STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PORT ST. LUCIE DISTRICT OFFICE

Andresaint Savilus,
Employee/Claimant,

vs.

OJCC Case No. 13-012343RDM

Riverbell, Inc/Sunz Insurance,
Employer/ Carrier/Servicing Agent.

Accident date: 5/14/2013

_____/

ORDER ON THE MERITS

Claimant, a surviving widow, seeks benefits pursuant to section 440.16. The employee died while on the job as a result of a coronary event. I find claimant fails to show the death of her husband resulted from his employment. I further find the employer/carrier (E/C) demonstrates this death stems entirely from pre-existing heart disease. The basis for these conclusions is explained below.

JURISDICTION AND NOTICE

The parties agree, and I find, the judge of compensation claims (JCC) has jurisdiction over the parties and subject matter. Notice of hearing is proper.

STIPULATIONS

It is agreed the date of death is May 14, 2013, and that for ministerial purposes the "date of accident" is that day. Venue is proper in St. Lucie County. There was an employer/ employee relationship. Workers' compensation insurance coverage was in effect. The employer was timely notified of the death. The average weekly wage is $100.00. A petition for benefits (PFB) was filed May 30, 2013. E/C filed a response on June 18, 2013. All issues pertaining to attorney's fees and costs may be reserved for subsequent hearing.

CLAIMS AND DEFENSES

Claimant seeks a determination that her husband met his death as a result of a compensable accident pursuant to section 440.09 so that she, Jolette Savilus, as surviving widow is eligible for dependency benefits pursuant to section 440.16 from the date of death to the present and continuing. Claimant also seeks attorney's fees and costs.

E/C responds: The major contributing cause of decedent's death is unrelated to his employment so that the claim is not compensable; claimant is not a proper recipient of death benefits in any event; the cause of death was a pre-existing condition; general denial of all remaining claims. E/C also seeks to recover costs from claimant.

PENDING CLAIMS

This order disposes of the only pending PFB filed May 30, 2013, to the extent indicated.

DATE OF DEATH AND SUBSEQUENT AUTOPSY

Decedent was a 53-year-old Haitian male. He was employed as a picker at a local orange grove. Around noon of the date of death decedent's coworkers heard a "thud" and investigated. Claimant was face down on the ground by the citrus tree where he was working. A 16 foot ladder was propped against the tree. The sheriff's office as well as emergency medical care was summoned to the scene.

Emergency measures taken to resuscitate claimant were to no avail. Claimant was taken to a local emergency room where he was pronounced dead on arrival. The cadaver was then transferred to the Medical Examiner's office.

Otherwise the facts surrounding this accident are obscure at best. Any reports prepared by the investigating officer or emergency medical personnel are not placed in evidence although their contents are commented on Roger Mittleman, M.D., the forensic pathologist performing an

autopsy for the Medical Examiner's office. There were no eyewitnesses to the "accident."

Dr. Mittleman comments that one of the emergency responders saw a small abrasion on claimant's forehead. However, on the autopsy itself this injury is not noted by Dr. Mittleman either in the text of his autopsy report or on the doctor's anatomical drawing. Dr. Mittleman does note no dental injuries were present. Claimant did not have any fractures or other fresh cuts or abrasions. He is not specifically asked about this on deposition.

The autopsy disclosed there were no drugs or alcohol in claimant's system. He did not have an aneurysm. A macroscopic examination of claimant's heart and other vital organs did not reveal an important anomaly except for moderate enlargement of the heart. No signs of external trauma, suicide or foul play were present.

No signs of workplace stress, such as dehydration, were present. Dr. Mittleman expresses in conclusory terms that he could not establish a fall from any height greater than standing on the ground took place.

The microscopic examination disclosed moderate scarring on the posterior wall of the left ventricle. The other abnormality noted was that part of the atrioventricular node, called the His bundle, had been replaced by fat.

