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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHARLES W. STENZ, deceased; and ELIZABETH STENZ, widow, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, CITY OF TUCSON, Respondent Employer, PINNACLE RISK MANAGEMENT SERVICES, Respondent Insurer.	2 CA-IC 2010-0016 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 20051100192

Insurer No. WCTUC2005478214

LuAnn Haley, Administrative Law Judge

AWARD SET ASIDE

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E S P I N O S A, Judge.

¶1 In this statutory special action, petitioner Elizabeth Stenz (Stenz) challenges the administrative law judge's (ALJ) decision upholding the defendant carrier's denial of her claim for widow's benefits. For the following reasons, we set aside the award.

Factual Background and Procedural History

¶2 We view the evidence in the light most favorable to upholding the Industrial Commission's award. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, ¶ 2, 154 P.3d 391, 392-93 (App. 2007). In April 2005, Charles Stenz (Charles) suffered a work-related injury that affected his back, shoulder, and ankle. In February 2009, he had surgery on his injured shoulder, and the following April, after a physical therapy appointment for his shoulder, suffered a heart attack and died in his truck in the parking lot of his physical therapist's office.

¶3 Early on the morning of his death, Charles needed help getting out of bed because his back was "froze[n]" and he was in severe pain. Later that morning, he

received a traffic ticket for speeding on the way to his physical therapy appointment. Once he arrived, he was informed his appointment was not scheduled until the next day, but was nevertheless accommodated at that time. Two physical therapists who worked with Charles that morning noted he was visibly stressed and was experiencing more pain than usual. During his session, Charles indicated his back was hurting, and he had to complete his exercises sitting down because of the pain. Afterwards, he made another appointment and then left. His body was found the next day in his truck, still parked outside the therapy office.

¶4 A forensic pathologist who conducted an autopsy, Cynthia Porterfield, determined Charles had significant coronary atherosclerosis and had died from a cardiac arrhythmia. During her testimony before the ALJ, she opined that the stresses Charles encountered that morning "did contribute to his death" that day, although she was unable to quantify to what degree. Defendants presented the testimony of Arthur Lipschultz, a cardiologist, who agreed Charles had coronary atherosclerosis and died from a sudden arrhythmia. He testified the stresses Charles faced that morning did not contribute, or only minimally contributed, to his death. He further explained that it is possible for stress to "potentially . . . play a small role" if a person is doing "something completely out of the ordinary" and that an example of the "type of stress that would be associated with a heart attack" would be "working extremely hard out in the yard" when the temperature was 110 degrees.

¶5 After Dr. Porterfield testified, and on the day before Dr. Lipschultz was scheduled to testify, Stenz requested that Lipschultz's testimony be postponed and that

cardiologist Mark Feldman be permitted to testify.[1] Defendants objected, arguing they had been led to believe Porterfield was Stenz's only medical witness and, as such, had deposed only Porterfield in preparation for trial. The ALJ denied Stenz's request, explaining the testimony would be cumulative and that Lipschultz's testimony could not be cancelled without cost, but allowed Stenz to make an offer of proof. Stenz's counsel stated that Dr. Feldman would testify the work-related injury "was directly a substantial cause of [Charles's] death" and "the increased pain [he had] suffered" that morning was "probably instrumental also in producing the cardiac event that led to his death."

¶6 After receiving testimony from Porterfield and Lipschultz and several lay witnesses, including Charles's two treating physical therapists, the ALJ denied Stenz's claim for widow's benefits, concluding that Charles's death "was not caused by his treatment or travel [to physical therapy] but resulted from a cardiac arrhythmia" and, accepting Lipschultz's testimony as "most probably correct," found that Charles's "activities, pain symptoms and stress level" on the day of his death "were not a substantial contributing cause of his cardiac arrhythmia or underlying heart disease." The ALJ further found that Porterfield's testimony, including her concession that "the role of stress in [the] sudden cardiac death cannot be quantified," could not "support a finding of a compensable death." The decision also stated "Dr. Feldman's opinion was considered and rejected in light of the unequivocal opinion of Dr. Lipschultz."

