

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 051756-01

John W. Huff (deceased)

Employee

Evelyn Huff

Claimant

TLC Companies, Inc.

Employer

AIM Mutual Insurance Co.

Insurer

REVIEWING BOARD DECISION

(Judges McCarthy, Carroll and Horan)

APPEARANCES

Thomas F. Grady, Esq., for the claimant

Robert J. Riccio, Esq., for the insurer at hearing and on brief

Holly B. Anderson, Esq., for the insurer on brief

McCARTHY, J. John W. Huff, an experienced long-haul truck driver, lived with his wife, the claimant, Evelyn Huff, in Worcester Massachusetts. On July 21, 2001, he left the Commonwealth in his employer's tractor-trailer on a trip scheduled to take him to Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, Kentucky and Tennessee. (Dec. 3.)

Mr. Huff was found on July 26, 2001 at about 8:00 p.m., "lifeless and face down wedged under the passenger's seat of the tractor with his feet facing the front of the compartment. He was lodged from the waist up under the sleeper portion of the bunk, back in the rear behind the seats of the truck." (Dec. 4.)

The tractor trailer unit was observed on July 26, 2001 in the late afternoon by Melvin Strother. It was parked in a truck stop plaza in Dublin, Virginia with the hood up, the motor running, the doors open and truck tools, gear and motor oil set around both sides of the tractor. Mr. Strother did not see the employee at that point. Virginia State Trooper John Jones was dispatched to the truck stop and arrived there at about 7:45 p.m. The cab doors were still open, the hood was up and the motor was still running. Truck tools and gear and motor oil were near both sides of the tractor. (Dec. 4.) "Rescue squad members and numerous Virginia State Police officials experienced considerable difficulty but

succeeded after twenty minutes in extracting the decedent whose upper body was wedged in a space between the bunk platform and the mattress. The decedent's upper back on the right shoulder and left lower back had scrape marks. The evidence elicited from Trooper Jones suggests that the decedent had died well prior to the time his body was discovered." (Dec. 4.)

In the face of conflicting medical testimony on the cause of death, the hearing judge adopted the opinion of Dr. William Massello, III, the Assistant Chief Medical Examiner for the Commonwealth of Virginia, who performed an autopsy on July 27, 2001. Dr. Massello noted that the employee was found dead lying face down, wedged in the parked truck with tools in the vicinity. The autopsy revealed no obvious abnormalities of the internal organs which might have caused Mr. Huff's death and there were no specific lethal injuries. (Dec. 5.) With respect to causal relationship, Dr. Massello opined that Mr. Huff died from mechanical asphyxia as demonstrated by the history of being wedged in the truck; marked plethora of the face and a pressure mark on the lower abdomen. The judge adopted Dr. Massello's testimony and opinion as "persuasive and compelling." (Dec. 6.)

The judge indicated that he relied on the testimony of Melvin Strother with respect to information about the truck during the late afternoon of July 26, 2001. (Dec. 7.) The judge also placed specific reliance on the testimony of Trooper Jones to the effect that Mr. Huff's upper body was wedged inside the truck and that "many emergency and police personnel took twenty minutes because of considerable difficulty in freeing his body." (Dec. 7.)

Neither Mr. Strother nor Trooper Jones appeared to testify at the hearing before the judge. Both resided outside the Commonwealth of Massachusetts. Their testimony was elicited under the provisions of § 11B which provides in pertinent part:

A member may upon the filing of a written request of any party appearing before him, together with interrogatories and cross-interrogatories, if any, request officers in other jurisdictions, having power and duties similar to those of a member of the board, to take depositions or testimony of persons or witnesses residing in such jurisdictions. On the return of any such deposition to the division it shall be forwarded to the appropriate member. A reasonable fee for services in connection with the taking of such depositions and the expenses thereof shall be assessed upon the requesting party.

The sworn testimony of Strother and Jones, taken by interrogatories and cross interrogatories outside of Massachusetts before authorized officers, is identified in the judge's decision as Exhibits 6 and 7.

As part of her effort to establish her husband's death as compensable, the claimant raised § 7A, which the judge found applicable in this case.¹ The judge also found that even in the absence of the presumption of compensability created by § 7A, the evidence, including the testimony of Mr. Strother and Trooper Jones, established that the employee's death "resulted from a personal injury arising out of and in the course of his employment." (Dec. 6.) The judge concluded his decision by ordering appropriate benefits under §§ 31, 33, 34B, 50, 13A(5) & costs incurred in obtaining the testimony of Mr. Strother and Trooper Jones. We have the case on appeal by the insurer.²

The central contention by the insurer is that the judge improperly admitted the hearsay testimony of Trooper Jones and Melvin Strother as a substitute for their live testimony without requiring a showing that they were unavailable to testify at the hearing. The insurer argues further that the judge used their testimony to make findings of fact crucial to the outcome reached in this case. In response, the claimant argues that to allow the taking of testimony under § 11B and then not allow its use as evidence in the hearing is illogical and inconsistent with the clear intent of the statute.

