minutes prior to his death and that he had only been outside the cab for a minute or two before he collapsed. There were no witnesses to what the claimant was doing prior to that 30 minutes, only that the claimant went and borrowed some tools. In my opinion, it requires

conjecture or speculation to conclude what the claimant's activities were prior to his death. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Further, it is evident that the claimant suffered from serious heart problems prior to the date of his death. Mrs. Poteete testified that the claimant was a yo-yo dieter who was overweight at the time of his death. The claimant suffered from high blood pressure and took Diovon regularly for five or six years prior to his death. The doctors who tried to revive the claimant at the hospital noted that the claimant was to be in "full arrest." The medical examiner who performed the claimant's autopsy found that the claimant had a 95% atherosclerotic narrowing of the proximal left anterior descending coronary artery and a 40 to 50% narrowing of the left circumflex and right coronary artery. The cause of death was listed as "hypertensive and arteriosclerotic cardiovascular disease". In the section of the death certificate requesting the interval between

onset and death, the examiner opined that the problem had been present for years. It is clear that the major cause of the claimant's death was extensive arteriosclerotic narrowing. The claimant suffered from hypertension and was obese. Simply put, I cannot find that the claimant's work activities were the cause of the claimant's death. The claimant has clearly failed to establish a link between any job-related activities and his death. Accordingly, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner