Buchner, Harley, Dec'd

HEART ATTACK

Unusual exertion

The duties of a job at a cement plant were not routine for a worker who, immediately prior to the injury, had been retired for six to seven years in a sedentary lifestyle. The physical exertion of the job was "unusual" even though the worker had been employed in the same job prior to retirement. **….*In re Harley Buchner, Dec'd*, BIIA Dec., 59,239 (1982)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 82-2-00922-5.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HARLEY BUCHNER, DEC'D	**)**	**DOCKET NO. 59,239**
	)	
CLAIM NO. H-805687	**)**	**DECISION AND ORDER**

APPEARANCES:

Petitioner, Lillian A. Buchner, surviving spouse
of Harley Buchner, Dec'd, by
Roehl and Roehl, per
Carl F. Roehl, Jr.

Employer, Columbia Cement Corp., by
Richard B. Johnson

Department of Labor and Industries, by
The Attorney General, per
William Taylor and J. Dianne Garcia, Assistants

This is an appeal filed by the employer on April 13, 1981, from an order of the Department of Labor and Industries dated March 31, 1981, which adhered to the provisions of a prior order dated February 27, 1981, allowing a widow's pension to Lillian A. Buchner, surviving spouse of Harley Buchner, deceased. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the petitioner to a Proposed Decision and Order issued on May 18, 1982, in which the order of the Department dated March 31, 1981 was reversed, and remanded to the Department with direction to issue an order rejecting the claim for the reason that Mr. Buchner's death was not the result of an industrial accident or injury.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The course of the working career of Mr. Harley Buchner was spent as a laborer for Columbia Cement Corporation. During that time there is no question that he was accustomed to performing, was required to perform, and did perform strenuous manual labor integral to the various cement manufacturing operations of his employer. His life style, however, markedly changed beginning 1974 when he embarked on his retirement.

Upon retiring, Mr. Buchner did little in the way of exertional activity. The facts before us well support that ever since his retirement Mr. Buchner had been relatively sedentary. Certainly, seven

years after his retirement he was not accustomed to the physical demands that a cement manufacturing laborer was called upon to perform.

In January 1981, Mr. Buchner was requested to help out at his former job, the cement plant being shorthanded. On Monday, January 5, 1981, he reported to work and spent a portion of the day loading cement sacks from a conveyor belt to pallets, the heaviest chore in the plant. The remainder of the day he drove a forklift and assisted in cleaning up. The following morning involved much the same routine. At the lunch break on the second day, he sat down for a brief rest. At the completion of the break, a co-worker attempted to rouse him to return to work but found him unconscious. Failing to respond to treatment in a hospital emergency room, Mr. Buchner died.

An autopsy disclosed the existence of marked coronary artery disease and evidence that an acute myocardial infarction had very recently occurred. The preponderance of the medical evidence in the record before us supports that the infarction occurred as a result of the exertional activity required during the time Mr. Buchner was asked to return to his former job.

The compensability of cardiovascular injuries under this state's Industrial Insurance Act has received much attention in reported decisions. This state holds to the view of a minority of jurisdictions that unusual or extraordinary exertion must be apparent as a proximate cause of a worker's cardiovascular insult before such can be accepted as an industrial injury under the purview of our statute. Windust v. Department of Labor and Industries, 52 Wn. 2d 33 (1958). The Windust decision changed the course of "heart injury" claims in this state by reversing a number of decisions traceable to and preceding the previous leading case of McCormick Lumber Company v. Department of Labor and Industries, 7 Wn. 2d 40 (1941). Under the reasoning expressed in McCormick, the court had held that requiring unusual effort or strain would be in conflict with the language of prior holdings. Thereby, the court had adhered to the rule that an accident arose when the required exertion producing the accident was too great for the man undertaking the work whatever the degree of exertion or the condition of the worker's health.