We believe that the answer to this issue of first impression is found in case law dating back to the early part of the last century. In Martinelli, Petitioner, 219 Mass. 58 (1914), "[t]he petitioner, as administrator of the estates of two different persons, [brought]

¹ General Laws c. 152, § 7A, provides:

In any claim for compensation where the employee has been killed or found dead at his place of employment or, in the absence of death, is physically or mentally unable to testify, and such testimonial incapacity is causally related to the injury, it shall be prima facie evidence that the employee was performing his regular duties on the day of the injury or death and that the claim comes within the provisions of this chapter, that sufficient notice of the injury has been given and that the injury or death was not occasioned by the willful intention of the employee to injure or kill himself or another.

² But for the § 11B issue summary affirmation of the judge's decision would be appropriate.

applications in the Superior Court, praying it to issue letters rogatory for taking the testimony of witnesses in the Kingdom of Italy, to be used in the hearings on proceedings brought and pending before the Industrial Accident Board for the recovery of payments provided by the workmen's compensation act (St. 1911, c. 751), for the death of these two decedents." As authority therefor, the petitioner pointed to St. 1912, c. 571, § 8, which provided:

The board or any member thereof shall have the power to subpoena witnesses, administer oaths, and to examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. . . . The Superior Court shall have power to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records.

In rejecting the petitioner's argument that extra territorial powers were implied in this statute, Chief Justice Rugg wrote:

These words confer no power to issue letters rogatory or to issue commissions to take depositions. It plainly goes no further than to authorize the court to compel the attendance of witnesses within its jurisdiction and to deal with those who refuse to appear and testify. It would have been a simple matter for the Legislature to have conferred upon the Superior Court the additional power here invoked. It seems quite probable that it was overlooked. At all events it is unprovided for. Although the workmen's compensation act is to be liberally construed, the court cannot go outside its language for the purpose of assuming a power not granted either expressly or impliedly.

The court then dismissed the appeal.

In apparent response, the Legislature enacted St. 1915, c. 275, § 1, which became the present second paragraph of § 11B. In Derinza's Case, 229 Mass. 435 (1918), Chief Justice Rugg, writing for the Court, confronted the issue again. Derinza, an Italian citizen, lived and worked in Massachusetts and supported his wife and children in Italy. He was killed in the course of his employment. The board found his wife wholly dependent upon him for support and awarded her compensation of \$7.20 a week for a period of five hundred weeks. The insurer appealed and the Superior Court " . . . made a decree in accordance with the decision of the Industrial Accident Board. . . ." Id. at 437. The

insurer's appeal caused the Supreme Judicial Court to confront the admissibility of the widow's testimony taken in Italy as follows:

Interrogatories are expressly required by the statute, and are the essential basis for the taking of a deposition. That is one thing. The written request for a commission [now "officers in other jurisdictions"] is another and quite separate thing. It cannot rightly be said that the writing out of the interrogatories by the secretary of the board was a written request for the issuing of a commission to a consul of the United States in Italy to take a deposition.

Id. at 438. The court continued:

It does not follow, however, that the deposition must be rejected. No objection was made to the form of the deposition *until it was offered in evidence* before the arbitration committee. The insurer filed interrogatories and hence must have known or had the opportunity for observing this irregularity at its inception. It has been held that objections to irregularities in the form of a deposition must be taken in some appropriate manner by notice, motion to suppress, or otherwise, *before the trial opens*, or they will be held to be waived. It is only objections to the substance of the interrogatories or answers that avail *when presented for the first time at the trial*.

. . .

There is nothing in the objection to the admission of the deposition on the ground that it did not appear that the deponent could be punished for perjury in the place where it was taken. The commission was in usual form directed to a consular officer of the United States accredited to a civilized nation. The return was in due form. *This was enough to make the deposition admissible prima facie.*

Id. at 439-440 (emphases added). Derinza stands as authority to this day, as the same statutory provision in § 11B, as noted above, differs only in particulars from that which Rugg, C.J., analyzed in 1918. See also Locke, Workmen's Compensation (2nd ed. 1981), § 489.

Therefore, the insurer's objection to the admission of the deposition testimony of the out-of-state witnesses in the present case is without merit. The failure of the department to promulgate regulations that specifically address the evidentiary use of depositions is

irrelevant. We conclude that the testimony of Melvin Strother and Trooper Jones was properly in evidence before the judge under the provisions of § 11B.

