

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 72

WCC No. 9903-8175

**KATHLEEN M. KING, Widow of Russell
King-Deceased Employee/Claimant on
behalf of herself and her three youngest
children: Mary, Phillip and Sarah and
MELISSA R. KING, adult invalid child
of Russell King,**

Petitioners

vs.

CREDIT GENERAL INSURANCE COMPANY

Respondent/Insurer for

TTC ILLINOIS, INCORPORATED and

SAMMONS TRUCKING

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Over-the-road truck driver died at age of 45 while napping after heating units were loaded on his truck in Finksberg, Maryland. Maryland Medical Examiner noted death resulted from "severe atherosclerotic disease," explained as degenerative changes in blood vessels due to fat deposit in the walls of blood vessels. A doctor testifying on behalf of the decedent's widow considered the decedent's activity in moving tarps to have triggered an arrhythmia which likely led to his death, but the doctor's opinion was formed on the basis of erroneous factual assumptions. Another doctor, testifying on behalf of the insurer, attributed the death to preexisting coronary disease, finding it unlikely that claimant's activity that day caused his death. Testimony from a dock worker indicated claimant's work had not been strenuous prior to his death.

Held: WCC was not persuaded that claimant's work activities triggered his arrhythmia or death. Putting together all the credible evidence, the record does not support the conclusions drawn by the expert who believed work activities caused claimant's death, but makes the contrary conclusions more credible. Note: WCC affirmed on appeal, King v. Credit General, 2000 MT 260 ("the Kings did not meet their burden of establishing

that Russell King's death was 'caused by a specific event on a single day or during a single work shift' as required under section 39-71-119(2)(d), MCA (1993).")

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 39-71-119(2)(1993). WCC was not persuaded that work activities of over-the-road truck driver caused an arrhythmia leading to his death, but credited testimony indicating claimant died from longstanding "severe atherosclerotic disease." Thus, claimants failed to prove that death resulted from a specific event on a single day or during a single work shift as required by statute. Note: WCC affirmed on appeal, King v. Credit General, 2000 MT 260 ("the Kings did not meet their burden of establishing that Russell King's death was 'caused by a specific event on a single day or during a single work shift' as required under section 39-71-119(2)(d), MCA (1993).")

Injury and Accident: Accident. WCC was not persuaded that work activities of over-the-road truck driver caused an arrhythmia leading to his death, but credited testimony indicating claimant died from longstanding "severe atherosclerotic disease." While the definition of accident includes an unusual strain, claimants failed to prove that death resulted from a specific event on a single day or during a single work shift as required by statute. Note: WCC affirmed on appeal, King v. Credit General, 2000 MT 260 ("the Kings did not meet their burden of establishing that Russell King's death was 'caused by a specific event on a single day or during a single work shift' as required under section 39-71-119(2)(d), MCA (1993).")

Injury and Accident: Causation. WCC was not persuaded that work activities of over-the-road truck driver caused an arrhythmia leading to his death, but credited testimony indicating claimant died from longstanding "severe atherosclerotic disease." Thus, claimants failed to prove that death resulted from a specific event on a single day or during a single work shift as required by statute. Note: WCC affirmed on appeal, King v. Credit General, 2000 MT 260 ("the Kings did not meet their burden of establishing that Russell King's death was 'caused by a specific event on a single day or during a single work shift' as required under section 39-71-119(2)(d), MCA (1993).")

Injury and Accident: Unexpected Strain or Injury. WCC was not persuaded that work activities of over-the-road truck driver caused an arrhythmia leading to his death, but credited testimony indicating claimant died from longstanding "severe atherosclerotic disease." While the definition of accident includes an unusual strain, claimants failed to prove that death resulted from a specific event on a single day or during a single work shift as required by statute. Note: WCC affirmed on appeal, King v. Credit General, 2000 MT 260 ("the Kings did not meet their burden of establishing that Russell King's death was 'caused by a specific event on a single day or during a single work shift' as required under section 39-71-119(2)(d), MCA (1993).")

Medical Condition: Cardiac Arrhythmia. WCC was not persuaded that work activities of over-the-road truck driver caused an arrhythmia leading to his death, but credited testimony indicating claimant died from longstanding "severe atherosclerotic disease." While the definition of accident includes an unusual strain, claimants failed to prove that death resulted from a specific event on a single day or during a single work shift as required by statute. Note: WCC affirmed on appeal, *King v. Credit General*, 2000 MT 260 ("the Kings did not meet their burden of establishing that Russell King's death was 'caused by a specific event on a single day or during a single work shift' as required under section 39-71-119(2)(d), MCA (1993).")

¶1 The trial in this matter was held on August 26, 1999, in Missoula, Montana. Claimant, Kathleen M. King, was represented by Ms. Sydney E. McKenna. Respondent, Credit General Insurance Company (Credit General), was represented by Mr. Robert E. Sheridan. A trial transcript has not been prepared.

