

RENDERED: NOVEMBER 13, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000696-WC

DONNA THOMAS, ADMINISTRATRIX OF
THE ESTATE OF EDDIE RAY THOMAS, JR.,
DECEASED

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 10-WC-97727

EDDIE'S SERVICE CENTER; HON. STEVEN G.
BOLTON, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION REVERSING & REMANDING

** ** * * * * *

BEFORE: JONES, D. LAMBERT, AND THOMPSON, JUDGES.

JONES, JUDGE: This is a workers' compensation case involving death benefits. The decedent, Eddie Ray Thomas, Jr., ("Eddie"), suffered a cardiac event and died while he was attempting to extricate a vehicle during the course of his

employment. The Administrative Law Judge ("ALJ") denied the Estate's claim¹ for benefits based on his finding that the cardiac event was not caused by Eddie's employment. The Workers' Compensation Board ("the Board") affirmed. On appeal before us, the Estate argues that the Board erred when it affirmed the ALJ because the ALJ did not apply the correct burden, misstated the law as it relates to preexisting, active heart conditions, and rendered a decision which is not supported by substantial evidence. For the reasons set forth below, we reverse and remand.

I. BACKGROUND

Prior to his death, Eddie worked as the manager and the tow truck operator for Eddie's Service Center ("Service Center"). The Service Center repaired and serviced automobiles, performed towing services, and sold gasoline. It was a family business. Eddie Ray Thomas, Sr., Eddie's father, owned the business, but Eddie planned to take it over one day. Eddie had worked at the Service Center since approximately 1980.²

On January 20, 2010, the day before Eddie's death, a representative from the Environmental Protection Agency ("EPA") notified the Service Center that there were problems with the gas tanks and that they would have to be removed. Eddie was distraught about the possibility of the EPA removing the tanks because he believed it would put the Service Center out of business. The

¹ Donna Thomas, Eddie's widow, is the administratrix of her late husband's estate. She is prosecuting this action in her capacity as administratrix.

² Donna testified that Eddie began working at the Service Center when he was sixteen. Eddie was born in 1964.

EPA returned to the Service Center the following day, January 21, 2010, at which time it began the process of removing the tanks. Donna visited Eddie at the station that afternoon. She testified that Eddie was on the verge of tears about the situation and was more upset than she had ever seen him before. Donna left the Service Center to return home at approximately five in the evening, but Eddie stayed a couple of hours longer.

When Eddie arrived home, at around seven, he was still very upset. Donna recalled that Eddie was pacing, would not eat, and appeared pale and sweaty. She implored him to calm down before he had a stroke. Eddie told Donna that he just needed to walk and refused to sit down with her. A bit before nine, Eddie finally joined Donna inside of the house. Both sat down in the living room to talk and watch television. Donna testified that she did not mention the EPA situation because Eddie seemed like he had calmed down and she did not want to upset him again.

Eddie and Donna had only been watching television for fifteen or twenty minutes when Eddie received a telephone call from the Kentucky State Police requesting his assistance in towing a wrecked vehicle.³ Eddie responded to the call and drove his tow truck to the scene.

When Eddie arrived at the scene, only the State Police were there. A short time later, Eddie was joined by the driver of the wrecked truck and the driver's father, Samuel Bailey. The truck was not visible from the road. It was

³ The Service Center had a contract with the Kentucky State Police for towing services.

"down under a culvert." The top of the truck was at least four feet below the road level. The truck had actually crossed over the culvert making it difficult to dislodge without causing additional damage to the truck. After surveying the scene, Eddie took chains from the tow truck, climbed down the embankment to where the bottom of the truck was located, hooked the chains on the truck, crawled back up the embankment, and tried to work the truck out using the levers on the tow truck. However, Eddie was not able to get the truck up high enough to lift it over the concrete part of the culvert. Approximately three more times, with Mr. Bailey's assistance, Eddie went down the embankment, repositioned the chains, and climbed back out in an attempt to get the truck high enough so that it would not catch on the concrete. These efforts did not prove successful. After a final trip down, Eddie indicated that he needed to call his father to bring in the larger tow truck because it had a taller boom and could lift the truck higher.

