

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

COCA-COLA BOTTLING CO.
and CONSTITUTION STATE
SERVICE CO.,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

Appellants,

v.

CASE NO. 1D05-1672

MICHAEL PERDUE,

Appellee.

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Opinion filed April 9, 2007.

An appeal from the Judge of Compensation Claims.
Lauren L. Hafner, Judge.

Lamar D. Oxford and Alan D. Kalinoski of Dean, Ringers, Morgan & Lawton,
Orlando, for Appellants.

Joey D. Oquist, St. Petersburg, and Bill McCabe of Shepherd, McCabe & Cooley,
Longwood, for Appellee.

HAWKES, J.

Claimant Michael Perdue, a deliveryman for Appellant Coca-Cola Bottling Company, suffered a myocardial infarction while delivering cases of Coca-Cola. A cardiac catheterization revealed an occlusion of the right coronary artery. Claimant sought workers' compensation benefits. The Judge of Compensation Claims (JCC)

concluded the claim was compensable under *Victor Wine & Liquor, Inc. v. Beasley*, 141 So. 2d 581 (Fla. 1962),¹ finding Claimant suffered a heart attack caused by unusual work-related exertion. We conclude the JCC applied the *Victor Wine* test incorrectly. Consequently, we reverse and remand for additional proceedings.

It is undisputed that Claimant had preexisting heart disease. Thus, his heart attack is compensable under *Victor Wine* “only if the employee was at the time subject

¹ Under the 2003 amendment to section 440.09(1), Florida Statutes, the major contributing cause standard requires claimants to prove the industrial accident caused more than 50% of the injury and the resulting need for treatment. Claimant’s date of accident preceded the 2003 amendment. Consequently, we do not address whether the amendment superseded *Victor Wine* for dates of accident occurring after October 1, 2003. Since all claimants have always been required to meet the applicable industrial causation standard, *see Harper v. Sebring Int’l Raceway, Inc.*, 886 So. 2d 288 (Fla. 1st DCA 2004), which post-2003 is the 50% plus major contributing cause standard, placing the additional burden of complying with the court-created *Victor Wine* test seems unduly burdensome and inappropriate. The test was originally established to show at least some industrial causation when claimants experience a heart attack while performing their work duties when they suffered from pre-existing heart disease. When *Victor Wine* was decided, there was no statutory test like the major contributing cause standard as a threshold for establishing industrial causation. Now, a claimant must show the major contributing cause of an injury is industrial, and make this showing by medical evidence. In the case of pre-existing heart disease, the claimant would also have to establish an unusual strain or over-exertion. Unless otherwise specified by the Legislature, all compensable injuries should be required to meet the same standard of proof. *See generally, Zundell v. Dade County Sch. Bd.*, 636 So. 2d 8 (Fla. 1994). A claimant who establishes his work was the major contributing cause of a myocardial infarction should be able to recover, even if on the day of the myocardial infarction, his duties were less than normal, or comparable to an “average” day.

to unusual strain or over-exertion *not routine* to the *type* of work he was accustomed to performing.” *Id.* at 589 (emphasis added).

In determining whether the employee was subjected to unusual strain or over-exertion, the analysis is not “solely predicated on the broad question of what was routine to the claimant; rather, that inquiry must necessarily be circumscribed by a consideration of what was routine to the *job* the claimant was accustomed to performing.” *Skinner v. First Fla. Bldg. Corp.*, 490 So. 2d 1367, 1369 (Fla. 1st DCA 1986). The court must “examine the work done by the employee as an entirety, rather than some isolated segment of his activities.” *Yates v. Gabrio Elec. Co.*, 167 So. 2d 565, 567 (Fla. 1964). *Victor Wine* requires the employee to show physical activity beyond his accustomed performance in either the scope or nature of his work.