¶2 Exhibits: Exhibits 1 through 5 and 7 through 18 were admitted without objection. Exhibit 6 was admitted in part (only the weather report from Westminster Station, Maryland.) Exhibit 19 was admitted for demonstrative purposes only.

¶3 Witnesses and Depositions: The depositions of Dennis J. Chute, M.D., Kathleen King, Mark E. Long, Anthony Mack, James H. Oury, M.D., Daniel Joseph Squires, and Stan Wilson, M.D. were submitted for the Court's consideration. James H. Oury, M.D., Stan Wilson, M.D., and Daniel Joseph Squires were sworn and testified at trial.

¶4 Issues Presented: The issues presented for decision are restated by the Court as follows:

1. Whether Russell King's death on June 26, 1995 is compensable under the Workers' Compensation Act of 1993?
2. If so, whether claimant should be awarded attorney's fees and costs. In the event the Court finds against claimant, a third issue is presented. That issue was phrased in the Pretrial Order as follows:
3. If King's death and/or heart attack are excluded as not compensable under the Montana Workers' Compensation Act, is that a violation of Petitioner's Constitutional right to equal protection under the law?

¶5 Having considered the Pretrial Order, the testimony presented at trial, the demeanor and credibility of the witnesses, the depositions and exhibits, and the arguments of the parties, the Court makes the following:

FINDINGS OF FACT

¶6 Russell King (King) died on June 26, 1995, at the age of 45. At the time of his death, he was employed as an over-the-road truck driver for TTC Illinois, Incorporated (TTC). Under a leasing arrangement, King was driving a truck owned by Sammons Trucking.

¶7 At the time of his death, King was married to claimant Kathleen King. He was survived by six children, three of whom were minors when he died (Philip, Mary and Sarah). Melissa, who was an adult at the time of her father's death, has spina bifida and hydrocephalus and is an invalid.

¶8 On June 26, 1995, TTC was insured by Credit General Company under Plan II of the Montana Worker's Compensation Act. Credit General has denied liability for the death claim filed by King's beneficiaries.

Circumstances of Death

¶9 On June 26, 1995, around 1:00 p.m., King arrived at the Powrmatic plant in Finksburg, Maryland to pick up heating units. Upon arriving, King unstrapped two folded tarps he carried on the flat bed trailer of his truck. Powrmatic's shipping and receiving employee, Tony Mack (Mack), then brought a forklift along side the trailer and "raised the forks up to the height of the bed right where the tarps were." (Mack Dep. at 39.) He and King then slid the tarps from the trailer onto the forklift. They had no difficulty sliding the tarps onto the forklift (*id.* at 40) and Mack testified that King did not appear to have unusually exerted himself. (*id.* at 58.)

¶10 The tarps were made of vinyl with a slick exterior surface. (Squires Tr. Test. And Squires Dep. at 29, 44.) Although weighing 60 to 70 pounds, they slid easily. (*id.* at 44.) Mack characterized the tarps as "kind of a light material" and "not really super heavy." (Mack Dep. at 10, 40.)

¶11 King and Mack slid the tarps approximately four feet. (Squires Test.)

¶12 Thereafter, an employee of Powrmatic loaded the heating units onto the flat bed trailer. King did not assist.

¶13 During the loading, King chatted with Mack. (Mack Dep. at 15.) At some point he said something to the effect of, "Boy, it's kind of hot out here." (*id.* at 24.) Mack had the impression "he was just trying to strike up a conversation, you know, just trying to be nice." (*id.* at 24-25.) Mack noticed that King was sweating but, given the temperature and humidity, not unusually so. (*id.* at 30-31.) Temperature measurements at the nearby Westminster station indicated a high of 85 degrees for June 26, 1995. (Ex. 6.) The humidity was in the neighborhood of 90 percent. (Long Dep. at 16.)

¶14 After the heating units were loaded, King got out straps and prepared to strap the units to the truck. (Mack Dep. at 16.) Mack testified that his preparations took "about a half hour, and that's when he came in and asked me, he felt a little tired and he wanted to go take a nap." (*id.*) "He just said he was a little tired because it was kind of warm out and wanted to go take a little nap." (*id.* at 17.) From his experience in shipping and receiving, Mack thought half an hour did not seem unusual for getting strapping materials together. (*id.* at 19.) He also said it was not unusual for truckers to "go back in their truck and take it easy a little bit." (*id.* at 32.)

¶15 King then went to his truck cab for a nap. Mack checked on him twenty minutes later and was unable to rouse him. Around 2:00 p.m., Corporal Mark Long of the Maryland State Police arrived and determined that King was dead. (Long Dep. at 6-7.)