Mr. Bailey described trying to get the truck out as tiring and being "hard work." He explained that the bank they had to climb was "straight up and down." This part of the embankment was grass not concrete. Mr. Bailey explained that the grass part was "hard to climb up" because "you had to dig your feet into it to climb up it." Once down with the truck, they had to climb under it to reposition the chains. Mr. Bailey indicated that Eddie was working hard on extricating the truck for approximately forty minutes before he decided to stop and call for a larger truck. During this time, he was climbing up and down the hill, climbing under the truck, moving the chains, and maneuvering the tow truck

levers. Mr. Bailey confirmed that Eddie was breathing hard after climbing up for the last time and that he was "tired." Mr. Bailey stated that Eddie had "really worked hard" trying to remove the truck. He explained, "a man's that climbed over an embankment four times and handled heavy chains and climb back up is going to be out of breath."

After climbing out for the last time, Eddie called his father for assistance. He then joined Mr. Bailey where the two flagged traffic for approximately five to ten minutes. While they were flagging traffic, Eddie told Mr. Bailey something he had eaten had given him heartburn or indigestion. Eddie then said he was going to his truck to call his father and check on his status. Mr. Bailey recalls Eddie being in the truck four or five minutes. When Eddie exited his truck, Mr. Bailey heard him make a noise and then saw him collapse on the ground. Mr. Bailey attempted CPR and told his son to call 911. After EMS workers arrived, Eddie was transported to the hospital where he was pronounced dead on arrival.

On October 14, 2011, Eddie's Estate filed a Form 101 Application for Resolution of Injury Claim with the Department of Workers' Claims seeking death benefits. On the section of the form asking for an explanation for how the injury occurred, the Estate stated as follows: "He was operating a tow truck, picking up a broken down vehicle, exerted himself pulling a chain, climbed up and down a ravine near the vehicle and then collapsed and died at the scene. The physical exertion on that day combined with the mental stress of the removal of the gas

tanks at the gas station the day before resulted in a heart attack." The Estate attached an opinion letter from Dr. Rodney Handshoe to the Form 101. The letter states:

I have reviewed the medical records you provided on Mr. Thomas. Mr. Thomas was a 45 year old white male with a history of hypertension who experienced sudden death January 10, 2010^[4] while operating a wrecker in an effort to tow a stranded car. Efforts to resuscitate him at St. Clare Medical Center in Morehead were unsuccessful. According to the death certificate, no autopsy was performed.

Sudden cardiac death is most commonly caused by a ventricular tachyarrhythmia induced by ischemia or myocardial infarction. There are other cardiovascular causes but his medical examination report for commercial driver fitness determination dated 8-29-2008 did not suggest the presence of any other cardiovascular disease.

Your question was whether or not the extraordinary exertion of the removal of the vehicle and stress on the day before his death involving removal of storage tanks could have served as a trigger or precipitator of his cardiac event. It is my medical opinion that current medical knowledge would suggest that intense physical stress and emotional stress can indeed precipitate cardiovascular events such as sudden cardiac death in those individuals with underlying cardiac disease. The events surrounding Mr. Thomas's death could have played a role in this regard.

The Estate's claim was assigned to an ALJ and discovery commenced.

During discovery the parties submitted medical records of Eddie as well as expert reports.

⁴ This was obviously a typographical error as it is undisputed that Eddie died on January 21, 2010.

The records from Morehead Clinic outline Eddie's medical treatment from 1998 through December 2009, primarily for treatment of hypertension and anxiety. On December 10, 2009, Eddie complained of right shoulder pain of three weeks duration. His blood pressure was noted to be 155/98 at that time.

Dr. Ellis performed a CDL examination of Eddie on August 29, 2008. At that time she noted he had hypertension which was under control.

