



The Administrative Law Judge (ALJ) found Wills' accidental death arose out of his employment due to anaphylaxis from an insect sting. Respondent was ordered to pay benefits to the decedent's surviving spouse and a trustee for the four minor dependents.

Respondent requests review of the following: (1) whether Wills' accidental death arose out of and in the course of employment; and, if so, (2) his average weekly wage.

The surviving spouse and dependents argue that the ALJ's Award should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On May 24, 2004, Terry L. Wills was working at a job site installing duct work in a residence in Sycamore, Kansas. The job required him to work not only in the house but also underneath the house. Earnest D. Sanders, owner of respondent, was also working at the job site and recalled that during the work Wills came out from under the house and asked Sanders whether he had heard him coughing. Wills told Sanders that he had just had a bad asthma attack. Sanders told Wills to take a break.

Sanders testified that he heard Wills go back under the house after taking an approximate 15-minute break. As the work continued Sanders was working on the furnace inside the house and called to Wills but did not receive a response. Sanders then went to the crawl space and observed Wills was face down and not responsive. Sanders said Wills feet were inside the crawl space a couple of feet from the opening. Sanders pulled Wills out and he and another employee detected no respiration or pulse. Sanders called 911 and they started CPR but Wills never regained consciousness. Emergency personnel arrived at the scene and continued unsuccessful efforts to resuscitate Wills. Wills was transported to the hospital in Independence, Kansas, where he was pronounced dead.

Sanders testified that he knew Wills had asthma and used an inhaler two or three times a day. Sanders further testified that for some reason Wills did not have his inhaler with him on May 24, 2004. Sanders had been in the crawl space and noted that he had not observed any bee or wasp nests. Nor did he notice any wasps or bees in the area when he discovered Wills.

An officer from the Montgomery County Sheriff's Department noted in a report that the drop light in the crawl space was not frayed and the breakers in the garage where it was plugged in had not been tripped. Wills had apparently complained to a co-worker early that morning that he was already worn out.

The autopsy examination did not determine the cause of death. There was minimal coronary atherosclerosis, small subpleural blebs of the apices of the lungs, mild fatty changes of the liver and superficial cutaneous brush abrasions but no visible electrical burns.

An OSHA investigation noted that in the crawl space there was a battery operated drill and an industrial drop light connected to an unfrayed electrical cord. Inspection of the garage electrical outlet and circuit breakers revealed no abnormalities. It was noted that the bulb in the drop light was inoperable. The investigation findings and absence of autopsy findings resulted in the elimination of low voltage electrocution as the cause of death.

At the request of the surviving spouse's attorney, Dr. Maurice H. Van Strickland, board certified in pediatrics as well as allergy and immunology, reviewed all the reports regarding Wills' death. Dr. Van Strickland stated that most common causes of sudden death in a man the age of Wills, in a work situation would be trauma, a cardiac event, a cerebral vascular event or anaphylaxis. Because the autopsy ruled out trauma, a cardiac event or a cerebral vascular event the doctor concluded that anaphylactic reaction was the possible cause of death.

Dr. Van Strickland then requested additional testing be performed to determine the tryptase enzyme levels in Wills' blood. The test results indicated Wills had an elevated tryptase level and RAST testing also revealed sensitivity to hymenoptera (bee or wasp stings). Dr. Van Strickland explained that when a person has an allergy or sensitivity to a particular substance the body develops and builds up a specific antibody to that allergen, known as an Immunoglobulin E, or IgE. That antibody remains in the bloodstream of the allergic person and can be measured by immunoassay, or RAST testing, even after prolonged periods without exposure. Dr. Van Strickland further stated that the level of IgE is not predictive of the severity of the anaphylactic reaction.