Medical Evidence and Opinions

¶16 Dennis Chute, M.D., an Assistant Medical Examiner with the state of Maryland, participated in an autopsy of King and testified by deposition.

¶17 In his examination of the heart, Chute found "[s]tenosis was due to severe atherosclerosis," which he explained is "a degenerative change of the blood vessels that is due to a combination of lipid deposit or fat material deposit into the wall of the blood vessel and associated with a response to that that causes thickening in the wall of the blood vessel and in layman's terms is hardening of the arteries." (Chute Dep. at 14 and 36; Ex. 3.) With respect to the left anterior descending artery, which courses down the front of the heart, he found "[i]n the proximal portion, there was 75 percent narrowing, and in the mid portion of that artery, there was 90 percent narrowing, narrowing due to atherosclerosis, and also, in the mid portion superimposed in the area of the 90 percent narrowing there was plaque rupture with some non occlusive thrombus deposition." (Chute Dep. at 20.) Dr. Chute described plaque as the area of narrowing inside the blood vessel. He explained a "thrombus," or clot inside the vessel arises when the body attempts to heal the rupture. (*Id.* at 25-26.) He also found 60 to 75 percent stenosis in the left circumflex vessel. His examination of the right coronary artery disclosed 75 percent stenosis in the proximal portion and 75 percent stenosis, with plaque rupture, in the distal portion. Finally, the autopsy disclosed 75 percent stenosis in the posterior descending coronary arteries. (Ex. 3 at 3.)

¶18 Dr. Chute testified King's atherosclerosis "had been there awhile, chronic." (Chute Dep. at 24.) He opined it would take some time to build up the amount of stenosis or blockage found in King's arteries. (*Id.* at 24-25.)

¶19 Dr. Chute also testified that King's heart was larger than normal for a man of his age. (*Id.* at 27). He explained: "The most common reason that hearts enlarge that we see are, one, hypertension or high blood pressure and/or atherosclerosis on top of that. Also, obesity can enlarge the heart, so there are three reasons." (*Id.*)

¶20 From examination of the decedent's respiratory system, Dr. Chute found indication of acute failure of the left side of King's heart. (*Id.* at 29-30). The doctor opined that King died of atherosclerotic cardiovascular disease, categorizing the death as a "natural" disease process. (Chute Dep. at 31; Ex. 3.) He further opined that death was immediately preceded by an arrhythmia, or abnormal electrical activity in the heart, which he called "the mechanism of death." (Chute Dep. at 32.) Based upon the autopsy findings, Dr. Chute opined that the arrhythmia was sudden, "meaning it could take seconds to minutes to develop." (*Id.* at 42.) He did not find evidence of a myocardial infarction, but indicated that King died before any indication of that condition would arise. (*Id.* at 28.)

¶21 Dr. Chute testified that the degree of King's atherosclerosis put him at considerable risk for either a myocardial infarction or a heart arrhythmia. (*Id.* at 34.) He noted that

either an arrhythmia or myocardial infarction may occur spontaneously, even when a triggering event is not apparent. (*Id.*) He indicated, however, that cardiac arrhythmia probably had some trigger. (*Id.* at 39.) When asked to assume that Mr. King had spent thirty minutes in the hot sun, in temperature of 85 degrees, with humidity of 90 percent, and had been moving around working with strapping to tighten down a load on a truck, then went into an air conditioned cab of the truck, Dr. Chute gave the opinion those events would be sufficient to trigger an arrhythmia. (*Id.* at 40.) Dr. Chute maintained, however, that the cause of death "was the underlying severe atherosclerotic disease." (*Id.* at 48.)

¶22 Both parties retained expert medical witnesses to review the autopsy results and the circumstances of King's death. Claimant retained Dr. James H. Oury, a cardiovascular surgeon with extensive experience in cardiac surgery and research. Credit General retained Dr. Stan Wilson, a cardiologist whose practice emphasizes treatment of coronary artery disease. Both doctors have impressive medical credentials. During his career, Dr. Oury has performed between 5,000 and 7,000 heart surgeries as lead surgeon. Dr. Wilson performs over 500 cardiac catheterizations annually.

¶23 At trial, Dr. Oury opined that King's activity in helping to move the tarps triggered an arrhythmia leading to death.⁽¹⁾ In his opinion, the activity caused the plaque rupture in the left anterior descending artery, which in turn triggered the arrhythmia. Dr. Oury agreed that King's atherosclerosis provided the substrate for deadly events on August 26, 1999. He testified that the greater the occlusion of the arteries, the less work it takes to trigger a fatal event. (Tr. Test and Dep. at 33-37). Dr. Oury suggested use of a "work product" formula to illustrate the relationship of physical exertion to heart trauma. (*Id.* at 36-37.) The formula uses the product of an individual's heart rate, pulse, and systolic blood pressure as a measure of stress placed on the heart. As the degree of occlusion increases, the amount of work necessary to increase the work product criticality decreases. Dr. Oury opined that decedent's moving of the tarps was sufficient to trigger the events leading to his death even if his activities on that day were typical of the work King performed daily as a truck driver.

