# Gronenthal, Alfred, Dec'd

## EMPLOYER'S FAILURE TO PROVIDE MEDICAL CARE

An employer's alleged negligent failure to provide proper medical care to a worker stricken on the job with a non-industrial heart attack does not convert the heart attack into a compensable industrial injury ***....In re Alfred Gronenthal, Dec'd*, BIIA Dec., 44,686 (1976)**

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS**
**STATE OF WASHINGTON**

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| **IN RE: ALFRED M. GRONENTHAL, DEC'D** | **)** | **DOCKET NO. 44,686** |
| | **)** | |
| **CLAIM NO. G418606** | **)** | **DECISION AND ORDER** |

APPEARANCES:

Widow-Petitioner, Jerri Gronenthal, by
Schroeter, Jackson, Goldmark & Bender, per
Paul Whelan and Dean Bender

Employer, REA Express,
None

Department of Labor and Industries, by
The Attorney General, per
Richard Roth, Assistant

This is an appeal filed by the widow-petitioner on October 15, 1974, from an order of the Department of Labor and Industries dated September 23, 1974, which adhered to the provisions of a prior order rejecting the claim of the decedent, Alfred M. Gronenthal, for the reason that the condition complained of is not due to an industrial injury nor to an occupational disease. **SUSTAINED**.

## DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on June 9, 1975, in which the order of the Department dated September 23, 1974 was sustained.

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

The parties agree that the factual situation recited in the Proposed Decision and Order accords with the evidence presented.

The legal theory, upon which the instant case is predicated, is indeed a bizarre one. Factually, it is the petitioner's contention that the employer failed to provide the decedent with timely and proper medical aid, and that as a result thereof he died. This failure, it is alleged, constituted negligence on the employer's part, thereby rendering the resulting death compensable. In other

words, employer negligence is the core allegation, and a finding of negligence on the employer's part is a condition precedent to a recovery on the petitioner's part. Accordingly, on its very face, the claim sounds in tort. Thus, it would seem that the petitioner's exclusive remedy would be a civil action at law for damages. It is the petitioner's position, however, that the employer's alleged negligence, having occurred during the course of the decedent's employment, gives rise to a compensable claim under Workmen's Compensation, citing out-of-state precedents as authority.

Specifically, the petitioner relies upon Lanier v. Kieckhefer - Eddy Div., 201 A. 2d 750, a 1964 opinion of the Supreme Court of New Jersey, and Baur v. Mesta Machine Company, 176 A. 2d 684, a 1962 opinion of the Supreme Court of Pennsylvania. In effect, both cases hold that where an employee is taken ill on the job and thereby rendered helpless to provide for his own care, the employer comes under a duty to exercise reasonable care to put proper medical assistance within reach of the stricken employee. Moreover, should the employer breach this duty, and should such breach result in the death of the employee, a compensable workman's compensation claim arises on behalf of the surviving widow, because of such death. The causal relationship requirement of Workmen's Compensation Law between the work and the death is deemed to be satisfied by the employer's negligence, i.e., his failure to exercise reasonable care to put proper medical care within reach of the stricken employee. The imposition of such a duty upon the employer is at marked variance with the rule of common law, and constitutes an exception thereto. As a legal precept, this exception has come to be termed the "humane instincts doctrine" and apparently descends from an earlier Pennsylvania case arising under the Federal Employers' Liability Act, 45 U. S. C. A. Section 51 et. seq. See Szabo v. Pennsylvania R.R. Company, 40 A. 2d 562(1945)

Be that as it may, the source of the law under which those two cases were decided must be taken into account. New Jersey and Pennsylvania are numbered among what is known as "accident-statute_ jurisdictions. This means that coverage under their Workmen's Compensation Acts is predicated upon the occurrence of an industrial "accident". Neither jurisdiction statutorily defines "accident", as that term is used in their respective Acts. Rather, each gives the word "accident" its ordinary "common usage" meaning. Thus, in Dudley v. Victor Lynn Lines, Inc., 161 A. 2d 479 (N.J., 1960), a case cited and relied upon in Lanier, supra, the New Jersey Supreme Court construed "accident" under its Workmen's Compensation Act to mean an "unlooked-for mishap or untoward event which is not expected or designed." Similarly, the Pennsylvania Supreme Court, in the predecessor case to Baur, supra, subscribed to a definition of "accident" reading: "...an event

that takes place without one's foresight or expectations; an undesigned, sudden, and unexpected event; chance; contingency." Baur v. Mesta Machine Company, 143 A. 2d 12 (Pa., 1958).