Dr. Van Strickland noted that death from anaphylaxis causes an elevated tryptase level. Testing revealed Wills had an elevated tryptase level and RAST testing indicated Wills had a sensitivity to insects. Therefore, the doctor concluded the probable cause of Wills' death was acute anaphylaxis due to insect sting. Dr. Van Strickland testified:

So the preponderance of evidence and it's more likely than not that he died of an allergic event under that house, an acute allergic event. And the fact that he is sensitized to insects and that he died in May, which is a common time for people to get insect stings, I believe that it's my medical opinion that the probable cause of his death, more likely than not, was acute anaphylaxis due to insect sting. This is the most medical probable diagnosis. The false positive rate of a tryptase test is recorded on the order of 10 percent and the false negative rate is about 5 percent. So this really gives him about a 95 percent chance of dying of anaphylaxis. And the history of asthma is an incidental finding, is not supported by autopsy results as a

cause of death. Death from unknown causes and death from electrocution does not raise the tryptase level; however, death from anaphylaxis causes a tryptase level to be elevated way higher than 51 percent, more on the order of 90, 95 percent. Thus, I conclude that in the evidence of postmortem serum tryptase, the rapidity of death, the positive IgE RAST tests to hymenoptera species, the position of the body when found, that he in all medical probability suffered an insect sting, and the insect sting caused an anaphylactic reaction and his rapid demise.<sup>1</sup>

At the request of respondent's attorney, Dr. Corrie L. May, board certified in Forensic Pathology and Anatomic and Clinical Pathology, reviewed all the reports regarding Wills' death. Dr. May testified that the most common findings in an autopsy that demonstrate anaphylaxis shock include fluid within the lungs, swelling of the voice box, constriction of the small airways within the lungs and that certain types of inflammatory cells fill the tissues particularly the spleen and lung. The doctor noted that it was significant that none of those findings were made in Wills' autopsy as there is no supporting documentation to suggest that a systemic allergic reaction did occur. Dr. May further testified that the elevated tryptase does not confirm a diagnosis of anaphylaxis. But Dr. May agreed that elevated tryptase is useful in the diagnosis of anaphylaxis, nonetheless, there must be additional supporting data to confirm a death from anaphylaxis. Consequently, Dr. May opined that Wills did not die from an allergic reaction to a wasp sting as there was no evidence to establish the cause of death was due to a wasp sting.

Dr. May concluded that Wills' death was the result of sudden cardiac death caused by the epinephrin in his Primatene Mist inhaler. Dr. May opined that Wills overuse of his inhaler resulted in cardiac arrhythmia and sudden death. But Dr. May agreed that anaphylaxis shock can also cause cardiac arrhythmia.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>2</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony which may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.<sup>3</sup>

Not surprisingly, the medical experts disagreed regarding the cause of Wills' death. Dr. May concluded the autopsy findings did not support a conclusion that Wills' death was

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<sup>1</sup> Van Strickland Depo. at 16-17.

<sup>2</sup> K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

<sup>3</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

due to anaphylaxis from an insect sting. Conversely, Dr. Van Strickland noted that autopsy findings such as Wills have been seen in anaphylaxis and where the cause of death cannot be determined at autopsy, standard procedure should be to perform tryptase testing and consult with an immunologist.

The absence of a sting cite at autopsy is explained by the fact that Wills had abrasions from being drug from underneath the house and such abrasions could have easily covered any sting site. And because the pathologist at autopsy suspected electrocution he was not necessarily focused upon finding an insect sting.

The autopsy did not confirm that Wills succumbed to an asthma attack nor was there evidence to support Dr. May's conclusion Wills had overused epinephrine. Moreover, Mr. Sanders testified that Wills did not have his inhaler with him on the date of his death.

Both medical experts did agree that testing revealed elevated tryptase and elevated IgE levels. This evidence supports Dr. Van Strickland's opinions regarding the cause of Wills death. And Dr. May agreed that elevated tryptase levels may be diagnostic of anaphylaxis.

The ALJ summarized the evidence and noted that Dr. Van Strickland based his opinion on elevated tryptase levels and the elevated IgE levels which indicated Wills' allergy to wasps. The ALJ further noted that Wills was in the crawl space underneath the house where wasps certainly may be found. Conversely, there was evidence that Wills did not have an inhaler with him on the date of his death and there were no autopsy findings consistent with epinephrine overuse. Consequently, the ALJ determined that Dr. Van Strickland's opinion was the most persuasive. The Board agrees and affirms.

Although the respondent raised the issue of average weekly wage in its application for review, that issue was neither briefed nor argued at oral argument to the Board and is deemed waived. Moreover, respondent's submission brief to the ALJ stated it stipulated that Wills average weekly wage was \$328.57, the wage which was adopted by the ALJ.