We summarily affirm the decision as to the other issues raised by the insurer, namely the defenses of proper notice and proper claim, and the amount of the average weekly wage. The insurer is directed to pay an enhanced fee in the amount of \$2,500.00 to claimant's counsel, pursuant to the provisions of § 13A(6).

So ordered.

William A. McCarthy
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed: November 10, 2005

HORAN, J., (concurring). I agree the decision should be affirmed. I write separately to note the judge properly invoked G. L. c. 152, § 7A, to award the benefits claimed. Because the judge's § 7A finding, *ipso facto*, justifies his decision, we need not address the insurer's remaining appellate arguments.

The record, apart from the testimony of Strother and Jones, supports the application of § 7A.³ Addressing the critical element contained in the first clause of § 7A, the insurer argues that "[a]lthough the Employee was found dead in a truck that he took out of Massachusetts for [the] business purposes of TLC, his employer, it does not necessarily follow that he was found dead at his place of employment."⁴ (Insurer br. 19; emphasis in

³ See footnote 1, *supra*. The evidence I refer to in this concurrence does not include the testimony of Strother and Jones.

⁴ The insurer cites Costa's Case, 52 Mass. App. Ct. 105, 109 (2001), for the proposition that because Costa died not at work, but at home, § 7A was inapplicable. There was no evidence in Costa the employee's "place of employment" included his residence. The insurer's reliance on this case simply begs the question of what Mr. Huff's workplace consisted of at the time of his demise.

brief.) The insurer's argument is too narrow. While these facts do not compel the finding, the evidence, and the reasonable inferences drawn therefrom, permit it. Sawyer's Case, 315 Mass. 75, 76 (1943)("The essential facts need not be proved by direct evidence but may be established by reasonable inferences drawn from facts shown to exist.")

The credited testimony of the claimant and David Powers (elicited without objection), the death certificate (admitted without objection), and the report of the insurer's own medical expert, Dr. Milo Pulde,⁵ permitted the judge to find that: 1) Mr. Huff was employed by the employer as a long haul truck driver, which required him to travel long distances, and be away from home for several days at a time; 2) the employee was not working for anyone else at the time of his death; 3) on these trips, the employee made deliveries and pickups, and performed light maintenance on the truck owned by his employer; 4) on July 21, 2001, his worksheet required him to travel during the next week from Massachusetts to Connecticut, New York, Pennsylvania, Maryland, Virginia, West Virginia, Kentucky and Tennessee, and then to return home; 5) as was his routine, he called Mrs. Huff on July 24, 2001, from his cell phone; 6) the employee was not heard from again; 7) he was found dead on July 26, 2001, face down in his truck; his body was removed from the truck; 8) following his death, the employee's cell phone, and other personal items, were returned to the claimant via the employee's boss; 9) the death certificate reveals the employee was found dead on 98 Country Club Boulevard in Dublin, Virginia; the listed cause of death was "Asphyxia" from "Mechanical Compression"; the death was categorized as accidental.

Insurer's counsel refused to stipulate that the employee was found in the employer's truck. (Tr. II, 45.) However, this fact, expressly found by the judge, could certainly be inferred and deduced from the evidence. Sawyer, supra. This is especially so because 1) there is no evidence introduced to suggest the employee's trip included activities inconsistent with his contract of hire; 2) there is no evidence he failed to make his appointed stops or deliveries, or that he deviated from his designated route; 3) there is no evidence to suggest Mr. Huff was driving any truck other than the one he was driving when he left Massachusetts; and 4) there is no evidence of criminal activity or suicide. Compare

⁵ The judge adopted Dr. Pulde's testimony only with respect to his explanation of mechanical asphyxia; he did not credit the doctor's causation opinion.

Belyea's Case, 355 Mass. 721 (1969)(employee died two hours after embarking on trip to employer's premises that ordinarily would take twenty minutes); Judkins's Case, 315 Mass. 226 (1943)(substantial evidence calling into question whether a travelling employee's death was work-related).

Based on this record, the judge properly applied § 7A by reasonably concluding that, at the time of his death, *this* employee's "place of employment" included his truck, and the open road. See Wormstead v. Town Manager of Saugus, 366 Mass. 659, 666 (1975)(" . . . numerous cases establish that an employee who has no single, fixed place of business is, for obvious reasons, generally exempt from the 'going and coming' rule"); see also G. L. c. 152, § 26.

If I were to reach the insurer's objections concerning the admission of the testimony of Strother and Jones, I would add the following practical observation in further support of the majority's sound legal analysis. If it truly desired the opportunity to question Strother and Jones live, the insurer could have noticed their depositions in the conventional manner, or requested permission to conduct videotape depositions.

I would affirm the judge's decision on the independent basis of § 7A.

Mark D. Horan
Administrative Law Judge

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