The Estate filed an additional letter from Dr. Handshoe dated May 3, 2012. After reviewing Mr. Bailey's deposition, he stated as follows:

The symptoms that Mr. Thomas experienced immediately prior to his sudden death are typical for an acute myocardial infarction . . . It is my opinion based on reasonable medical probability that the physical exertion immediately preceding Mr. Thomas's symptoms triggered plaque rupture and precipitated the heart attack and sudden death.

The Service Center filed the October 22, 2007, office note of Dr. Shelly Rogers who noted Eddie had previously been diagnosed with high blood pressure. She diagnosed hypertension and anxiety. She stated, "Patient reports that he has been anxious for nearly 30 years and gets so nervous he vomits on a somewhat daily basis due to his nerves."

The Service Center also filed the March 8, 2002, office note of Dr. Stephen Damron who diagnosed severe uncontrolled hypertension. In reference to Thomas, Dr. Damron stated, "He does occasionally have problems with a temper at work due to some stressors, there, but this last episode was with him waking up."

As to causation, the Service Center relied on the report of Dr. Hal Roseman, a cardiologist in Nashville, Tennessee. Dr. Roseman outlined Eddie's dealings with the EPA, and responding to the scene of an accident. He noted Eddie had several cardiovascular risk factors including hyperlipidemia, hypertension, family history of premature coronary artery disease, and probable genetic disposition. Specifically, Dr. Roseman stated the following:

Without benefit of an autopsy it will never be known with certainty what caused Mr. Thomas' sudden death. The indigestion symptoms decedent experienced prior to death could have been due to GERD (gastro-esophageal reflux) rather than Angina, and merely coincidental.

.....

There is no definite proof Thomas suffered a heart attack.

.....

In conclusion, it is my professional opinion as a cardiologist that relating Mr. Thomas' death to a cardiac etiology and to his employment is tentative at best. Even if one assumes Mr. Thomas was experiencing unstable angina just before his death, it is doubtful that the exertional activities of Mr. Thomas' work on January 21, 2010 was sufficient to cause his death.

Dr. Roseman disagreed with Dr. Handshoe's opinions. He specifically stated, "The event of the fatal arrhythmia that caused the unfortunate death of Mr. Thomas could have occurred at any time and was merely coincidental that it took place while he was at work."

The ALJ conducted a Benefit Review Conference ("BRC") on March 8, 2013. At the BRC, the parties stipulated to jurisdiction under the Workers' Compensation Act ("the Act"); an employment relationship existed between Eddie

and the Service Center; Eddie's alleged date of injury (January 21, 2010); average weekly wage (\$290.00); date of birth (March 11, 1964); and education level (12th grade with a CDL). The parties identified the contested issues as: 1) work relatedness/causation of the death of Eddie; 2) entitlement to death benefits pursuant to Kentucky Revised Statutes (KRS) 342.750; and 3) *Daubert* objection to Dr. Handshoe's reports. Also, at the BRC the parties agreed to waive a formal hearing and submit this matter on the record to the ALJ.

On November 18, 2013, the ALJ dismissed the Estate's claims finding that it had failed to meet the burden of proof of establishing that Eddie's death was the result of a work-related injury. The Estate filed a petition for reconsideration which was overruled by the ALJ by order dated December 20, 2013.

Subsequently, the Estate appealed to the Board which vacated the November 18, 2013, Opinion and Order of the ALJ, and remanded the case back to him "for a decision based upon the totality of the evidence, not just on the medical opinions."

On remand, the ALJ again dismissed the Estate's claims. In so doing, the ALJ indicated that he considered both lay witness testimony and the medical opinions, and after doing so, was still persuaded that the Estate had failed to meet its burden of proof as related to causation. Specifically, the ALJ rendered the following findings:

2. The Plaintiff's decedent did not suffer a work related injury while in the employ of the Defendant Employer on January 21, 2010.

3. Plaintiff's decedent suffered symptoms of ischemic heart disease that was a pre-existing present and active condition.

4. Within reasonable medical probability, Plaintiff's symptoms were not work-related.

5. In making the foregoing findings, I rely on the medical opinion of Dr. Hal Roseman, M.D., which I find to be the most persuasive and compelling medical evidence in the record as well as the lay testimony in the record, which I find to be inconclusive as to the cause of death.