¶24 Dr. Oury acknowledged that plaque ruptures and sudden coronary failure often occur in the absence of physical activity. He also agreed that decedent's medical records referenced several factors associated with the risk of death from coronary disease, including moderately high blood pressure, high cholesterol, and a history of smoking. Dr. Oury agreed these factors would place decedent "in a higher-than-normal risk category." (*Id.* at 27-28).

¶25 Dr. Wilson agreed that the most likely cause of death was an arrhythmia but disagreed with Dr. Oury as to the cause of the arrhythmia. Dr. Wilson attributed the arrhythmia and death to King's preexisting coronary artery disease and said that attributing a plaque rupture and King's death to his activities on June 26, 1995, is speculative and unlikely. Dr. Wilson testified that "ruptured plaques, and even ruptured plaques with associated thrombus, are a part of the natural history of coronary disease and its progression." (Wilson Dep. at 43.) He rejected King's exertion on June 26th, as the precipitating cause:

First, the fact that this was not an extraordinary effort. And secondly, in taking care of these patients over the years, it is much more common for folks to come in with symptoms that indicate that the process became active at a time when they weren't doing physical exertion.

(*Id.* at 77.) He concluded:

I think it's unlikely that the activity that he did that day physically altered anything in his coronary arteries. I think this was an event that was destined to happen and might have happened in his sleep the night before or the night after.

(*Id.* at 63.)

Resolution

¶26 The difference in medical opinions in this case reflects a legitimate difference of medical judgment. While claimant has made a substantial case in support of her contention that King's moving of the tarps triggered arrhythmia and death, after listening to Dr. Oury and Dr. Wilson, considering the deposition testimony of the pathologist, the medical records, and the circumstances of June 26, 1995, I am unpersuaded that claimant's activities on June 26th either triggered his arrhythmia or death. In reaching this conclusion, I particularly take note of the following:

1. Dr. Oury based his initial opinion in this case on erroneous factual assumptions. Records he produced at deposition included a letter dated April 3, 1996, from counsel for claimant. Among other things, Dr. Oury was informed that King pulled into the Powrmatic plant and "helped load heating units onto his truck." The units were described as "about 8 feet tall and bulky." (Oury Dep. Ex. 10.) Another letter from counsel, dated October 15, 1997, advised him that King "was loading and tarping" (Oury Dep. Ex. 9.) On the basis of this information, Dr. Oury opined that heavy labor, heat and humidity precipitated death. He first presented his opinion by letter dated November 4, 1997. That letter includes the following:

I believe the cause of Mr. King's heart attack and subsequent death relates directly to the circumstances surrounding his work unloading his vehicle, a truck, on June 26, 1995. The description of the humidity and heat on that day plus the **heavy labor** involved in unloading

(Oury Dep., Ex. 7.)

2. At deposition, counsel for Credit General questioned Dr. Oury about his understanding of the decedent's activities on June 26, 1995. Dr. Oury acknowledged that his understanding had changed following review of the deposition testimony of Tony Mack, but maintained his opinion that work-related activities were the cause of King's death. Dr. Oury agreed that handling the strapping materials used by King would not constitute an unusual strain likely to cause the death, but cited King's participation in sliding the tarps. (*Id.* at 18, 21). Dr. Oury indicated that this opinion was based in part upon his personal experience with tarps on over-the-road vehicles. (*Id.* at 22). He

acknowledged, however, that this experience, which dated from approximately 1956 to 1960, was with canvas, not nylon tarps. (*Id.* at 23).

3. Dr. Oury acknowledged during his trial testimony that in absolute numbers, more people in the United States suffer plaque ruptures while inactive than while active. While he attributed that statistic to the fact that more people in the United States are sedentary than active, his acknowledgment shows that **plaque ruptures occur with great frequency spontaneously and in absence of any physical exertion.**

4. The activity which Dr. Oury identifies as the precipitating factor was brief and not particularly difficult. Each tarp weighed between sixty and seventy pounds and two men were involved, thus King's load was thirty to thirty-five pounds. Moreover, the task did not involve lifting, only sliding, and the distance moved was four feet or less.

5. Dr. Oury did not know whether King's work on June 26th was any different than his work on other days, and said that it didn't matter to him in forming his opinion. Other evidence indicates that King's level of exertion on June 26th was typical and not unusual. This evidence tends to support Dr. Wilson's opinion that death was due to the underlying coronary artery disease and not to King's activity on June 26th.