It was under these judicially espoused definitions that the New Jersey and Pennsylvania Supreme Courts held that the death of an employee due to the negligent failure of the employer to provide adequate medical care qualified as an industrial "accident".

To point up the fact that the instant case is governed by the Workmen's Compensation Law of Washington, and not by that of New Jersey or Pennsylvania, is, albeit obvious, of critical significance. The cornerstone of compensability under our Act is not "accident", but "injury". Rather than relegate the construction of this term to the vagaries of "common usage", as did the lawmakers of New Jersey and Pennsylvania with the term "accident", our Legislature expressly codified the definition of "injury" in RCW 51.08.100, as follows:

> "'Injury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom."

This definition is unique to Washington and distinguishes our law from that of all others. It is a distinction with a difference -- one which is perhaps most often confronted in the so-called "heart" or vascular problem cases. Whereas "accident-statute" jurisdictions commonly hold that a heart attack due to ordinary or usual work exertion qualifies as an "accident", our jurisdiction requires that the work exertion be unusual or extraordinary for the resulting heart attack or stroke to qualify as an "injury", since work exertion that is merely usual does not satisfy the statutory requirement of RCW 51.08.100, supra, of "a sudden and tangible happening, of a traumatic nature." See Spino v. Department of Labor and Industries, 1 Wn. App. 730 (1969).

In the final analysis, what we are confronted with here is an act of omission (the employer's alleged negligent failure to provide proper medical care to an employee stricken on the job with a non-industrial heart attack). As in the case of "usual exertion", we are of the view that an "omission to act" (assuming, arguendo, a duty to act) does not constitute "a sudden and tangible happening, of a trau- matic nature" within the purview of RCW 51.08.100, supra, defining "injury", and we so hold. As our Court noted in Spino, supra, "An injury must be more than a 'fortuitous event'". In Mork v. Depart-ment of Labor and Industries, 48 Wn. 2d 74 (1955), our Court stated "[f]ailure to provide the hospitalization that might have saved a man, is not an industrial injury, ...". Although, as noted by the petitioner herein, this statement is mere dictum, it still indicates the Court's reaction

to the precise point in issue here and constitutes the closest our Court has come to dealing with the question at hand.

Although we hold that the petitioner's claim herein is non- compensable as a matter of law, we must still pass upon the mixed question of fact and law as to the employer's alleged negligence, in accordance with the requirements of RCW 51.52.106, which directs this Board to make findings and conclusions as to each "contested issue of fact and law".

The employer conduct which the petitioner relies upon to support her contention of negligence is the failure of the decedent's supervisor, James E. Spellman, to summon Medic I immediately following the decedent's initial fainting spell.

As noted at the outset herein, the factual situation as recited in the Proposed Decision and Order accurately reflects the evidence, and the parties take no exception thereto. By way of augmentation, we would further highlight certain points. Namely:

1. The decedent had no prior history of any type of heart condition.

2. The decedent did not complain of chest pain either before or after his first fainting spell.

3. The medical evidence establishes that fainting may be due to any number of causes and is not a unique or classical sign of a heart condition or irregularity.

4. Following his initial fainting spell, the decedent seemed to be fully recovered, talked rationally, and gave every appearance of being normal. When questioned, the decedent merely stated he had experienced a dizzy spell and was "feeling alright". However, Mr. Spellman, the decedent's supervisor, insisted that the decedent lay down and rest while he, Mr. Spellman, proceeded to make arrangements to transport the decedent to the hospital.

In summary, we find nothing in the factual circumstances of this case to suggest a medical emergency prior to the decedent's second collapse, such as would alert a reasonably prudent mind that expert medical assistance and equipment were required. To our mind, the actions of Mr. Spellman were reasonable and prudent in all respects. In short, we find the allegation of negligence against the employer to be unsupported by the facts herein.

## FINDINGS OF FACT

Based upon the entire record, the Board makes the following findings:

1. On April 9, 1973, Alfred M. Gronenthal, filed a claim with the Department of Labor and Industries alleging that he had sustained an industrial injury on February 25, 1973, during the course of his employment with REA Express. On November 9, 1973, the Department issued an order rejecting the claim on the grounds that the condition complained of did not constitute an industrial injury nor an occupational disease. On December 21, 1973, a notice of appeal on behalf of Alfred M. Gronenthal was filed with the Board, and on December 28, 1973, the Department issued an order reassuming jurisdiction of the claim for further investigation and consideration. On January 11, 1974, the Board issued an order denying the appeal in light of the Department's order of December 28, 1973, reassuming jurisdiction of the claim.