Dr. Mittleman's opinions as to the cause of death are disregarded based on E/C's timely objection pursuant to section 440.13(5)(e).

No direct evidence regarding the accident scene, the weather, claimant's general duties or any unique factor concerning that day's job is presented.

PERSONAL BACKGROUND

Little in the way of background information is placed in evidence. The decedent and his surviving widow were married on March 20, 1983. She was living with and supported by the

decedent on the date of accident. However, the surviving widow did work at a dry cleaning establishment earning $250 weekly.

According to the surviving widow, the decedent never complained of any heart problems. He is described by her as being a good health and never being sick. On the date of death claimant got up, cooked his breakfast and went to work without complaints.

The decedent is also survived by five children, the youngest presently being a 22 years old son. The pending PFB only seeks benefits for the surviving widow so it is unnecessary to comment on his status as a "child" under the Workers' Compensation Law. Sec. 440.02 (6) *Fla. Stat*. (2013).

While the evidence is minimal I find claimant's widow qualifies as a "spouse." Sec. 440.02 (26*) Fla. Stat*. (2013).

EXPERT TESTIMONY

Michael A. Nocero, Jr., M.D. performed an independent medical examination at E/C's behest. He reports the decedent had pre-existing scar tissue in his heart including some enlargement of both ventricles. There is no evidence on autopsy of a coronary artery clot. There is no evidence of acute myocardial infarction.

This board-certified cardiologist advises pre-existing fatty tissue replaced a portion of the His bundle which is the main wiring of the heart. Dr. Lucero testifies, "… (I)t's my opinion that he had very disorderly conduction of his electrical activity in the heart that led to ventricular fibrillation, which without any type of external assistance, such as a counter shock by an EMT person, would lead to death within probably a minute, and that's exactly what I think happened."

This physician further explains a nonischemic cardiomyopathy is a frequent phenomenon a portion of which are caused by scar tissue in the heart leading to a conduction system malady.

Usually an individual suffering from this condition is not aware of it.

In Dr. Nocero's opinion the major contributing cause of the decedent's death was the foregoing ventricular fibrillation and not the decedent's employment.

I accept this expert's opinion noting there is no countervailing opinion even if all aspects of Dr. Middleton's testimony are taken into account. See Sec. 440.09 (1) *Fla. Stat*. (2013) ("The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty….")

ANALYSIS

I find an analysis of compensability should not be based on *Victor Wine & Liquor, Inc. v. Beasley*, 141 So. 2d 581, 588-589 (Fla. 1962), determining this decision is not controlling for a heart attack death occurring in 2013 under the circumstances present in this case.

In 2007 the district court considered a heart attack case where the incident itself occurred before October 1, 2003, the effective date of the major contributing cause standard in its present form. See Sec. 440.09 (1) *Fla. Stat*. (2013). The Worker's Compensation Law provides, "An accidental injury or death arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury or death." Sec. 440.02 (36) *Fla. Stat*. (2013).

In so doing the court observes in a footnote, obviously dicta, the statutory test of causation had markedly changed since the *Victor Wine* decision. Observing it is incumbent on claimant to show the major contributing cause of an injury is industrial, the court notes "… placing the additional burden of complying with the court-created *Victor Wine* test seems unduly burdensome and inappropriate." *Coca-Cola Bottling Company v. Purdue*, 955 So.2d 73, 74 (fn 1) (Fla.1st DCA 2007) (Van Nortwick, J., dissenting).

The footnote observation in *Purdue* is consistent with case law dealing with the initial version of the major contributing cause rule established by chapter 93 – 415, *Laws of Florida* effective January 1, 1994. William Mangold incurred an industrial injury which his employer refused to treat causing him to incur emotional stress and financial hardship. Mr. Mangold had other conditions as well as a family history with cardiac implications. He died of a heart attack occurring several weeks after the industrial accident.