6. Plaintiff has failed to meet her burden of proof to establish that the death of Plaintiff's decedent is the result of a work related injury within reasonable medical probability.

The Estate then filed a timely Petition for Reconsideration with the ALJ. The ALJ denied the petition. The Estate appealed the ALJ decision to the Board. The Board affirmed. This appeal followed.

II. STANDARD OF REVIEW

Pursuant to KRS 342.285, the ALJ is the sole finder of fact in workers' compensation claims. Our courts have construed this authority to mean that the ALJ has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from that evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth-Elkhorn Corporation*, 514 S.W.2d 46, 47 (Ky. 1974). Moreover, an ALJ has sole discretion to decide whom and what to believe, and may reject any testimony and believe or disbelieve various parts of the evidence, regardless of

whether it comes from the same witness or the same adversary party's total proof.

Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

On review, neither the Board nor the appellate court can substitute its judgment for that of the ALJ as to the weight of evidence on questions of fact.

Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440, 441 (Ky. App. 1982). In short, the reviewing body cannot second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion.

Medley v. Board of Education, Shelby County, 168 S.W.3d 398, 406 (Ky. App. 2004). Discretion is abused only when an ALJ's decision is arbitrary,

unreasonable, unfair, or unsupported by sound legal principles. *Downing v.*

Downing, 45 S.W.3d 449, 454 (Ky. App. 2001). To demonstrate an abuse of discretion, "[a] party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, *i.e.*, that the finding was unreasonable under the evidence." *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 754 (Ky. 2011).

III. ANALYSIS

The Estate first argues that that the Board erroneously adopted the ALJ's "failure" to follow KRS 342.680. The Estate asserts that KRS 342.680 requires a shifting of the burden of proof once it established that Eddie's cardiac event was in some way caused by his work. The Estate maintains that the ALJ erred in placing the burden of causation on its shoulders.

KRS 342.680 provides:

In any claim for compensation, where the employee has been killed, or is physically or mentally unable to testify as confirmed by competent medical evidence and where there is unrebutted prima facie evidence that indicates that the injury was work related, it shall be presumed, in the absence of substantial evidence to the contrary, that the injury was work related, that sufficient notice of the injury has been given, and that the injury or death was not proximately caused by the employee's intoxication or by his willful intention to injure or kill himself or another.

KRS 342.680 "authorizes a rebuttable presumption of causation in instances where a worker is incapable of explaining how a workplace injury occurred." *AK Steel Corp. v. Adkins*, 253 S.W.3d 59, 63 (Ky. 2008). "A rebuttable presumption shifts to the party against whom it is directed the burden of going forward with evidence to rebut or meet it but does not shift the burden of proof (i.e., the risk of nonpersuasion) from the party upon whom the burden was originally cast." *Id.* at 63-64.

The Kentucky Supreme Court explained the procedural effect of KRS 342.680 in *Williams v. White Castle Systems Inc.*, 173 S.W.3d 231 (Ky. 2005).

The procedural effect of the presumption is to shift to the employer the burden of going forward with substantial evidence that the injury or death was not work-related; however, the burden of proving causation remains on the claimant. If the employer fails to meet its burden, the claimant is entitled to the presumption and prevails on the issue of causation. *If the employer does meet its burden, the claimant is not entitled to the presumption of causation and must go forward with evidence that is persuasive enough to convince the ALJ that the injury or death was work-related.*

Id. at 235-36 (emphasis added).

Had the Service Center failed to present *any* evidence that Eddie's death was not work-related then the Estate would have been entitled to prevail under KRS 342.680. This is the function of KRS 342.680. It shifts the initial burden of going forward from the claimant onto the defendant. If the defendant satisfies its burden of presenting some proof, the ultimate burden of proving causation shifts back to the plaintiff.

