STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Clarence Birchmore	)	State File No. S-17115
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Whiting Volunteer Fire Department	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 26S-03WC

RULINGS ON DEFENSE MOTION FOR STAY AND CLAIMANT'S MOTION TO AMEND

In these post-hearing motions, the Claimant is represented by Benjamin H. Deppman, Esq. and Kevin L. Todd, Esq. and the Defendant by Andrew C. Boxer, Esq.

"Claimant," as used in this motion, refers generally to all parties in interest of the claimant, including the deceased, spouse of the deceased, and attorney for the spouse.

Motion for Stay

Pending its appeal to the Supreme Court pursuant to 21 V.S.A. § 672, the defendant has moved for a stay of the order dated May 23, 2003 awarding death benefits to Mrs. Birchmore for what this Department held was the work-related death of her husband, a volunteer with the Whiting Fire Department.

In a worker's compensation case, "[a]ny award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding." 21 V.S.A. § 675. To prevail on its request in the instant matter, defendant must demonstrate: "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v.Webster Corporation*, Opinion No. 62S-96WC (1996).

Defendant asserts it is likely to succeed in its appeal because the Commissioner accepted the opinion of Dr. Shapiro, who included the word "conjecture" in his testimony. Because speculation and surmise cannot serve as the basis for an award, see *Lapan v. Berno's Inc*. 137 Vt. 393, 395 (1979), defendant argues that the Supreme Court is likely to reverse. Although Dr. Shapiro's testimony was crucial to the ultimate determination, it was the overall testimony, and not a single word, that was significant. Furthermore, that medical opinion was buttressed by facts such as early morning awakening and the stress of a new paging system, before the conclusion regarding causation was made. Although Clarence Birchmore had a preexisting heart problem, the conclusion that his death was work related is supported by medical opinion, circumstances preceding his death and the well established principal that the "aggravation or acceleration of a pre-existing condition by an employment accident is compensable under the workers' compensation law." *Jackson v. True Temper Corp.,* 151 Vt. 592, 595-96, (1989) (citations omitted).

Next, the defendant as moving party must demonstrate irreparable harm before a stay can be granted. *Gilbert* 163 Vt. at 560. As explained below, a lump sum payment will not be awarded in this case, thereby reducing the potential for large financial losses to the defendant should the decision be reversed. Past due and ongoing payments to a surviving spouse are not likely to cause irreparable harm to an insurer.

Nor has the Claimant proven that a stay would not substantially harm Mrs. Birchmore. Although she testified that she is currently employed, there was no other evidence elicited from which defendant can now prove the lack of substantial harm.

Finally, best interest of the public would be served by the payment of spousal benefits, not with further delay.

Accordingly the defense motion for a stay is denied.

Claimant's Motion to Amend

Amount of Compensation to be Awarded:

Claimant asserts entitlement under §635 to 330 weeks of the maximum weekly compensation as an immediate lump sum payment, plus interest on the lump sum. "Compensation…shall be payable…: (1) To a spouse until: (A) The age of 62 if …entitled to benefits under the social security act…; or (B) Remarriage; or (C) Death, whichever occurs first. However, in no event shall the spouse receive less than a sum equal to 330 times the maximum weekly compensation except when the compensation terminates by reason of death". 21 V.S.A. §635. (emphasis added). With the statutory provision for termination of benefits at death, as defendant correctly asserts, the claimant is not automatically entitled to 330 weeks of compensation.

The total amount of compensation awarded in this case may be more than 330 weeks of the maximum weekly compensation, if none of the three potential cut-off conditions occur within 330 weeks; or it may be less. Furthermore, under Workers' Compensation (WC) Rules 19.0000 – 19.5013, it is clear that Claimant is not entitled to a lump sum payment, except for the amount of retroactive compensation due plus interest on that amount. The rule expressly and exclusively provides that lump sum payments may be approved for permanent disability compensation, and only under certain conditions and only when certain conditions are met. Rules 19.3000 and 19.5000 require claimant to give reasons for the request and for this Department to weigh countervailing considerations, which means that all parties must be heard on the issue.