With a specific overruling of the reasoning advanced in McCormick, this state's appellate courts embarked on a distinct line of decisions adhering to the unusual exertion rule with little additional elaboration of law until Chittenden v. Department of Labor and Industries, 71 Wn. 2d 899 (1967). However, the most recent decision of the court of appeals in Louderback v. Department of Labor and Industries, 19 Wn. App. 138 (1978) took issue with dictum expressed in Chittenden. The analysis of the court of appeals indicated that the supreme court had incorrectly summarized

the true holding of the post-Windust decision of Lawson v. Department of Labor and Industries, 63 Wn. 2d 79 (1963). The court of appeals in Louderback viewed the force of Windust and its case law progeny as holding that as a matter of law the performance of routine tasks normally required of an occupation by one engaged regularly in that occupation cannot be considered an "event" precipitating a heart attack even though the worker may have performed the specific routine task infrequently.

The majority of this Board understand the Louderback decision to identify four elements which if met will preclude as a matter of law the finding of an injury in "heart" cases. Those four elements include the performance of (1) routine tasks (2) normally required by one (3) engaged regularly in (4) that occupation. Conversely, should any one of those four elements not be present, it would be inappropriate to conclude that as a matter of law the claim was to be rejected.

The term "routine" was further defined and noted in Louderback to be "the habitual method of performance of established procedures," or "adherence to a pattern of behavior characterized by mechanical repetition." The failure of one of the four elements above described was termed to be the "something more" which would permit the trier of fact to view the event, i.e., required exertion, as legally sufficient (assuming evidence of medical causal relationship) to support the conclusion of compensability. The decision was quite specific in describing that the "something more" could be:

> "(1) The worker had not previously been regularly engaged in that specific occupation,...
>
> (2) The worker, although previously regularly engaged in that specific occupation,, had not previously performed that particular routine task,...
>
> (3) The worker, although previously regularly engaged in that specific occupation, performed that particular routine task under conditions which entailed substantially more physical exertion than usual..."

Applying the four elements gleaned from the Louderback decision, there are several respects in which the facts surrounding Mr. Buchner's death should not preclude his widow from making a valid claim for compensation. As noted above, Mr. Buchner had been retired for a period of seven years to a sedentary life-style. He began work on January 5, 1981, attempting to perform heavy manual labor of the same type he had performed prior to his retirement. However, we believe the intervening six to seven years of physical inactivity certainly made the duties of a cement manufacturing laborer to be non-routine for him. Second, he had not been regularly engaged in any specific occupation but rather was disposed only to perform sedentary avocations

and hobbies. Even though he had much experience and knowledge of what the job duties required at the cement plant, he had not recently been regularly engaged in heavy manual labor of the type required in the cement manufacturing operation. These circumstances provide that "something more" which the law of this state demands in determining whether the physical activity performed by Mr. Buchner served as the requisite event leading to his heart attack. We are persuaded that the exertion he performed during the very brief period he was recalled to work at Columbia Cement was such an "event" and that this unaccustomed and non-routine exertion contributed in a material degree to his heart attack and consequent death. The Department's order allowing the claim for widow's pension is correct and will be affirmed.

FINDINGS OF FACT

After a careful review of the entire record of this appeal, the following findings are made:

1. On January 6, 1981, while employed by Columbia Cement Corporation in Bellingham, Whatcom County, Washington, Harley Buchner died from complications of a heart attack. A petition for widow's benefits under the Industrial Insurance Act was timely filed by Lillian A. Buchner, the surviving spouse of the deceased. On February 27, 1981, the Department issued its order allowing the petition. On March 25, 1981, a protest was timely filed by the employer with the Department. On March 31, 1981, the Department issued its order adhering to the provisions of its previous order dated February 27, 1981, which had granted the widow's petition. On April 13, 1981, the employer filed a timely notice of appeal with the Board of Industrial Insurance Appeals, which the Board granted by its order issued May 12, 1981.

2. Harley Buchner retired from his work at Columbia Cement Corporation in 1974. From the date of his retirement to January 5, 1981, he led a sedentary life involving little vigorous physical activity. He performed no work for any other employer until he returned to work for Columbia Cement Corporation on January 5, 1981, at his former job on a temporary basis.