Here, the Service Center came forward with its own evidence that Eddie's death was not work-related by filing Dr. Roseman's report. The report was sufficient for the Service Center to meet its burden under KRS 342.680. This shifted the burden back to the claimant. After the Service Center met its burden, causation was to be determined as in any other case with the burden of persuasion on the causation issue resting with the Estate. Accordingly, we disagree with the Estate that either the ALJ or the Board misapplied the burden of proving causation inasmuch as the ultimate burden of causation remained on the Estate.

Next, we turn to the Estate's second argument that the Board's April 10, 2015, Opinion and Order established a new legal causation standard for cardiac event claims requiring alleged work-related cardiac events to be established by autopsy. In making this argument, the Estate cites the following passage in the Board's opinion:

Unfortunately, that is all we know about the death of Mr. Thomas, because no autopsy was performed to determine the cause of death. Even if Mr. Thomas did die of a heart

attack, we have no positive way of knowing from the lay testimony whether the work related events precipitated the event, or it could have happened at any time due to Mr. Thomas's long history of extreme anxiety, hypertension and high blood pressure, his genetic history and his lack of regular exercise.

In the quoted portion relied on by the Estate, the Board was quoting a portion of the ALJ's opinion. Whether a statement by the ALJ or the Board, we do not read it as requiring an autopsy. Rather, we read the statement as saying that because there was no objective medical opinion on the cause of death in the record, the ALJ was faced with considering and weighing the two differing expert medical opinions as if they were on equal footing with one another. In other words, we believe the ALJ was stating that had there been an autopsy, it would have given the ALJ some yardstick against which to consider the expert opinions regarding causation.

We do not believe that the ALJ meant to imply that the Estate could not prevail as a matter of law without an autopsy. We simply believe that the ALJ was pointing out that without an autopsy, it may be more difficult for a claimant to prove causation because it becomes a battle of experts as to the actual cause and mechanism of death, especially in cardiac-related cases because a heart attack (or cardiac event) occurring while at work does not, in and of itself, establish causation. *Roberts v. Estep*, 845 S.W.2d 544, 547 (Ky. 1993). "In heart attack cases, causation is a factual determination based on a legal concept for the purpose of determining whether or not the work was the legal cause or only the stage on

which an inevitable tragedy occurred.” *Campbell v. Hauler’s Inc.*, 320 S.W.3d 707, 711 (Ky. App. 2010) (citing *Hudson v. Owens*, 439 S.W.2d 565, 570 (Ky. 1969)). “Indeed, proving causation is often elusive and requires that the fact-finder review the medical evidence and non-medical evidence.” *Id.* Accordingly, we find no error with respect to the ALJ's and the Board's comments on the lack of an autopsy.

The Estate next argues that the evidence of record is so compelling it requires reversal of the Board’s decision and a finding that Eddie did suffer a work-related cardiac event. On this point, we agree.

As an initial matter, we first address the mental stress component of Eddie's claim. Donna testified that Eddie was very stressed about the removal of the gas tanks from the Service Center in the two days before his death. It is unclear to us how the ALJ considered the mental component of Eddie's claim. The ALJ noted in his opinion that the Service Center denied Eddie's claim, in part, on the basis that a heart attack caused by mental stress is not compensable. The ALJ never outright addressed this argument or clearly articulated how he figured the alleged mental stress issue into his ultimate conclusion.

The legislature amended KRS 342.0011(1) in 1996 to prevent “mental-mental” claims, i.e., psychological injuries which result from emotional traumas. However, in the amended statute, the legislature gave “no indication that it intended to preclude compensation for ‘mental-physical’ claims[.]” *McCowan v. Matsushita Appliance Co.*, 95 S.W.3d 30, 32 (Ky. 2002). As a result, in

McCowan, a heated argument between the claimant and her supervisor over an assembly line stoppage which caused a heart attack was compensable. *Id.* at 32-33. ("Although the trauma that the claimant experienced was emotional rather than physical in nature, the harmful changes for which she sought compensation included the heart attack and its consequences. Thus, the last sentence of KRS 342.0011(1) did not apply to her claim, and the decision to the contrary was erroneous as a matter of law."). *Id.* at 33.