6. The triggering activity (moving tarps) identified by Dr. Oury as the precipitating event occurred at least half an hour, and probably closer to an hour, prior to King going to his truck cab for a nap. During his trial testimony, Dr. Oury testified that an arrhythmia typically follows a plaque rupture "within minutes, not hours." Similarly, Dr. Chute opined that the mechanism of death appeared to have been sudden, "meaning it could take seconds to minutes to develop." (Chute Dep. at 42).

CONCLUSIONS OF LAW

¶27 The 1993 version of the Workers' Compensation Act applies in this case. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶28 Claimant bears the burden of persuading the Court, by a preponderance of the evidence, that the decedent suffered a compensable injury. *See Ricks v. Teslow Consolidated*, 162 Mont. 469, 483-84, 512 P.2d 1304, 1312 (1973); *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 201, 598 P.2d 1099, 1105 (1979).

¶29 Section 39-71-119, MCA (1993), provides the definition of work-related injury applicable to this case. The first two subsections set forth the general criteria which must be met, as follows:

39-71-119. Injury and accident defined. (1) "Injury" or "injured" means:

- (a) internal or external physical harm to the body;
- (b) damage to prosthetic devices or appliances, except for damage to eyeglasses, contact lenses, dentures, or hearing aids; or
- (c) death.

(2) An injury is caused by an accident. An accident is:

- (a) an unexpected traumatic incident or **unusual strain**;
- (b) **identifiable by time and place of occurrence**;

- (c) identifiable by member or part of the body affected; and
- (d) **caused by a specific event on a single day or during a single work shift.** [Emphasis added.]

¶30 In situations involving a cardiovascular disease, subsections (4) and (5), section 39-71-119, MCA (1993), are also applicable. Those subsections provide:

- (4) "Injury" or "injured" does not include a disease that is **not caused by an accident.**
- (5) A cardiovascular, pulmonary, respiratory, or other disease, cerebrovascular accident, or myocardial infarction suffered by a worker is an injury only if the accident is the **primary cause** of the physical harm in relation to other factors contributing to the physical harm.⁽²⁾ [Emphasis added.]

¶31 Without regard to the "primary cause" requirement of subsection (5), the claimant must prove that her deceased husband's death on July 26, 1995 was in fact caused by an identifiable traumatic incident or unusual strain on that day. In that regard, her burden is no different than the burden placed upon claimants prior to the addition of subsection (5) in 1987.

¶32 In the present case there is no evidence of a traumatic incident, therefore the Court must determine whether death was due to an "unusual strain." The term "unusual strain" was first interpreted by the Montana Supreme Court in *Jones v. Bair's Café*, 152 Mont. 13, 445 P.2d 923 (1968). The Court held that "unusual strain" encompasses not only unexpected *causes* of injury, but also unexpected *injuries* resulting from ordinary workplace activities. *Id.* at 19, 445 P.2d at 926. In *Jones* the Court allowed recovery when a dishwasher, during an unusually heavy work period, picked up a heavy tray of dishes and suffered a back injury. Similarly, in *Robins v. Ogle*, 157 Mont. 328, 485 P.2d 692 (1971), the Court allowed recovery by a claimant who, "while working as a cook on the graveyard shift, was engaged in lifting a mop pail full of water when she felt a pull and a burning sensation." *Id.* at 329, 485 P.2d at 693. The Court explained: "The strain suffered by claimant here, although not 'unusual' from the standpoint of the general manner in which the mopping was done, was 'unusual' in that on this particular occasion she 'picked [the bucket] up wrong' and 'twisted [her] back' when she moved the bucket and removed the mop." *Id.* at 332, 485 P.2d at 694.

¶33 While not requiring an "unusual cause" for a compensable injury, the "unusual strain" cases nonetheless require some tangible occurrence in the workplace which causes an unusual result, i.e. the injury. There must be a cause and effect relationship between the work activity and the injury.

¶34 In cases involving cardiovascular trauma, numerous Montana decisions have drawn the distinction between "heart attacks" caused by some tangible work-related occurrence and those taking place in the context of work but lacking a work-related cause.

¶35 In *Ness v. Diamond Asphalt Co.*, 143 Mont. 560, 393 P.2d 43 (1964), a 64-year old worker was found dead in the company's restroom. His "death was medically defined, by the examining doctor, as resulting from a myocardial infarction due to coronary

thrombosis." *Id.* at 562, 393 P.2d at 44. The evidence revealed the worker had no history of heart problems, but had a history of high blood pressure, ulcers, and intermittent spells of heavy breathing. An expert cardiologist gave the opinion "there was no relationship between Mr. Ness's employment and the cause of his death." He explained, "the acute episode occurred *while at work*, rather than *as a result of work*." *Id.* at 564, 393 P.2d at 45; italics in original. The Court affirmed the lower court's finding that death was due to natural disease processes in decedent's coronary arteries and was not compensable under the Workers' Compensation Act. *Id.* at 563, 393 P.2d at 45.