Computation of Average Weekly Wage:

Claimant's base wage, as well as the value of extra benefits he received in addition to his wage, should be verified and determined before the average weekly wage is determined.

Accordingly, the motion to amend for the amount of compensation to be awarded is denied.

Date Upon Which Obligation to Pay Compensation Begins:

Claimant requests that the Judgment be amended to include the date which obligation to pay compensation began. Since both parties agree that the obligation to pay began on the date of the claimant's death (March 16, 2002), the Judgment should be amended to specify this date.

This case will be returned to the informal process in this Department for a determination of average weekly wage and resolution of outstanding issues. If that process is not successful, either party may request another hearing.

ORDER:

1. The defense Motion for Stay is DENIED.

2. Claimant's motion to amend for an award of a lump sum and determination of average weekly wage is DENIED.

3. Defendants are ordered to pay past due compensation beginning on March 16, 2002, the date of decedent's death. 21 V.S.A. § 664.

DATED in Montpelier, Vermont, this 10th day of July 2003.

_____

Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.

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Whiting Volunteer Fire Department	)	For: Michael S. Bertrand
	)	Commissioner
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	)	Opinion No. 26-03WC

Hearing held in Middlebury on March 3, 2003
Record closed on May 5, 2003

APPEARANCES:

Benjamin H. Deppman, Esq. and Kevin L. Todd, Esq., for the Claimant
Andrew C. Boxer, Esq., for the Defendant

ISSUES:

Was Clarence Birchmore's death proximately caused by service in the line of duty as a volunteer firefighter as defined in 21 V.S.A. § 601 (11) (A).

CLAIM:

Surviving spouse death benefits pursuant to 21 V.S.A. § 632 and § 635.

Attorney fees and costs pursuant to 21 V.S.A. § 678(a).

EXHIBITS:

Claimant's Exhibits:

1. Medical Records
2. CV of Stanley Shapiro, M.D.
3. Letter from Dr. Shapiro dated 08/01/02
4. Not offered
5. Letter from Timothy Cope, M.D. dated 07/03/02 (not offered)
6. Certificate of Death

Defendant's Exhibits:

A. CV of David Leaman, M.D.
B. MET Tasks (4 pages)
C. Medical records and letter from Travelers
D. NEJM article by Mittleman
E. NEJM article by Willich
F. Letter from Dr, Leaman dated 11/12/02
G. Supplemental medical records

FINDINGS OF FACT:

1. At all times relevant to this action Claimant Clarence Birchmore, was a member of the Whiting Volunteer Fire Department (WVFD) and an "employee" as that term is defined in the Workers' Compensation Act (Act).

2. Claimant had been the Chief of the Whiting Volunteer Fire Department for 30 years and a member for 35 years. He also worked for Scapland Farms, a 65-animal herd dairy farm as the herdsman.

3. Travelers was the workers' compensation insurer for the Whiting Volunteer Fire Department.

4. In 1990 Claimant had a heart attack while mowing his lawn. Afterwards he returned to full work activity.

5. Claimant had been a smoker prior to his heart attack in 1990, but quit smoking just prior to its occurrence.

6. Claimant has several risk factors for a second heart attack, including a strong family history, high blood pressure, increased LDL ("bad" cholesterol), decreased HDL ("good" cholesterol) and underlying cardiac disease. He took medications to control the risks.

7. During the week of March 15, 2002 Claimant went about his normal routine without complaint. He worked 12-hour days at the farm, went square dancing with his wife, and in the evening of Friday, March 15th, attended a hockey tournament, returning home at about 9:30 p.m. He retired at 10:00 p.m.

8. On March 16, 2003 at approximately 2:00 a.m., an emergency page awoke the Claimant. The pager system was a new one for the Whiting Fire Department and this was its first use. The auditory page announced a car accident in Sudbury. Claimant got up, dressed in his regular clothing and donned his fire boots and over-jacket, all the while anxiously awaiting the phone call intended as a back up during the initial pager use. The call and pager were not simultaneous as was intended. However, the call came in before he left the house.

9. Within minutes of the page, Claimant left his house and drove toward the accident scene in Sudbury, a drive that took about 15 minutes.