The ALJ stated on page 16 of his opinion that "it would seem that an obvious conclusion could be drawn from a sequence of events that included high stress over the feared loss of the business due to the removal of gas tanks by the EPA" The ALJ also stated that "in the hours just before his death, [Donna] described an emotional crisis caused by EPA findings at the workplace owned by Mr. Thomas' father that he apparently expected to inherit. In a perfectly understandable emotional panic, he was extremely worried about the ability to continue operating, cost of remediation and penalties for environmental violations." The ALJ then concluded that Eddie's worries about the removal of the tanks were "not directly connected to his work" as manager of the Service Center. The ALJ based this conclusion on the fact that Eddie was not technically the owner of the Service Center and only had a "mere expectancy" of inheriting it one day.

The ALJ's conclusion that Eddie's concerns were not work-related is baffling. Even though Eddie did not own the Service Center, he managed it. As the manager, Eddie was responsible for the day-to-day operation of the Service

Center. Eddie met the EPA agent concerning the removal of the tanks and was concerned about the effect the removal would have on the Service Center's profits. Donna testified that Eddie was more upset about the EPA removing the tanks than she had ever seen him.

The evidence concerning Eddie's anxiety on the day of his death was uncontroverted in our opinion. No one attributed it to anything other than the EPA's removal of the tanks. Furthermore, we believe that it is important to emphasize here that the Estate is not seeking compensation for the anxiety; it is seeking compensation for Eddie's death. While Eddie might have suffered from anxiety in the past, that is not the determinative issue. The issue is whether Eddie was suffering from "work-related" anxiety immediately prior to his death, which contributed to his heart attack. Based on the ALJ's findings that Eddie was extremely stressed and anxious about the removal of the tanks, we believe that the ALJ erred in holding that Eddie's stress and worries about the tanks was "not directly connected" to his work.⁵

⁵ On page 17 of Dr. Roseman's opinion he "opines" that:

Mr. Thomas did not experience emotional stress related to a physical condition. He had chronic anxiety, which was exasperated by the recent fears of business disruption by the EPA edicts and actions. As such, under the definition of 'injury' by Kentucky Workers Compensation Act [KRS 342.0011(1)], the anxiety experienced by Mr. Thomas, a chronic issue, does not appear to be related to his occupation, but appears to be intrinsic to Mr. Thomas' personality.

It was clearly improper for the ALJ to rely on Dr. Roseman for a legal opinion as to what constitutes an "injury" under the Act. Additionally, Dr. Roseman's opinion that Thomas "did not experience emotional stress related to a physical condition" misses the point. As established by our Supreme Court in *McCowan, supra*, the question is whether the mental stress caused or contributed to a physical condition.

We are also perplexed regarding the ALJ's finding on page 24 of his opinion that Eddie suffered "symptoms of ischemic heart disease that was a pre-existing, present and active condition." We have extensively reviewed Eddie's medical records. Eddie was never diagnosed with heart disease. He had never complained to his doctors of any heart-related pain or symptoms. Eddie had been diagnosed with hypertension and high cholesterol (via a routine blood screen) - risk factors for heart disease. However, Eddie's physicians had never recommended that Eddie have any diagnostic heart test. To the extent that Eddie did have risk factors that predisposed him to heart disease, the record is absolutely devoid of any evidence that these risk factors manifested themselves into a symptomatic heart condition prior to January 21, 2010. Not even Dr. Roseman, upon whom the ALJ relied heavily, stated that Eddie had an "active" heart condition prior to January 21, 2010. The use of the word "active" was the ALJ's alone and it is unsupported by the evidence.

Next, we examine Dr. Roseman's opinion, upon which the ALJ found convincing. The report is lengthy and complex. But, dissecting it is vitally important. We have reviewed the opinion extensively and find that it mischaracterized Mr. Bailey's testimony regarding the level of exertion Eddie performed immediately prior to his heart event to such an extent that the ALJ should not have relied on it for the proposition that the exertion did not contribute to Eddie's heart attack. *See Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839, 842 (Ky. 2004).