¶36 In *Hurlbut v. Vollstedt Kerr Co.*, 167 Mont. 303, 538 P.2d 344 (1975), the 59-year old claimant worked as the superintendent of a lumber mill. On the day in question, he was re-opening the mill after closure for low temperatures. He became dizzy at work, went to the hospital, and was found to have suffered a myocardial infarction. The hearing officer denied the claim on the ground that claimant "did not in fact suffer an accidental injury arising out of and in the course of his employment." *Id.* at 306, 538 P.2d at 345. Claimant argued "that the lumber mill had never before been operated in weather as cold as it was the morning of January 6, 1973," and that "this condition constituted an 'unusual strain' because it was a unique, new, different and unusual demand placed upon claimant by the Company." *Id.* at 306, 538 P.2d at 346. The Court rejected his contention, noting:

The duties performed by claimant on the day before his attack and on the day of his attack . . . were duties he had performed for the previous eight years as plant superintendent. Simply opening a mill on a day colder than was customary, with no inordinate kind or amount of work on his part, cannot be said to constitute 'a tangible happening of a traumatic nature.' Claimant has failed to carry the burden of proof that he was injured, within the meaning of the statute.

Id. at 307, 538 P.2d at 346. As a second ground, the Court noted "there was no proof in the record that the myocardial infarction had any causal connection to claimant's employment." *Id.* Claimant's doctor had testified there are two principal causes of myocardial infarction: "(1) arteriosclerosis, a gradual developing condition that has nothing to do with trauma, strain or anxiety; and (2) when a blood clot which had previously and gradually formed somewhere inside the heart breaks loose and occludes a heart blood vessel." *Id.* The doctor could not say with medical certainty whether the claimant's myocardial infarction resulted from arteriosclerosis or a clotting. The Court thus concluded the claimant failed to establish a causal connection between his condition and work.

¶37 *Dumont v. Aetna Fire Underwriters*, 183 Mont. 190, 598 P.2d 1099 (1979) involved facts similar in several respects to the present matter. In that case the worker died while in bed in his trailer on the job site. An autopsy revealed the following findings:

"I. Marked stenosing arteriosclerosis of coronary arteries with:

"A. Recent thrombosis of posterior right coronary artery.

"B. Old occlusion, anterior descending branch of left coronary artery.

"C. No gross evidence of recent or past myocardial infarction."

Id. at 192, 598 P.2d at 1101. Although the decedent's wife presented evidence of the long hours and stresses under which her husband worked, coworkers testified that his activities on the day of his death were normal. The Supreme Court reviewed the medical evidence presented at trial and found that it "supports the conclusion that the deceased died as the result of a disease process, progressive in nature, that is not 'traceable to injury.'" *Id.* at 203, 598 P.2d at 1107. Although one doctor had opined a relationship between specific work activities of the decedent and his death, the court noted that even this doctor acknowledged "the extend [sic] of the atherosclerotic process in his artery, the presence of atherosclerotic plaques and previously diseased vessels, and [acknowledged] that it would be a logical conclusion that at some time this disease process would have progressed to this event or a similar event at some time." *Id.* at 203, 598 P.2d at 1107. The Court held that claimant failed to prove a compensable injury causing the death of the worker.

¶38 *Stamatis v. Bechtel Power Corp.*, 184 Mont. 64, 601 P.2d 403 (1979), is also similar. The deceased worker was an electrician who collapsed on the job. He was taken by ambulance to the hospital, but pronounced dead on arrival. The coroner's report found the cause of death to be acute coronary thrombosis. As summarized by the Supreme Court, the "decedent was a large man standing 6' 2" and weighing 250 pounds. He was 54 years old at the time of his death and had no past medical history of heart disease. He smoked two packs of cigarettes a day and had been smoking since age 13." *Id.* at 67, 601 P.2d at 405. The Workers' Compensation Court was presented with conflicting versions of the decedent's activities at work prior to his death and with conflicting medical opinions. Although one employee testified the decedent spent the morning working with heavy conduit circuits, others testified he had been installing light fixtures weighing only twenty pounds. Based upon the assumption that decedent had been performing the light fixture work, a cardiologist testified such exertion was not a causal factor in the death. He explained that unusual strain increases the probability of sudden death from coronary disease, but normal exertion would not produce a heart attack. Another doctor, a specialist in internal medicine, rendered a contrary opinion on the same assumed facts, testifying that decedent's physical activity precipitated the heart attack. This doctor also opined that working in cold weather could have been a causative factor. The WCC credited testimony that decedent had been changing light fixtures, as well as the medical opinion that such activity was not a causal factor in the death.