In examining the employee’s work in its entirety to determine what constitutes a routine work day or a day that does not involve unusual strain or over-exertion, an evaluation of the range of days the employee experiences is necessary. The employee may have days involving more arduous activity than other days, and days that involve less arduous activity than other days. All of these days must be considered, or the evaluation would impermissibly be made “on some isolated segment of [the employee’s] activities.” *Id.* It is this combination of the more arduous days and the less arduous days to which an employee may typically be exposed that result in what

may be called the routine or average job the claimant is accustomed to performing. Whenever the claimant's work requirements fall within the range between the less arduous days and more arduous days, the employee is not subject to unusual strain or over-exertion.

Here, Claimant was not doing any unusual activity or activity of a different nature. He was delivering cases of Coca-Cola as he did every day. He argues that the determination of whether he was subject to unusual strain or over-exertion should be based on an evaluation of the number of cases of Coca-Cola he delivered, a claim under *Victor Wine* based on the scope of his work. This evaluation is performed by looking at the day he suffered the myocardial infarction, and comparing the number of cases he delivered that day to range of cases he was accustomed to delivering.

Consequently, to evaluate his claim, the JCC must also have evidence of the scope of Claimant's work, here, the number of cases of Coca-Cola Claimant would be accustomed to delivering on the range of days he worked. A less arduous day would require delivering fewer cases, and a more arduous day would require delivering more cases. Any day requiring delivery of a number of cases within this range cannot be found to have required *unusual* strain or over-exertion.

Here, conspicuously absent from the record is evidence reflecting the average number of cases Claimant was accustomed to delivering on a daily basis, or the

number of cases he delivered on the less arduous and more arduous days. These figures are crucial to a determination of whether the scope of Claimant's work activities giving rise to his myocardial infarction were unusual requiring over-exertion, and were, therefore, not routine to his work. To calculate Claimant's daily average, both peak delivery days and low delivery days must be included.

For example, if 600 is the largest number of cases a particular employee is accustomed to delivering on a given day, and 300 is the fewest number of cases the employee is accustomed to delivering on a given day, the employee's daily average would be 450. Assuming a sufficient work history, approximately one-half of the employee's days, he would be accustomed to delivering between 450 and 600 cases (more arduous), and approximately one-half of the employee's days, he would be accustomed to delivering between 300 and 450 cases (less arduous).

To qualify as an *unusual* exertion beyond the scope of the employee's job, the employee would have to establish that he was required to deliver a number of cases exceeding, in a statistically significant manner, the larger number of cases he would have been accustomed to delivering on one of his peak days.

Stated differently, a claimant would not meet his burden under *Victor Wine* by establishing he had a demanding, although not an aberrationally arduous, day. Under the 300-600 case hypothetical, it would not be sufficient for the employee to merely

establish that he delivered more than his 450 average number of cases. If that were so, an employee would be entitled to compensation for half of the days he performed his normal duties, but not the other half. The *Victor Wine* rule does not allow compensation when an employee establishes his day's work merely required performance in his average to peak range. *Victor Wine* requires claimants to show physically demanding activity outside the scope or nature of their routine work activities. See, e.g., *Walker v. Friendly Village of Brevard*, 559 So. 2d 258 (Fla. 1st DCA 1990); *Silvera v. Miami Wholesale Grocery, Inc.*, 400 So. 2d 439 (Fla. 1981).

Here, there is no evidence as to what constitutes Claimant's routine or average day and what figures make up those calculations in order to show the scope of his activities, nor is there any evidence that his duties were altered to create more arduous activities of a different nature. Consequently, there is no competent, substantial evidence that Claimant's myocardial infarction was caused by *unusual* strain or over-exertion not routine to his work.

Claimant's reliance on *Gardinier v. Coker*, 564 So. 2d 254 (Fla. 1st DCA 1990), is misplaced. Although the facts in *Gardinier* suggest merely a heavier workload on the day in question, which may not meet the *Victor Wine* test, there was also testimony that the claimant experienced equipment problems that made his job "10 times harder." *Id.* at 255. This court affirmed the JCC's conclusion that the

claimant's heart attack was compensable, finding it was "clear from the evidence" that claimant's activities that day were "significantly greater than usual." *Id.* at 256.