10. Just before arriving at the accident scene, Claimant's vehicle drove slowly off the side of the road into a ditch. The car was not damaged. Paramedics at the accident site attended to the Claimant who was moaning and gurgling when they first saw him. They began resuscitation, which was not successful, and transported him to the Rutland Regional Medical Center where he was pronounced dead at 3:35 a.m.

11. The Death Certificate indicates that Claimant died of cardiopulmonary arrest due to coronary artery disease and ventricular fibrillation. A postmortem examination was not performed.

12. Claimant's attorney submitted evidence of 174.50 hours worked and $161.61 incurred in costs.

Medical Opinions

13. Claimant's medical expert, Stanley M. Shapiro, M.D., testified in person at the hearing. Dr. Shapiro is board certified in internal medicine, cardiology and nuclear cardiology. He is also a professor of cardiology and had treated the Claimant. His opinion was based on his review of records and his training and experience. His review of the records was incomplete, however. Until the day of hearing, he had not seen the Lab Flow Sheets with an ongoing record of Claimant's HDL and LDL levels. Nor was he aware of Claimant's history of hypertension.

14. David Leaman, M.D., also a board certified cardiologist, testified for the defense. Dr. Leaman is a professor of medicine in Hershey, Pennsylvania. He has performed studies, written papers and submitted material for texts in the area of cardiology. His opinion is based on a review of the Claimant's medical records and his training and experience.

15. The experts agree that Claimant likely died of a myocardial infarction, commonly known as a heart attack. They also agree that prior to March 15, 2002, Claimant had atherosclerosis, with the build up of plaque in the blood vessels.

16. Dr. Shapiro opined that a plaque rupture caused the heart attack. He concluded that the events of rushing to an emergency prompted a rush of adrenaline, which perhaps aggravated the plaque in an artery; a conclusion he agreed is conjecture. He also explained the jumping out of bed going to an accident scene "has got to be different" from sleeping through the night.

17. Dr. Leaman was unable to find any relationship between Claimant's work at the WVFD and his death. To find a relationship between physical work and a heart attack, Dr. Leaman explained, a person has to be working at a level of physical exertion far in excess of what Claimant was doing at the time of his death. The studies on which Dr. Leaman relied considered physical exertion. With regard to the effect of psychological stress, he opined that the emotional level must be more than one with years of experience taking calls would have. Based on the Claimant's widow's deposition testimony, Dr. Leaman concluded that Claimant's behavior from the time he awakened until he left the house indicates that he had nowhere near an emotional tumult sufficient to precipitate a heart attack.

18. He rejected Dr. Shapiro's theory that sympathetic stimulation caused the plaque to rupture, as unsupported by the literature.

19. In Dr. Leaman's opinion, the heart attack would have occurred whether or not Claimant had been working that morning.

CONCLUSIONS OF LAW:

1. Worker's compensation benefits are due an employee or surviving dependents when the worker "receives a personal injury by accident arising out of and in the course of his employment…." 21 V.S.A. § 618 (a).

2. "Personal injury by accident arising out of and in the course of such employment includes…in the case of a fire fighter…disability or death from a heart injury or disease incurred or aggravated and proximately caused by service in the line of duty." § 601 (11) (A). Furthermore, "[a] heart injury or disease symptomatic within seventy-two hours from the date of last service in the line of duty at a fire shall be presumed to be incurred in the line of duty." § 601(11) (C).

3. When the language concerning firefighters was first added to the Act in 1955, it provided coverage to firefighters for heart attacks sustained in the line of duty without regard to causation, although it required a higher showing for non heart attack cases. The statute read: "'Personal injury by accident arising out of and in the course of such employment' includes …death from a heart ailment in case of a fire fighter while in the line of duty but does not include other disease unless it results from the injury." Public Act No. 172 H. 304 § 1 IV (1955). The 1955 statute was in keeping with many other states, which gave special compensation coverage to police officers or firefighters who had heart and respiratory diseases. *See generally* Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 52.07.