¶39 The Supreme Court affirmed. The Court found that although an "unusual strain" may be shown from unusual result, "some action or incident, or chain of actions, or incidents, must be shown which may be perceived as a contributing cause of the resulting injury." *Id.* at 70, 601 P.2d at 406. This language was quoted and applied in other "heart attack" cases, including *Moen v. Decker Coal Co.*, 185 Mont. 79, 604 P.2d 765 (1980). There, the Supreme Court reversed the lower court's award of benefits because the record did not show any tangible occurrence at work leading to the deceased worker's myocardial infarction. See also, *Ferdinand v. Intermountain Insurance Co.*, 221 Mont. 436, 439, 719 P.2d 775, 777 (1986) (heart attack not compensable under section 39-71-119, MCA because claimant cannot "show that a tangible, real happening, which is related to his employment, caused his heart attack"

and medical testimony established only "*possible* causal relationships between claimant's work and his heart attack.")

¶40 In contrast, in cases finding "heart attacks" compensable under the Workers' Compensation Act, the facts have clearly established causation by workplace activity. In *Rathbun v. Taber Tank Lines*, 129 Mont. 121, 283 P.2d 966 (1955), the Supreme Court found that a truck driver's extraordinary work caused his heart attack and death. The decedent had driven all night over partially icy roads, then driven all the following day. Just previously, he had made a similar trip, covering approximately 600 miles in 20 hours of driving time. The Court noted:

There is evidence that in the 11 months preceding his death, Rathbun had worked long hours without regular sleeping periods. Many trips would require 16 hours or more of driving time. During those 11 months he gained in weight from 180 or 185 to 220 or 225 pounds. Also during that time he developed coughing spells to the extent that during rest periods his coughing would awaken him. Dr. Keenan examined him on March 20, 1952, pursuant to regulations of the interstate commerce commission and found his heart normal at that time. The evidence shows heavy turnover of drivers because of the strain 'and a good many of them just can't take it.' The standing orders to the drivers were to 'get on the road and get back as soon as possible.'

Id. at 125, 283 P.2d at 968.

¶41 The medical evidence in *Rathbun* included the testimony of a doctor who examined the decedent shortly after his death. The doctor opined "that the cause of death was myocardial infarction and that long hours of physical exertion 'would generally predispose to such a condition.'" *Id.* at 126, 283 P.2d at 968. While there was medical evidence the decedent was likely predisposed to heart attack, the Court noted as follows:

The evidence as to the cause of death stands undisputed unless the different names applied to the immediate cause of death given by the doctors for plaintiff may be said to raise a conflict. But both doctors reached the conclusion that driving with lack of sleep produces a nervous tension, and, as Dr. Powers put it, adds up to 'hasten a man's death with a bad heart.'

Id. at 126, 283 P.2d at 969. The Court also noted "there was nothing to dispute the essential facts of long working hours producing stress and strain on the drivers." *Id.*

¶42 In *Davis v. Mountain West Farm Bureau Mutual Insurance Co.*, 216 Mont. 300, 701 P.2d 351 (1985), the decedent was a ranch hand. The Court summarized his work on the day of his death as follows:

One of his duties was to chop through the ice covering cattle watering holes so that the cattle could drink. To do this, he used a dull ax to break the ice and a shovel or pitchfork to remove the broken ice from the hole. He would have to chop a hole through the ice two feet wide and ten feet long. This activity usually led to Davis getting wet from the knees down, and otherwise was very strenuous

work. On the date in question, the air temperature was somewhere between -10 and +20 degrees Fahrenheit, with a wind chill down to -31 degrees.

Id. at 301, 701 P.2d at 352. Based upon statements the decedent made prior to his death, the Court found that "his heart attack began while he was chopping ice to make a second watering hole on the morning of February 16, 1980 and continued throughout the day and ended with his death that evening." *Id.* at 303, 701 P.2d at 353. Although the opinion in *Davis* does not summarize the medical evidence in detail, the Supreme Court noted that the lower court heard medical testimony from both sides and found that the claimant had established by a preponderance of the credible medical evidence that decedent's heart attack was work related. *Id.* at 305, 701 P.2d at 354.