Because no such evidence exists here, we REVERSE and REMAND for an evidentiary hearing to ascertain whether on the day of Claimant's myocardial infarction, he was required to perform beyond the range of what he was accustomed to performing on one of his peak days. REVERSED and REMANDED for additional proceedings.

THOMAS, J., CONCURS; VAN NORTWICK, J., DISSENTS WITH WRITTEN OPINION.

VAN NORTWICK, J., dissenting.

Because I find that competent substantial evidence in the record supports the JCC's findings that the work performed by claimant on the date of the heart attack was not routine for his job and that the heavy delivery volume and uphill delivery requirements on that day caused unusual strain or overexertion not routine to this usual work of claimant, I conclude that we are obligated to affirm. Accordingly, I respectfully dissent.

As the majority states, where, as here, a claimant has a preexisting heart disease, an injury sustained from the heart condition is compensable under chapter 440, Florida Statutes, only if the claimant, at the time of injury, was subject to unusual strain or overexertion not routine to the type of work which he or she was accustomed to performing. Victor Wine, 141 So. 2d 581, 588-89 (Fla. 1962). Under the Victor Wine test, "whether a heart attack occurred during a job-related exertion over and above normal working conditions constitutes the test for legal causation, and proof of this element is geared towards satisfying the requirement that an injury is one arising out of the employment." Harper v. Sebring Int'l Raceway, Inc., 886 So. 2d 288, 291-2 (Fla. 1st DCA 2004)(citing McCall v. Dick Burns, Inc., 408 So. 2d 787, 790 (Fla. 1st DCA 1982)). In determining what is "routine" under Victor Wine, consideration must be given to the job a claimant was accustomed to performing at the time of his heart

attack. Harper, 886 So. 2d at 291. A heart attack may be deemed compensable if the extent of claimant's activity was significantly greater at or before the time of injury than was usually the case and not routine to the job that the claimant was accustomed to performing. Id.; see also Gardinier, Inc. v. Coker, 564 So. 2d 254 (Fla. 1st DCA 1990).

The majority suggests that the claimant here is required to introduce a specific type of evidence to establish that his employment exertion was not routine under the Victor Wine test. While the majority's suggestions are certainly a logical approach that a claimant might adopt to prove this element of Victor Wine causation, the applicable case law does not require any particular type of evidence to satisfy the test. Here, the record contains competent, substantial evidence to support the JCC's finding that the work performed by claimant was not routine and caused unusual strain and overexertion not routine to his usual work. In my view, the majority opinion inserts this court into the fact-finder's role.

The record reflects that, as a delivery driver, claimant drove a truck to an average of sixteen to twenty-three locations a day, manually unloaded and stacked Coca-Cola products packed in cases of cans or bottles or canisters of syrup from his truck onto a wheeled cart, pushed the loaded cart into the store, and removed the products from the cart onto shelves or a storeroom. The claimant testified that the

quantity of products he was required to deliver on the day of his heart attack was an unusually heavy load which required unusual and intense physical labor to push the loaded cart uphill. Although the claimant's supervisor testified concerning the number of cases delivered that day and the routine delivery load of deliverymen under his supervision, the JCC accepted the claimant's testimony, as the JCC was free to do. The JCC also expressly accepted the testimony of a cardiologist who performed an independent medical examination of claimant and who testified that the major contributing cause of the heart attack suffered by claimant was the work performed by claimant which resulted in biochemical and physical stress to claimant's coronary arteries such that plaque already present in the artery erupted and blocked the artery leading to the heart attack.

Although I might have ruled differently had I been the finder of fact, there is no doubt that the record contains competent substantial evidence to support the JCC's findings that claimant was subject to unusual work-related stress or exertion prior to his heart attack. As a result, in my view, we should affirm the JCC's order ruling that the heart attack was compensable.