[1]Stenz previously had requested a subpoena for Dr. Feldman over four months earlier, but apparently took no further action to have him testify.

¶7 Thereafter, Stenz requested a review of the award, raising several issues including the ALJ's refusal to allow Feldman to testify, its adoption of Lipschultz's testimony, and its failure to apply the "unexplained death presumption." The ALJ thereafter affirmed its award, and Stenz timely filed this special action. *See* Ariz. R. P. Spec. Actions 10. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(2) and 23-951(A).

Discussion

¶8 Stenz argues the ALJ erred by failing to apply the unexplained death presumption, refusing to allow Dr. Feldman to testify, and accepting the testimony of Dr. Lipschultz. "On review of an award, we deferentially review an ALJ's factual findings reasonably supported by the record but review the ALJ's legal conclusions de novo." *Hypl v. Indus. Comm'n*, 210 Ariz. 381, ¶ 5, 111 P.3d 423, 425 (App. 2005).

¶9 Because we conclude the ALJ's reliance on the medical opinion of Dr. Lipschultz is dispositive, we address that issue first. Stenz argues Lipschultz's opinion was legally invalid because it was based on the statutorily invalid assumption that, as a general proposition, customary exertion cannot cause heart attacks. Under A.R.S. § 23-1043.01(A), a heart-related death is not compensable "unless some injury, stress or exertion related to the employment was a substantial contributing cause." This court has concluded that through the enactment of § 23-1043.01(A), the legislature has determined for all cases that "customary occupational stress or exertion can cause a heart attack" and that expert opinions based on the premise that customary work activity and stress cannot cause a heart attack are statutorily precluded. *Aguiar v. Indus. Comm'n*,

165 Ariz. 172, 176, 797 P.2d 711, 715 (App. 1990). The separate inquiry of "whether customary occupational stress or exertion was a substantial contributing cause of a given heart attack," however, remains "a question of adjudicative fact . . . requiring a factfinder's case-specific determination." *Id.*[2]

¶10 In *Aguiar*, a 58-year-old farm worker had died after having chest pains while harvesting lettuce. *Id.* at 172-73, 797 P.2d at 711-12. At a subsequent hearing, two cardiologists testified, and both agreed the probable cause of death was cardiac arrest resulting from myocardial infarction. *Id.* at 173, 797 P.2d at 712. They disagreed, however, as to whether the employee's death was work-related, and the ALJ accepted the testimony of Dr. Richter, who had determined the decedent's work activities did not substantially contribute to the cause of death. *Id.* On appeal, Aguiar's widow argued that Richter's opinion was "legally invalid because it was grounded in the statutorily invalid assumption that customary labor cannot cause heart attacks." *Id.* at 174, 797 P.2d at 713.

¶11 This court examined Dr. Richter's testimony and determined it "revealed the dispositive importance that he attributed to" his understanding that the deceased was "working at no more than his customary level of exertion." *Id.* at 177, 797 P.2d at 716.

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[2]The ALJ determined that because an injury occurring while an employee is traveling to or from a physical therapy appointment is compensable, *see Joplin v. Indus. Comm'n*, 175 Ariz. 524, 528, 858 P.2d 669, 673 (App. 1993), any injuries occurring due to the travel or treatment on the day of Charles's death would be compensable. However, because Charles's death "was not caused by his treatment or travel[,] but resulted from a cardiac arrhythmia," Stenz needed to establish that Charles's travel to physical therapy, work-related pain, and "increases in stress from the physical therapy session played a substantial contributing role in his fatal arrhythmia." Neither party disputes the ALJ's premise that if Stenz could establish this element, the claim would be compensable.