2. Alfred M. Gronenthal died on June 9, 1973 from respiratory arrest resulting from brain damage secondary to a myocardial infarction.

3. On January 30, 1974, Jerry Gronenthal, the petitioner herein, filed a claim for widow's benefits with the Department of Labor and Industries as the surviving widow of Alfred M. Gronenthal. On September 23, 1974, the Department issued an order adhering to the provisions of its prior order of November 9, 1973, rejecting the claim. On October 15, 1974, the petitioner filed a notice of appeal with the Board, and on October 25, 1974, the Board issued an order granting the appeal.

4. Appellate proceedings were conducted before the Board of Industrial Insurance Appeals, and on June 9, 1975, a hearing examiner of the Board entered a Proposed Decision and Order in connection with this appeal. Thereafter, within the time allotted by law, Petitions for Review were filed and the case referred for review by the Board pursuant to RCW 51.52.106.

5. On February 25, 1973, the decedent, Alfred M. Gronenthal, suffered a fainting spell while engaged in his usual and routine work duties of unloading packages from a van onto roller belts. When he was first discovered by his supervisor, James E. Spellman, he was on his feet leaning against the inside wall of a van. Upon being questioned by Mr. Spellman, the decedent stated he was "a little bit dizzy", and Mr. Spellman instructed him to come out of the van and sit down until he got over it. As the decedent stepped down out of the van, he started to drop, but was caught and raised up by Mr. Spellman. The decedent did not lose consciousness at this time, but upon being raised up he seemed to come to completely. The decedent professed to be feeling alright at this time, and Mr. Spellman sat him down and went to get him a glass of water. As Mr. Spellman returned with the glass of water, he met the decedent walking towards him and when Mr. Spellman asked the decedent why he was up and about, the decedent responded by

saying that he was feeling alright. Mr. Spellman, however, insisted that the decedent go to the lunch room and lay down, a distance of approximately 300 feet. The decedent proceeded to the lunch room where he laid on a cot. In the meantime, Mr. Spellman tried to contact a hospital to tell them he was bringing the decedent in to be checked. After about five minutes, Mr. Spellman returned to check on the decedent, and the decedent again insisted he was alright. However, Mr. Spellman told him he was taking him to the hospital anyway, to be checked by a doctor. Leaving the lunch room, Mr. Spellman and the decedent walked about 200 feet, the length of the warehouse, and then descended down a short flight of stairs. The decedent suddenly collapsed at the bottom of the stairs where he lost consciousness. Mr. Spellman immediately summoned Medic I, which arrived approximately four minutes from the time of the call. Upon arrival, the Medic I unit found no heart response in the decedent and instituted emergency measures to activate the heart, and then transported the decedent to the hospital. The decedent remained in a coma from the time of his collapse until his death on June 9, 1973.

6. At no time prior to the decedent's final collapse did he complain of chest pain or of feeling ill. Following his initial fainting spell, he talked rationally, appeared to be normal, and professed, on several occasions, to be feeling alright.

7. The decedent had no known history of any kind of heart condition.

8. There is no evidence that the claimant was subjected to anything other than his usual and normal work exertion on February 25, 1973.

9. The medical evidence establishes that fainting may be due to a number of causes and is not unique to a heart condition or irregularity.

10. The weight of the medical evidence establishes, on a more probable than not basis, that the decedent would not have suffered fatal brain damage secondary to his myocardial infarction had expert medical care and equipment been immediately available at the time of the decedent's final collapse.

## CONCLUSIONS OF LAW

Based upon the foregoing findings, the Board makes the following conclusions:

1. The Board has jurisdiction of the parties and the subject matter of this appeal.

2. The failure of Mr. James E. Spellman, the decedent's supervisor, to call Medic I immediately following the decedent's initial fainting spell at work does not render the decedent's resulting death compensable as an industrial injury, within the meaning of the Washington Workmen's Compensation Law.

3. The failure of Mr. James E. Spellman to summon Medic I prior to the decedent's final collapse was reasonable and prudent under all the circumstances.

4. The order of the Department dated September 23, 1974, which in effect found that the decedent did not sustain an industrial injury nor suffer from an occupational disease, is correct, and should be sustained.

It is so ORDERED.

Dated this 8th day of March, 1976.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T. BORK Chairman

/s/_____
R. M. GILMORE Member

/s/_____
SAM KINVILLE Member