

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Case No. LoD2014-04

Employee: Dale W. Newman, dec.
Claimant: Estate of Dale Newman by Tracey Eatherton
Employer: City of Leadwood
Decedent's Title: Police Chief

The above-entitled Line of Duty Compensation Act case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by §§ 287.243.8 and 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Line of Duty Compensation Act.¹

Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 18, 2018, and awards no compensation in the above-captioned case.

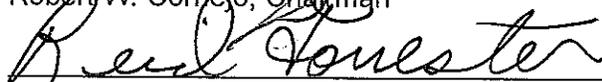
The award and decision of Administrative Law Judge Karla Ogradnik Boresi, issued October 18, 2018, is attached and incorporated by this reference.

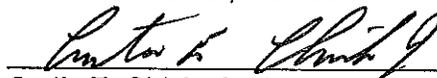
Given at Jefferson City, State of Missouri, this 11th day of June 2019.



LABOR AND INDUSTRIAL RELATIONS COMMISSION


Robert W. Cornejo, Chairman


Reid K. Forrester, Member


Curtis E. Chick, Jr., Member

Attest:


Secretary

¹ We note that the administrative law judge's award incorrectly references August 28, 2014, as the effective date of the statutory provision containing the definition of "Killed in the line of duty" she deemed to be applicable in this case. In fact, § 287.243(5), cited in the "Rulings of Law" on page 3 of the award, provides the definition of "Killed in the line of duty" in effect on August 27, 2014, the date of employee's death. As the administrative law judge later correctly notes, the legislature significantly modified this definition by amendments to the Line of Duty Compensation Act that became effective on August 28, 2014, the day after employee's death. This typographical error did not affect the rights of the parties nor does it affect our ability to properly review this case.

AWARD DENYING COMPENSATION

Decedent/Employee: Dale W. Newman

Case No.: LoD2014-04

Claimant: Estate of Dale Newman by Tracey Eatherton,

Employer: City of Leadwood

Decedent's Title: Police Chief

Hearing Date: July 16, 2018

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

FINDINGS OF FACT AND RULINGS OF LAW

1. Was the Claim for Compensation for Line of Duty Compensation Benefits filed within one year from the date of death of law enforcement officer, emergency medical technician, air ambulance pilot, air ambulance registered professional nurse, or firefighter? Yes.
2. Was the Claim for Compensation filed by the estate of the deceased? Yes.
3. Date of death of law enforcement officer, emergency medical technician, air ambulance pilot, air ambulance registered professional nurse or firefighter? August 27, 2014.
4. Title or designation of the position that the law enforcement officer, emergency medical technician, air ambulance pilot, air ambulance registered professional nurse or firefighter held at the time of his or her death? Police Chief.
5. Decedent/Employee's Employment Information: Dale Newman was the full time Police Chief for the City of Leadwood, Missouri. He also had a part time job with United Parcel Service.
6. Did the decedent/employee's death occur as a result of an injury received in the active performance of his or her duties within the ordinary scope of his or her profession while on duty and but for the individual's performance, death would have not occurred. No.
7. Did the injury that caused the death result from the employee's willful misconduct or voluntary intoxication? No.

FINDINGS OF FACT and RULINGS OF LAW:

Decedent/Employee: Dale W. Newman

Case No.: LoD2014-04

Claimant: Estate of Dale Newman by Tracey Eatherton,

Before the
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Compensation

Employer: City of Leadwood

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Decedent's Title: Police Chief

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Checked by: KOB

PRELIMINARIES

The Estate of Dale Newman by Tracey Eatherton ("Claimant") seeks compensation under § 287.243 of the Missouri Revised Statutes, commonly known and cited as the "Line of Duty Compensation Act." Following the death of Dale Newman ("Decedent") on August 27, 2014, Claimant filed a timely claim for Line of Duty Compensation Act benefits. On August 15, 2017, the Acting Director of the Division of Workers' Compensation, Nasreen Esmail, denied the claim, pursuant to a written decision, which is incorporated herein by reference. Claimant filed a timely Application for Review and, on July 16, 2018, the undersigned Administrative Law Judge conducted a hearing considering the same evidence presented to the Acting Director. Attorney Michael Moroni represented Claimant. Assistant Attorney General Cara L. Harris represented the Division of Workers' Compensation as Administrator of the Line of Duty Compensation Fund.