This conclusion was based on Richter's statements that the deceased's work activity was not related to the cause of death because "the work activity did not appear to be out of the ordinary for him," "I felt that his activities at work weren't any different than he had done on any other occasion," and "since he was used to working at this rate . . . for a number of years . . . I would still feel that this was a usual activity for him and that his illness was not related to his work activities." *Id.* at 178, 797 P.2d at 717 (emphasis omitted). Based on this testimony, this court set aside the award, explaining "Dr. Richter essentially ruled out customary work activity as a cause of myocardial infarction" and "[t]his premise conflicted with a preclusive legislative policy determination to the contrary and rendered the causal opinion statutorily invalid." *Id.*

¶12 Here, Dr. Lipschultz's testimony similarly suggests that his opinion was based on the same statutorily precluded basis. When asked whether stress could be a potential triggering event for a sudden fatal arrhythmia, he testified, "Not all the time, not even part of the time. The role stress would play is all relative. If they are doing something completely out of the ordinary it's possible that stress potentially could play a small role." Likewise, in response to a question regarding "what [he was] looking for [in] . . . trying to decide [whether] stress trigger[ed] what happened to Mr. Stenz," Lipschultz responded,

> [U]sually the type of stress that would be associated with a heart attack would be one that one would consider fairly obvious. Someone who is working extremely hard out in the yard, the temperature's 110 degrees, something like that, they get dehydrated, that sets up the possibility of a heart attack, or someone who is doing some sort of activity that is outside of

> their norm. But if a person, let's say, is used to doing activity, then it may not be producing any stress at all.

In addition, when asked what could be a triggering event for a sudden cardiac arrest, Lipschultz explained,

> Something that's excessive compared to this person's normal life, far out of the range of what would be normal, let's say, for that person, or situation that could have brought it on. You know, usually you relate these to, like, heavy exertion or dehydration or electrolyte abnormalities, things like that . . . .

¶13 We agree with Stenz that these portions of Lipschultz's testimony reveal that his opinion, at least in part, was based on the statutorily proscribed assumption that customary occupational stress or exertion cannot cause a heart attack. *See Aguiar*, 165 Ariz. at 178, 797 P.2d at 717.[3] Because we cannot determine whether his opinion regarding the circumstances concerning Stenz's death was based on the statutorily proscribed premise, and because the ALJ placed great weight on this opinion, we must set

[3]Other portions of Lipschultz's testimony further support this conclusion. For example, he explained that even if Charles experienced some stress that morning, it would not have triggered his death because "the stress itself, you know, doesn't seem to be that much out of the ordinary, other than the speeding ticket" and "it sounds like it was fairly uneventful once he got to physical therapy." Likewise, after being read a list of the stresses and pain that Charles faced on the morning of his death, Lipschultz said this information did not change his opinion because "[i]t sounds like he had some minor issues, but I don't see anything major. It seems like those issues were resolved without much problem" and "I don't see . . . that there was anything that would cause him [an] undue amount of stress." He later testified that "I did not see . . . that there were any significant instances of this [physical therapy] session being totally different from anything before."

the award aside. *See id.*[4] Accordingly, we need not reach the other arguments Stenz has raised on appeal.

Disposition

¶14 For the foregoing reasons, the ALJ's award denying Stenz widow benefits is set aside.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[4]Defendants contend that even if Lipschultz's opinion is not considered, Stenz nevertheless has failed to meet her burden of proof. This argument, however, ignores the fact that Feldman's opinion was presented to the ALJ, albeit in an offer of proof, that the work-related injury "was directly a substantial cause of [Charles's] death." In the ruling, the ALJ stated "Dr. Feldman's opinion was considered and rejected in light of the unequivocal opinion of Dr. Lipschultz." Additionally, although Dr. Porterfield refused to quantify the degree to which the events of the morning contributed to Charles's death, she did testify that "the stresses of that morning did contribute to his death" and "had he not had all th[ose] stresses, I think it would have been far less likely that he [would have] had a fatal cardiac event" when he did. *See Estate of Plemons v. Indus. Comm'n*, 167 Ariz. 300, 302, 806 P.2d 889, 891 (App. 1990) ("The term 'substantial contributing cause' [in § 23-1043.01(A)] means more than insubstantial or slight but less than predominant.").