The district court, without mentioning *Victor Wine*, observes the surviving widow was required to prove her case by the "more stringent evidentiary standard" established by the major contributing cause rule. Accordingly, the court affirmed the JCC's decision noting that it was not shown the decedent's industrial accident was the major contributing cause of his death. *Mangold v. Rainforest Golf Sports Center*,675 So.2d 639, 641 (Fla.1st DCA 1996).

In 2006 Antonio Speed boarded an elevator at the top of his employer's building which was over 200 feet tall. While it was descending, the elevator malfunctioned resulting in it to drop a distance, catching to a stop, and then repeating the process. This lasted several minutes. When the elevator finally reached bottom claimant had chest pains later determined to have resulted from a heart attack.

At the trial the only expert testimony presented was that of a doctor who opined the major contributing cause of the heart attack was the elevator incident. The JCC held claimant's injury was caused by fright or excitement only and therefore not compensable, citing section 440.093 (1).

The district court reversed stating there was no expert medical testimony or other objective medical evidence of claimant incurring a metal or nervous injury. The court held the physiological stress response to the elevator incident was sufficient to establish compensability.

Notably, the court makes no mention of *Victor Wine. Speed v. Securitas USA*, 989 So.2d 710 (Fla. 1st DCA 2008).

The continuing applicability of *Victor Wine*, however, is supported by *Harper v. Sebring International Raceway Inc.*, 886 So.2d 288 (Fla. 1st DCA 2004). Claimant was a member of the fire protection team at his employer's racetrack. He experienced a heart attack in November 2001 while helping in an attempt to rescue a driver who had crashed. The court performs a detailed analysis as to the application of the rule established by Victor Wine, to wit, in order for a heart attack to the compensable it must have been caused "… by the unusual strain or overexertion of a specifically identifiable effort *not routine* to the work the employee was accustomed to performing." *Id* at 291. (emphasis quoted).

The court held claimant satisfied the *Victor Wine* test and in so doing obviously implies *Victor Wine* remains good law. But in reversing the trial decision the court instructed the JCC to "… address the issue of medical causation" citing section 440.02 (35). *Id* at 295.

Since *Victor Wine* has not been specifically put to rest by case law there is room for doubt as to whether this decision is applicable at all or can be blended with the major contributing cause provisions of the present law. See, "Revisiting the Expanding Compensability of Heart Attacks Eight Years Later", *Florida B. Jour.*, October 1996; "Mental and Nervous Injuries, Heart Attacks (Other Than Presumptions) and Internal Failures", *The Florida Bar Workers' Compensation Forum, 2013*. (Without the *Victor Wine* unusual stress and strain test being considered and applying the major contributing cause standard instead it remains to be seen whether in practice establishing compensability in a heart attack case becomes more difficult or less so.)

In the interest of completeness, in light of the uncertainty expressed above, compensability is assessed applying *Victor Wine* and its progeny.

There is no evidence the decedent incurred unusual stress or strain prior to the heart attack causing his death. There is an indirect report, twice removed in the evidence, of coworkers hearing a "thud." The distance between the coworkers and the decedent is unknown as is the loudness of this otherwise nondescript sound. No weather information is provided. Nothing suggests the decedent or his fellow grove workers were working under any special instructions.

No conclusion can be reasonably drawn from the mark on claimant's forehead, if it existed at all. It is reasonably plausible such a mark could be caused by the decedent keeling over from a heart attack and striking the ground.

To the extent there is any evidence, it points to decedent performing his job in a routine fashion when he was struck down by a heart attack.

I find claimant's reliance on *Zundell v. Dade County School Board*, 636 So.2d 8 (Fla. 1994) misplaced. Mr. Zundell, a middle school teacher, had a heated dispute with a disruptive student. During the process of trying to control this student Mr. Zundell had a stroke. The only expert testimony on causation was that the hemorrhage was caused by increased blood pressure in turn precipitated by the encounter with the student. There was no evidence the claimant had a relevant pre-existing injury or disease. See also *Zundell v. Dade County School Board*, 609 So. 2d 1367 (Florida 1st DCA 1992).