4. Four years later, a Senate committee recommended adding the proximate cause requirement with one senator explaining that otherwise the bill would shift the burden of proof to the municipality or insurance company. *See* Senate General Committee, Record of Committee Meeting (April 22, 1959).

5. The resultant l959 statutory change read: "Personal injury by accident arising out of and in the course of employment includes …disability or death from a heart injury or disease incurred or aggravated and *proximately caused by service in the line of duty* but does not include other disease unless it results from the injury." Public Act 222 S. 96 § 1 IV (1959(emphasis added). That proximate cause requirement has remained unchanged since.

6. Therefore, it is the burden of the claimant to prove the compensability of this claim, *See Goodwin v. Fairbanks*, 123 Vt. 161 (1963), by establishing with sufficient credible evidence the character and extent of the injury … as well as the causal connection between the injury and the employment. *Egbert v. Book Press*, 144 Vt. 367 (1984).

7. There is no question that Mr. Birchmore died in the line of duty because he was responding to a call when he collapsed. The next question is whether his death was caused by his service in that line of duty. "There must be created in the mind of the trier something more than a possibility, suspicion or surmise that such was the cause, and the inference from the facts proved must be at least the more probable hypothesis, with reference to the possibility of other hypotheses. …A possible cause cannot be accepted as the operating cause unless the evidence excludes all other causes or shows something in direct connection with the occurrence." *Burton v. Holden & Martin Lumber Co*., 112 Vt. 17, 20 (1941) (citations omitted).

8. Where the causal connection between an accident and an injury is obscure, and a layperson would have no well grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc*.,137 Vt. 393 (1979).

9. In a heart attack case involving a worker who is not a firefighter, a claimant in Vermont must initially satisfy the burden of proving that the heart attack was causally related to the Claimant's work and thereafter must prove that the heart attack was the product of some unusual or extraordinary exertion or stress in the work environment. See *Charles Emerson v. Transport Dynamic*, Op No. 40-02WC (2002) and cases cited therein; Larson's § 43.03[1][b] (substantial minority of jurisdictions require a showing of unusual exertion).

10. Even if § 601 (11) (A) is construed as removing the heightened extraordinary stress standard requirement for firefighters, it still retains the requirement that causation between the work and the heart attack be established as the legislative history clearly demonstrates.

11. The medical experts agree that Clarence Birchmore probably died of a heart attack. The crucial question then becomes: what caused the heart attack? To accept the Claimant's theory that his firefighting duties caused the attack is to adopt the following reasoning as the probable explanation of events: the page that awakened the Claimant with notice of an accident, and the wait for the telephone call, set in motion a stress reaction with the release of adrenaline, increased heart rate and the rupture of a plaque that led to the heart attack and ultimately to his death.

12. While it is clear that the Claimant had pre-existing heart disease, such a predisposition is not a bar to compensation if a work-related activity incites it. *See Morrill v. Bianchi & Sons, Inc*., 107 VT 80 (1935). The inference from the facts proved, including the abrupt early morning awakening, concomitant increase in heart rate, stress from the emergency as well as the anxiety surrounding a change in the method of notifying firefighters and medical testimony from Dr. Shapiro regarding plaque ruptures lead me to conclude that the probable hypothesis is that the page and call precipitated the heart attack. As such, the crucial burden of proof on causation has been met. Even if the unusual stress standard were applicable to this case, the Claimant has met that standard as well with the stress associated with the change in notifying firefighters of emergencies.

13. Pursuant to 21 V.S.A. § 678(a) it is a matter of discretion to award a prevailing Claimant reasonable attorney fees and mandatory to award necessary costs. This Claimant has prevailed in a hotly disputed claim due to the efforts of his attorney and is entitled to the fees of $15,705 based on 174.5 hours at $90.00 per hour as well as the necessary costs of $161.61.

ORDER:

Therefore, based on the Foregoing Findings of Fact and Conclusions of Law, Travelers is ORDERED to:

1. Pay death benefits to Mrs. Birchmore pursuant to 21 V.S.A. § 632;
2. Pay attorney fees of $15,705 and $161.61 in costs.

Dated at Montpelier, Vermont this 23rd day of May 2003.

_____
Michael S. Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.