ISSUES

1. Which version of §287.243 RSMo controls; and
2. Did Decedent's death occur in such a way as to qualify for benefits under §287.243?

FINDINGS OF FACT

The first four facts were established by stipulation of the parties. The remaining facts are based on the competent and substantial evidence of record, including medical records, reports, and other documents submitted in these proceedings.

1. Decedent died on August 27th, 2014.
2. In the role of Chief of Police in the City of Leadwood, Missouri, Decedent was a law enforcement officer as defined under the Line of Duty Compensation Act.
3. The Claim for benefits under the Line of Duty Compensation Act was appropriately and timely filed.
4. Claimant, the Estate of Dale Newman, is represented by Tracey Eatherton. Ms. Eatherton is the mother and natural guardian of the children of Decedent, and the affiant in the Small Estate opened in St. Genevieve County, Missouri as Estate 15SG-PR00072.
5. Decedent held two jobs. He worked for the City of Leadwood, Missouri as its Chief of Police. He also worked for United Parcel Service ("UPS").

6. As Chief of Police, Decedent "was always subject to call." Although it may be reasonable to presume all first responders have stressful jobs, Claimant did not provide any procedure manual, activity log, or other evidence to demonstrate the actual calls, duties, or circumstances to which Chief Newman was subject in the time leading up to his heart attack.
7. As a UPS warehouse worker, Decedent loaded package delivery trucks. On August 27, 2014, Decedent was on the premises of UPS in Crystal City, Missouri, performing his regular duties for UPS by loading a truck, when he sustained a fatal heart attack. Decedent was not intoxicated or engaged in misconduct at the time.
8. The cause of death was arteriosclerotic and hypertensive cardiovascular disease and the manner of death was natural. At the time of his death, Decedent had a severe degree of atherosclerotic heart disease that resulted in the narrowing of the major coronary arteries, whose function is to carry blood and oxygen to the heart.¹
9. The underlying atherosclerosis is generally a stable condition, without there being a pathological, physical or emotional stress to the heart. The significant physical exertion with the upper extremities that Mr. Newman was performing on August 27, 2014, caused ischemia, which was intensified by hot weather. Mr. Newman "developed ventricular fibrillation due to ischemia caused by his significant isometric exertion in hot weather and contributed to by his being under constant emotional stress as police chief."²
10. Dr. Schuman concluded that "based upon a reasonable degree of medical certainty, Mr. Newman's work for UPS on 08/27/14 was the prevailing cause of his cardiac death and his work as police chief directly contributed to his death."

RULINGS OF LAW

I. Decedent's death does not qualify for benefits under the Line of Duty Compensation Act.

Claimant asserts Decedent was killed in the line of duty and seeks to recover the \$25,000 benefit provided by the Line of Duty Compensation Act codified in §287.243 RSMo.³ With regard to workers' compensation cases, the statute in effect at the time of injury is generally the applicable version. *See Anderson v. Veracity Research Co.*, 299 S.W.3d 720, 725 (Mo. App. 2009), *as cited in Kayden v. Ford Motor Co.*, 532 S.W.3d 227, 230 (Mo. Ct. App. 2017), *reh'g and/or transfer denied* (Oct. 31, 2017). On August 28, 2014, §287.243(5) read in relevant part as follows:

"Killed in the line of duty", when a person defined in this section⁴ loses one's life as a result of an injury received in the active performance of his or her duties within the ordinary scope of his or her respective profession while the individual is on duty and but for the individual's performance, death would have not occurred.

¹ Dr. Mary Case, Chief Medical Examiner

² Dr. Stephen Schuman, Claimant's expert

³ Claimant has met the other elements of the claim by establishing Dale Newman was a law enforcement officer who was not intoxicated or engaged in misconduct at the time of his death, and by filing a timely claim.

⁴ Although there are multiple professions that qualify for Line of Duty Compensation, this Award will only reference law enforcement officers.