3. On January 5, 1981, Harley Buchner worked an 8 hour day, a portion of which involved the rapid loading of sacks of cement. Other portions of that day were spent in operating a fork lift truck, loading bulk cement trucks, and cleaning up spilled cement. During the morning of January 6, 1981, he performed duties similar to those performed the previous day.

4. On January 6, 1981, at approximately noon, Harley Buchner suffered the fatal onset of ventricular fibrillation, or arrhythmia, which was the result of a myocardial infarction, which had occurred between 12 and 24 hours prior to his death.

5. At the time he returned to work for the employer on January 5, 1981, Harley Buchner suffered from coronary artery disease which had the effect of decreasing the internal diameter of coronary arteries and produced a resultant restriction to the flow of blood supplying oxygen to heart muscle.

6. Because of the intervening 6 or 7 years of sedentary activity, on January 5 and 6, 1981 Harley Buchner was not performing tasks at the time of his heart attack which were routine for him as he had not been regularly engaged in any occupation and certainly not that of cement manufacturing for a substantial period prior to January, 1981. The exertion required by the nature of the work on January 5, 1981 increased the demand for oxygen by his heart muscle, which could not be adequately supplied because of his underlying condition. The result was his myocardial infarction, which in turn produced the arrhythmia causing his death 12 to 24 hours after the infarction.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the following conclusions are reached.

1. This Board had jurisdiction over the parties and the subject matter of this appeal.

2. On or about January 5, 1981, Harley Buchner sustained an industrial injury as defined by RCW 51.08.100, which resulted in his death.

3. The order of the Department of Labor and Industries issued March 31, 1981, adhering to the provisions of its previous order dated February 27, 1981, allowing the petition for widow's benefits filed by Lillian A. Buchner, surviving spouse of Harley Buchner, deceased, is correct and should be affirmed.

It is so ORDERED.

Dated this 9th day of September, 1982

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENTING OPINION

I dissent from the Board majority's opinion for two reasons: (1) The majority's interpretation of the governing legal principle does violence to the settled law on heart cases in this state; and (2) the majority's opinion finds the existence of proximate causation, which I believe was not shown by a preponderance of the medical evidence.

The Proposed Decision and Order of our industrial appeals judge correctly reviews and analyzes the major appellate interpretations relative to heart attacks as industrial injuries in this state. It is well-reasoned, and I think reaches the only tenable conclusion. The Board majority's application of Louderback v. Department of Labor and Industries, 19 Wn. App. 138 (1978), to the facts in this case appears to be an attempt to resurrect McCormick Lumber Co. v. Department of Labor and Industries, 7 Wn. 2d 40 (1941), which was emphatically over- ruled by Windust v. Department of Labor and Industries, 52 Wn. 2d 33 (1958). The discredited rule set forth in McCormick (as quoted in the Proposed Decision and Order) reads as follows:

> "An accident arises out of employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of the workman's health." (Emphasis supplied)

I have no particular quarrel with the holding of Louderback, supra, at page 142, (and reiterated at lines 8-16, page 4, of the Board majority's decision) which attempts to harmonize the current case law on heart attack cases. However, I certainly disagree with the majority's "stretching" of the effect of Louderback to encompass the instant case, by saying that (1) Mr. Buchner was not previously engaged in this occupation because he had not "recently" been so engaged, and (2) by saying that the duties of the job were "non-routine for him" because of the intervening period of retirement.

In my view, the Louderback case holding does not provide legal coverage for a factual situation like that presented here. Neither sub-parts (1) or (2) thereof have a requirement about how "recently" the worker had regularly engaged in the occupation or its routine tasks, only that he had "previously" done so. Without a doubt, this worker had previously done so for many years.

The Proposed Decision and Order correctly notes that, while Mr. Buchner's activity on January 5, 1981 was not a usual and routine day for him in view of the intervening retirement period, the work being done entailed only the usual and routine duties of the job, with no more exertion than routinely required for that job. I believe this is the test, according full consideration to the Louderback holding, particularly sub-part (3) thereof, as well as Woods v. Department of Labor and Industries, 62 Wn. 2d 389 (1963), and Lawson v. Department of Labor and Industries, 63 Wn. 2d 79 (1963), at pages 82 and 83. Thus, as a matter of law, there was no industrial "injury" under our Act.