The supreme court ruled that absent this stroke being attributable to any ascertainable pre-existing condition, the claim was compensable because a physical injury arising from workplace exertion had occurred.

There are two important differences between the facts in *Zundell* and the present case. The sole medical evidence in this case is that the decedent did have a pre-existing condition which was the cause of his heart attack. Moreover, there is no evidence of any unusual occurrence preceding this decedent's heart attack. An employee found dead at the job site, without more, is insufficient to establish industrial causation applying *Zundell.*

Although not argued in these proceedings, case law dealing with unexplained falls or similar occurrences is also considered.

In a 1978 case the court analyzed a concussion stemming from a blow to the head resulting from falling and striking a terrazzo floor. No evidence was presented by claimant or E/C as to the precipitating cause. Relying on the statutory presumption that a claim comes within the provisions of the Workers' Compensation Law then in effect, the court stated, "We hold that where an accident occurs while an employee is at his place of employment during working hours under circumstances such that no evidence of cause is available, the burden shifts to the employer to show idiopathic cause if the claim for compensation is to be denied." *Hacker v. St. Petersburg Kennel Club*, 396 So.2d 161, 163 (Fla. 1st DCA 1981).

In a case involving the Workers' Compensation Law in its present form a claimant fell striking the floor while on the employer's premises and performing his job duties. Expert medical testimony from doctors presented by both claimant and E/C opined claimant's temporal hemorrhage was caused by his head impacting the floor.

The cause of the fall, however, was unexplained. The employee could not remember what happened. "Claimant satisfied the major contributing cause requirement when evidence showed that he was removing shelving in the employer's store at the time of the accident and suffered closed -head injuries as a result of the accident." Claimant prevailed because E/C failed to come

forward with evidence demonstrating claimant's fall was due to an idiopathic condition. *Caputo v. ABC Fine Wine & Spirits*, 93 So.3d 1097, 1098 (Fla. 1st DCA 2012).

If this line of cases applies to an internal failure case where the employee is found dead on the job site, then it follows the burden shifts to E/C to come forward with evidence showing a non-industrial cause of the injury. In the present case E/C successfully does so.

Because the evidence shows the decedent's death did not occur as a result of any occupational event but instead resulted from pre-existing disease of his heart the claim for benefits pursuant to section 440.16 must be denied.

CONCLUSION

Based on the foregoing analysis, it is

ORDERED AND ADJUDGED as follows:

a). The claim that the decedent sustained a compensable industrial accident is denied.

b). The claim for survivor benefits pursuant to section 440.16 is denied.

c). All issues pertaining to attorney's fees and costs are reserved for subsequent hearing.

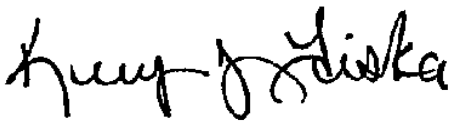
DONE AND ORDERED this 21st day of October, 2013, in Port St. Lucie, St. Lucie County, Florida.

Robert D. McAliley
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Port St. Lucie District Office
WestPark Professional Center, 544 NW University Blvd., Suite 102
Port St. Lucie, Florida 34986
(772)873-6585
www.jcc.state.fl.us

I HEREBY certify that a true and correct copy of the foregoing has been e-mailed to Counsel on October 21st, 2013.

Andrew A. Reich
Reich & Mancini, P. A.
150 SW CHAMBER CT. SUITE 205
Port Saint Lucie, Florida 34986
areich@4injuryhelp.com,wcpleadings@4injuryhelp.com

Gregory D. White, Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1560 Orange Avenue Suite 500
Winter Park, Florida 32789
GWhite@hrmcw.com,DDykes@hrmcw.com



Assistant to Robert D. McAliley