The circumstances of Decedent's sudden death do not fall within the parameters of the statutory definition of killed in the line of duty.

As it does throughout Chapter 287, the word "injury" has a specific meaning. Section 287.020.3(1) provides:

In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Where the alleged injury is a heart attack, §287.020.3(4) further provides a "cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition." Section 287.020.3(4) makes it clear that—when a cardiovascular event kills or injures an employee at work—the claimant must show: (1) there was an "accident," e.g., some specific trauma or strain of the sort required by section 287.020.2; (2) there was an "injury," e.g., a cardiovascular event resulting in death or damage to heart muscles, the brain, or other tissues; and (3) the former was the prevailing factor in causing the latter. *White v. ConAgra Packaged Foods, LLC*, 535 S.W.3d 336, 339 (Mo. 2017). Thus, in order to recover line of duty compensation, the alleged accident must be the prevailing factor in causing the fatal injury.

There is insufficient evidence to establish the stress of the job as police chief (accident) was the prevailing factor in Decedent's heart attack (injury and medical condition). Here, there are at least two factors to consider in the accident analysis: Decedent's contemporaneous work for UPS on the loading dock on a hot day, and the stress of being a police chief. Where more than one factor contributes to a workplace death or injury, the phrase "prevailing factor" would require a comparison of contributing factors to determine which was the "prevailing" or "primary" factor that caused the injury or death. *Leake v. City of Fulton*, 316 S.W.3d 528, 532 (Mo. Ct. App. 2010). Claimant's own expert, Dr. Schuman, provided the most favorable opinion when he concluded with a reasonable degree of medical certainty, "Mr. Newman's work for UPS on 08/27/14 was the prevailing cause of his cardiac death and his work as police chief⁵ directly contributed to his death." Unequivocally, Dr. Schuman establishes the work for UPS was the primary factor, in relation to any other factor (police related stress), causing both the resulting medical condition and disability. Claimant best evidence does not result in compensation. Decedent did not lose his life as a result of an "injury" under the Line of Duty Compensation Act and Chapter 287 RSMo.

Even if Claimant could overcome the injury/primary factor analysis, Decedent's purported injury was not "received in the active performance of his ... duties within the ordinary scope of his ... respective profession while ... on duty." §287.243(5) RSMo (2013). Decedent was on the dock in Crystal City loading packages into a UPS truck on a summer day when the fatal event occurred. The duties he was actively performing were completely unrelated to his duties as police chief, the city of Leadwood, or the law enforcement profession. While it is generally understood a police officer is never off duty for purposes of workers' compensation,

⁵ There is no credible evidence to establish what the work as police chief was and how it contributed to his death.

see *Spieler v. Vill. of Bel-Nor*, 62 S.W.3d 457, 459 (Mo. Ct. App. 2001), the cases which so hold still require some nexus between the accident and the profession of law enforcement. For example, while Officer Spieler was technically off duty when he stopped to assist a stranded motorist, the injuries he sustained when a car subsequently struck him were compensable because he was performing the duties of a police officer. *Id.* The purported accidental injury here did not occur when Decedent was actively performing any ordinary duty of the law enforcement profession.

A final element of proof to meet the definition of "killed in the line of duty" under the Line of Duty Compensation Act is that "but for" the individual's performance of the duties within the ordinary scope of the law enforcement profession, death would have not occurred. Here, there is no evidence that "but for" the alleged stress and depression associated with his work as Chief of Police for Leadwood, Decedent would have died on August 27, 2014. Dr. Schuman opined the prevailing factor of decedent's death was his work for UPS on August 27, 2014, and the work as the Chief of Police only "contributed to his death." Dr. Case noted the risk factors of high blood lipids, smoking, obesity, diabetes, hypertension and a sedentary life style. Neither Dr. Schuman nor Dr. Case establish that "but for" the stressors related to his employment as the Chief of Police for Leadwood, Missouri, Decedent would not have died.