Dr. Roseman acknowledges in his report that "exertional activities have been linked to the occurrence of cardiovascular events, considered primarily the result of plaque rupture." On page 14 of his opinion, Dr. Roseman stated that exercise or exertion can cause plaque rupture leading to decreased blood flow and angina in unconditioned individuals who undertake vigorous exercise within an hour of the cardiac event and may occur in the rest period. Yet, Dr. Roseman (and in turn the ALJ) rejected these factors as contributing to Eddie's death.

Yet, ironically, based on the lay witness testimony, the ALJ made the two findings necessary to meet Dr. Roseman's criteria: lack of conditioning and intense physical exertion. Based on Donna's testimony, the ALJ found that Eddie "did not engage in any form of regular exercise" and suffered from "lack of conditioning." Based on Mr. Bailey's testimony, the ALJ found that Eddie was engaged in "unusually demanding physical efforts" immediately prior to his death. We agree with the ALJ that the lay evidence supported these two conclusions. In fact, there was no evidence to the contrary on these issues.

Despite the uncontroverted evidence regarding Eddie's activities, Dr. Roseman based his conclusion that Eddie's cardiac event was not triggered by his work on the fact that Eddie was not engaged in any "rigorous exertion" prior to his death. In support of this conclusion, Dr. Roseman states that "as it relates to work activity, the best evidence from the *medical records* indicates that Mr. Thomas participated in minimal exertion prior to his sudden death. The activity that Mr. Thomas was engaging was not strenuous, although his work did entail some

exertion. The exertional activities did not prevent him from talking in a normal conversational tone."

As a preliminary matter, there are no *medical records* documenting the level of exertion that Eddie engaged in prior to his death. The only medical records generated on the night of Eddie's death are from EMS workers. They do not provide any information regarding Eddie's activities in the hour before his death. The only evidence in the record regarding Eddie's activities in the hour or so before his death is from Mr. Bailey. We have read Mr. Bailey's testimony several times. Having done so, we fail to understand how Dr. Roseman could characterize Eddie's activities prior to his death as "minimal exertion." Mr. Bailey explained that for nearly forty minutes Eddie was engaged in very physically demanding work. Although Dr. Roseman stated in his report that Eddie was "walking" up and down a hill at this time, Mr. Bailey's testimony was clear that Eddie was engaged in far more strenuous activity than merely walking up an incline. Mr. Bailey testified that the embankment was so steep that the men had to basically "crawl" up and down it. Mr. Bailey further explained that this portion of the embankment was grass and that the men had to dig their heels into the ground as they crawled up the hill. After engaging in this activity for nearly forty minutes, Mr. Bailey explained that Eddie was breathing hard and was winded. Mr. Bailey did not state how long it took Eddie to regain his breath to a point where he could carry on a normal conversation; although, at some point he must have done so because while the men were flagging traffic he told Mr. Bailey that he was having indigestion. Even the

ALJ acknowledged in his opinion that Eddie was engaged in "unusually demanding physical effort" that evening.

Having carefully reviewed all the evidence of record, we cannot agree with the Board that substantial evidence supports the ALJ's opinion. There is no evidence to support that Eddie had an active heart condition; the only evidence of record indicates that Eddie's anxiety on the day of his death was related to the EPA's removal of gas tanks from the Service Center, a matter related to his work; Eddie was unconditioned at the time of his death; and according to Mr. Bailey, the only eyewitness, Eddie was engaged in physically demanding activities for forty minutes in the hour preceding his death. The ALJ is certainly entitled to rely on medical opinions to establish causation; however, those opinions should be predicated on accurate facts. In this instance, we believe Dr. Roseman's opinion so gravely misrepresented the facts surrounding Eddie's death as to render the ALJ's reliance on it a substantial miscarriage of justice.

Accordingly, we reverse and remand for entry of an award in the Estate's favor.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT
FOR APPELLANT:

Paula Richardson
Owingsville, Kentucky

BRIEF AND ORAL ARGUMENT
FOR APPELLEE:

R. Christian Hutson
Paducah, Kentucky