¶43 In *Tocco v. State Compensation Insurance Fund*, 220 Mont. 221, 714 P.2d 160 (1986), there was evidence that the decedent "had hypertension (high blood pressure) and coronary arteriosclerosis (narrowing of the arteries leading to the heart) which pre-existed his employment" *Id.* at 222-23, 714 P.2d at 161. In contrast to the present case, however, the record showed extraordinary exertions and pressures on the decedent led to his death. Tocco was a temporary employee on a city sanitation route. Two days before his death, he was notified that he would be laid off in two weeks. He was led to believe he could obtain a full-time position if he impressed his employers with his job performance. On the date of his death, he thought he had been assigned work as lead man as a test of his abilities. By noon on that date, Tocco was fifty-six stops ahead of schedule. After lunch, he was assisting another worker in lifting a box approximately two and one-half feet wide and six to seven feet long. The decision tells the rest of the story:

Tocco grabbed the box and dragged it four or five feet from the garbage can rack to the truck. At this point both Tocco and Ken Lind grabbed the box to lift it. The box bent in the middle as they lifted it, and Tocco had all the weight of the box as they put it in the truck. Approximately two to three minutes after Tocco lifted the box, Ken Lind found him lying on the ground beside the truck. Tocco was given CPR but could not be revived, and was dead on arrival at the hospital.

Id. at 223-24, 714 P.2d at 162.

¶44 Medical evidence in *Tocco* indicated that the decedent had severe stenosing arteriosclerosis of coronary arteries, along with an "organizing thrombosis [blood clot] and partial occlusion of anterior descending branch." *Id.* at 224, 714 P.2d at 162. Three doctors testified, however, that if Tocco had not died at work, he may have lived weeks, months, possibly years longer. The medical evidence also indicated that job-related emotional and physical stress may have played a very direct role in the sudden death. Under these facts, the Supreme Court found the evidence sufficient to find that the deceased died as a result of a work-related aggravation to an existing condition.

¶45 This Court's finding of compensability in *Cheetham v. Liberty Northwest Insurance Co.*, WCC No. 9612-7675 (1997) was similarly premised upon evidence linking the claimant's strenuous work activity with his cardiovascular trauma. Cheetham was working as a heavy equipment operator, engaged in constructing oil containment ditches. One of the pumps used in the project would not start. As this Court noted,

"Claimant attempted to start the pump by placing one of his feet on the pump and pulling the starter cord upward, much as one would do when starting a lawnmower. He pulled the cord between 50 and 70 times over the next 20 to 30 minutes, finally starting the pump." At the time, the temperature was in the neighborhood of 100 degrees Fahrenheit. *Id.*, at 2. The *Cheetham* opinion summarized relevant medical testimony as follows:

Both Dr. Weeks and Dr. Kalbfleisch testified that, in their medical opinions, the August 7th aortic dissection was precipitated by claimant's strenuous attempts to start the pump engine, which significantly raised claimant's blood pressure. . . . Both Dr. Weeks and Dr. Kalbfleisch further opined that claimant's work that day contributed 51% or more to the dissection when compared to claimant's preexisting aortic disease.

Id. at 4.

¶46 In the present case, the Court is not persuaded that any work-related activity triggered a cardiac arrhythmia or caused decedent's death. King was not engaged in any unusual or strenuous work-related activity on June 26th which is even remotely comparable to activity which has been found in prior cases as triggering cardiovascular events. That lack of comparability is not fatal to claimant's case; each case must be decided on its own facts and in light of the specific medical testimony. However, the medical testimony in this case failed to persuade me that King's moving of tarps triggered his arrhythmia or death. It is equally, or even more likely that his death would have occurred whether or not he had moved the tarps.

¶47 In light of this conclusion, it is unnecessary to consider whether the evidence supports a conclusion that King's work was "the **primary cause** of the physical harm in relation to other factors contributing to the physical harm." § 39-71-119(5), MCA (1993); emphasis added.

ORDER

¶48 1. The Court has jurisdiction over this matter.

¶49 2. The claimant has failed to carry her burden of proof. She and other beneficiaries of Russell King are not entitled to workers' compensation benefits on account of Russell King's death.

¶50 3. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

¶51 4. The Court does not decide the constitutional issue raised by claimant. Having reserved on that issue, the Court will give notice of the issue to the Montana Attorney General. Following his response to the notice, the Court will set a briefing schedule.

¶52 5. This decision is **not** certified as final. Final certification will be made only after the constitutional challenge is addressed.

DATED in Helena, Montana, this 10th day of November, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Ms. Sydney E. McKenna
Mr. Robert E. Sheridan
Mr. Joseph P. Mazurek - Courtesy Copy
Date Submitted: August 30, 1999

1. He agreed during his deposition that claimant's handling of the straps was insufficient to have precipitated the death sequence.
2. Section 39-71-119 (5), MCA, was amended in 1995 to substitute the word "condition" for "harm" and to provide a definition of "primary cause," now set forth in a subsection (b). See Montana Session Laws 1995, ch. 243, sec. 6, and this Court's decision in *Cheetham v. Liberty Northwest Ins. Corp.*, WCC No. 9612-7675 (1997). Because the injury in this case occurred June 26, 1995, prior to the effective date of these amendments, the new provisions are not relevant in this particular proceeding.