II. The 2014 amendments to the Line of Duty Compensation Act do not apply retroactively.

Soon after Decedent's fatal heart attack occurred, significant changes to the Line of Duty Compensation Act went into effect. With an effective date of August 28, 2014, §287.243.2(5), the legislature modified the relevant definition to read as follows:

"Killed in the line of duty", when any person defined in this section loses his or her life when:

- (a) Death is caused by an accident or the willful act of violence of another;
- (b) The law enforcement officer...is in the active performance of his or her duties in his or her respective profession and there is a relationship between the accident or commission of the act of violence and the performance of the duty, even if the individual is off duty; the law enforcement officer... is traveling to or from employment; or the law enforcement officer... is taking any meal break or other break which takes place while that individual is on duty;
- (c) Death is the natural and probable consequence of the injury; and
- (d) Death occurs within three hundred weeks from the date the injury was received.

The legislature changed the very definition of the phrase that gives rise to the benefit itself. Despite such alterations, Claimant asserts the changes are merely procedural in nature, and therefore apply retroactively to Decedent's death. Claimant's position is not legally sound⁶.

The Missouri Supreme Court presumes "statutes operate prospectively unless legislative intent for retrospective application is clear from the statute's language or by necessary and unavoidable implication." *State ex rel. Schottel v. Harman*, 208 S.W.3d 889, 892 (Mo. banc 2006) (citations omitted). A statute will be applied retrospectively if (1) the legislature clearly

⁶ Clearly, Claimant suggests the claim is compensable under the terms of the 2014 version of the Line of Duty Compensation Act. Because I find the 2014 changes are inapplicable, further analysis of the issue is moot.

expressed an intent that the statute be applied retrospectively, or (2) the statute is procedural or remedial (not substantive) in its operation. *Dalba v. YMCA of Greater St. Louis*, 69 S.W.3d 137, 140 (Mo. Ct. App. 2002) (citation omitted). Neither exception applies.

The 2014 amendments to the Line of Duty Compensation Act are substantive. “A substantive law relates to rights and duties giving rise to the cause of action, while procedural statutes supply the machinery used to effect the suit.” *Dalba v. YMCA of Greater St. Louis*, 69 S.W.3d 137, 140 (Mo.App. E.D.2002). “Additionally, a substantive law takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed.” *Id.*; see also *State ex rel. Carter v. City of Indep.*, 272 S.W.3d 371, 375 (Mo. Ct. App. 2008); see also *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. 2007).

The changes to the Line of Duty Compensation Act are comparable to other substantive changes in the Workers' Compensation Act. For example, in *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 349-50 (Mo. Ct. App. 2007), it was found the modification of the claimant's burden of “substantial factor” to “prevailing factor” to qualify as a compensable injury under the worker's compensation law was substantive, and therefore, could not be applied retrospectively. A statute's modification of the burden of proof and its requirement that courts shift the burden of proof is substantive. *Hurley v. Vendtech-SGI, LLC*, No. 16-01222-CV-W-ODS, 2018 WL 736057, at 4 (W.D. Mo. Feb. 6, 2018); see also *Demi v. Sheehan Pipeline Constr.*, 452 S.W.3d 211, 215 (Mo. Ct. App. 2014) (finding the Missouri Supreme Court's alteration to the burden of proof required for a worker's compensation retaliation claim—from “exclusive cause” to “contributing factor” was a substantive change in the law) (citation omitted). By creating new rights and not merely affect the machinery for recovering compensation, the 2014 amendments to the Line of Duty Compensation Act are substantive and cannot be applied to an injury arising prior to the effective date of the amendments.

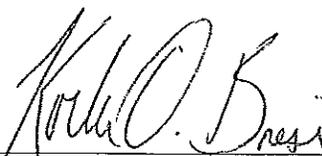
CONCLUSION

Decedent's tragic death did not occur in such a way as to qualify for benefits under version of the Line of Duty Compensation Act that was in effect on the date of his death. The 2014 amendments to the Line of Duty Compensation Act that became effective after Decedent's death are substantive and cannot apply retroactively to his death. Claimant is not entitled to compensation.

I certify that on 10-18-18
I delivered a copy of the foregoing award
to the parties to the case. A complete
record of the method of delivery and date
of service upon each party is retained with
the executed award in the Division's case file.

By MP

Made by:


KARLA OGRODNIK BORESE
Administrative Law Judge
Division of Workers' Compensation