The Board majority, in reaching its opposite conclusion on this legal issue, necessarily had to also find as a fact that there was proximate causation between Mr. Buchner's job activity on

January 5, 1981 and his myocardial infarction. This the majority did, by briefly asserting that the preponderance of medical evidence supports such causation. I disagree.

Although the employer, as the appealing party here, had the obligation of presenting its case-in-chief first (RCW 51.52.050), the petitioner and the Department had the ultimate burden of proof, i.e., burden of persuasion. Olympia Brewing Co. v. Department of Labor and Industries, 34 Wn. 2d 498,505 (1949). In that case, the court reiterated the rule:

> "We have again and again declared that, while the act should be liberally construed in favor of those who come within its terms, persons who claim rights thereunder should be held to strict proof of their right to receive the benefits provided by the act (citations omitted)."

The autopsy was performed by Dr. Robert P. Gibb, a pathologist. His report was stipulated into evidence as Exhibit No. 1. The medical specialty of Dr. W. B. Hamlin, who testified on behalf of the petitioner, is also pathology. The employer presented Dr. Roland Trenouth, a cardiologist, who specializes in diseases of the heart and their treatment: It does not appear that Dr. Hamlin has ever treated any patient for a heart problem.

In his report, Dr. Gibbs stated the cause of death to be as follows: "Acute myocardial infarction due to thrombosis of coronary artery and (2) atherosclerosis of coronary arteries, marked."

Drs. Hamlin and Trenouth both agreed with the autopsy report in that the onset of Mr.Buchner's myocardial infarction was 12 to 24 hours prior to his death, which would be from approximately 12:00 noon on Monday, January 5, 1981 to approximately 12:00 p.m. that evening.

This means that the deceased spent approximately one-third of that 12-hour period working. Time wise, the odds are two to one that the myocardial infarction occurred while he was not working.

Dr. Hamlin agreed with Dr. Trenouth that only 12% of myocardial infarcts occurred during heavy to moderate exertion, and that 60% occur at rest at night. However, Dr. Hamlin added the opinion that it is open to some question as to the exact instant that the anoxic (lack of oxygen to the heart) episode occurs and the heart muscle dies.

Both Dr. Trenouth and Dr. Gibb agree that the myocardial infarction was precipitated by a thrombosis (blockage) of the coronary artery. Dr. Hamlin waffles on this point before reaching the opposite opinion that anoxia, brought about by the exertion of Mr. Buchner's work on January 5, 1981, caused a portion of his heart muscle to die.

Mrs. Buchner testified that she had lived with her husband for 39 years and that she had been unaware of any pre-existing heart problem. However, she also admitted that he had complained of some chest pain on Sunday, January 4.

Drs. Trenouth and Hamlin acknowledged that it was impossible concretely determine the immediate causation of Mr. Buchner's death. Further, it should be noted that the Department of Labor and Industries had corresponded with Dr. Hamlin, requesting that he answer certain questions. One of these questions was as follows: "In your medical opinion did the work activity of January 5 and 6, 1981 on a more probable than not basis, cause his (Mr. Buchner's) death?" In his reply, dated February 20, 1981, Dr. Hamlin answered that question as follows: "I am not certain that I can answer this question. I certainly could not prove that the work activity resulted in the infarct." Later on in his reply, the following quotations appear: "I rather suspect in my own mind that this patient would have had his myocardial infarction regardless of his work activity." "His basic coronary artery disease was of such severity that sooner or later he most likely would have had a myocardial infarct anyway, and it is possible that this catastrophe was independent and coincidental to his work. The latter proposition would be most difficult to prove one way or the other (Emphasis added).

This is evidence of causation on a possible, rather than probable, basis. Probable causation is what the law requires.

The Proposed Decision and Order should be adopted; and the Department's allowance of this claim should be reversed.

Dated this 9th day of September, 1982.

/s/
PHILLIP T. BORK Member