Finally, it must be noted that in the ALJ's Award there is simply the finding that Wills' surviving spouse and four dependent children are entitled to benefits. K.S.A. 44-525 provides that every award shall specify the amount due and unpaid up to the date of the award and the amount of payments due thereafter, if any. Rather than remand this case to the ALJ, the Board will provide the necessary calculations.

The Workers Compensation Act authorizes the ALJ to order compensation to be paid to a conservator for the benefit of a minor child. The Board notes the legislature intended to grant the administrative law judges the authority to order payments to be made to a conservator for the benefit of an incapacitated person. What is more, the Kansas Probate Code by implication requires a conservator to be appointed when the amount of money (for example, the amount of compensation) involved exceeds \$10,000.

Consequently, the payments to the four minor dependents must be made to their conservator.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Thomas Klein dated September 15, 2008, is affirmed.

**AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR OF** Burlinda Wills, as surviving spouse, and Kathreen Marie Wills, Austin Lee Wills, Wyonia Sue Wills and Thomas Wayne Wills, as surviving minor dependents, and against the respondent, Independence Heating and Air, and the insurance carrier, State Auto Property & Casualty Insurance Company, for an accidental injury which occurred on May 24, 2004, and based on an average weekly wage of \$328.57, for compensation at the rate of \$219.06 per week from May 24, 2004.

Subject to the provisions below and K.S.A. 44-510b, one-half of the payment shall be paid to Burlinda Wills, as surviving spouse, one-eighth of the payment to the conservator of Kathreen Marie Wills, a minor dependent, one-eighth of the payment to the conservator of Austin Lee Wills, a minor dependent, one-eighth of the payment to the conservator of Wyonia Sue Wills, a minor dependent and one-eighth of the payment to the conservator of Thomas Wayne Wills, a minor dependent. The payments shall continue to the minor dependents until he or she reaches 18 years of age. After that date the minor dependent will continue to receive payment until he or she reaches 23 years of age only if he or she is enrolled as a full-time student in an accredited institution of higher education or vocational education, or if he or she is physically or mentally unable to earn wages in any type of substantial or gainful employment, subject, of course, to the maximum amount of compensation payable, whereupon all rights to benefits terminate.

There is due and owing to Burlinda Wills, as surviving spouse, \$20,000 plus for the period from May 24, 2004 through June 17, 2009, 264.29 weeks at the rate of \$109.53 per week in the sum of \$28,947.68 for a total due and owing of \$48,947.68 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$109.53 per week subject to the provisions of K.S.A. 44-510b, or until further order of the Director.

There is due and owing to the conservator of Kathreen Marie Wills, a minor dependent, \$5,000 plus for the period from May 24, 2004 through June 17, 2009, 264.29 weeks at the rate of \$27.38 per week in the sum of \$7,236.26 for a total due and owing of \$12,236.26 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$27.38 per week subject to the provisions of K.S.A. 44-510b, or until further order of the Director.

There is due and owing to the conservator of Austin Lee Wills, a minor dependent, \$5,000 plus for the period from May 24, 2004 through June 17, 2009, 264.29 weeks at the rate of \$27.38 per week in the sum of \$7,236.26 for a total due and owing of \$12,236.26 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$27.38 per week subject to the provisions of K.S.A. 44-510b, or until further order of the Director.

There is due and owing to the conservator of Wyonia Sue Wills, a minor dependent, \$5,000 plus for the period from May 24, 2004 through June 17, 2009, 264.29 weeks at the rate of \$27.38 per week in the sum of \$7,236.26 for a total due and owing of \$12,236.26 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$27.38 per week subject to the provisions of K.S.A. 44-510b, or until further order of the Director.

There is due and owing to the conservator of Thomas Wayne Wills, a minor dependent, \$5,000 plus for the period from May 24, 2004 through June 17, 2009, 264.29 weeks at the rate of \$27.38 per week in the sum of \$7,236.26 for a total due and owing of \$12,236.26 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, payments will continue at the rate of \$27.38 per week subject to the provisions of K.S.A. 44-510b, or until further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: William J. Pauzauskie, Attorney for Claimant's Surviving Spouse
- Randall W. Schroer, Attorney for Respondent and its Insurance Carrier
- Thomas Klein, Administrative Law Judge