



**TERESA E. NEATHERY, Plaintiff, vs. CHEVRON TEXACO CORPORATION
GROUP ACCIDENT POLICY NO. OK 826458 et al., Defendants.**

CASE NO. 05 CV 1883 JM (CAB)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA**

2009 U.S. Dist. LEXIS 96031

August 11, 2009, Decided

August 11, 2009, Filed

SUBSEQUENT HISTORY: Costs and fees proceeding at, Motion granted by *Neathery v. Chevron Texaco Corp. Group Accident Policy No. OK 826458, 2009 U.S. Dist. LEXIS 101938 (S.D. Cal., Oct. 30, 2009)*

PRIOR HISTORY: *Neathery v. Chevron Texaco Corp. Group Accident Policy No. OK-826458 & Accident Policy No. SLG-000784, 303 Fed. Appx. 485, 2008 U.S. App. LEXIS 26106 (9th Cir. Cal., 2008)*

COUNSEL: [*1] For Teresa E Neathery, an individual, Plaintiff: Thomas M Monson, LEAD ATTORNEY, Susan Lee Horner, Miller Monson Peshel Polacek and Hoshaw, San Diego, CA.

For Chevron Texaco Corporation Group Accident Policy No. OK 826458 and Accident Policy No. SLG-000784, -, group welfare benefits plans under ERISA, Defendant: Michael Bernacchi, LEAD ATTORNEY, Burke, Williams & Sorensen, LLP, Los Angeles, CA.

JUDGES: Hon. Jeffrey T. Miller, United States District Judge.

OPINION BY: Jeffrey T. Miller

OPINION

MEMORANDUM AND DECISION REVERSING

DEFENDANTS' DECISION TO DENY BENEFITS

Plaintiff Teresa Neathery ("Plaintiff") brought this action to recover accidental life insurance proceeds under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29U.S.C. § 1001 et seq. Plaintiff claims accidental death benefits were unlawfully denied under 29 U.S.C. § 1132(a)(1)(B). Defendants are Voluntary Group Accident Insurance Plan and On-the Job Accident Insurance Plan, erroneously sued as Chevron Texaco Corporation Group Accident Policy No. OK 826458 and Accident Policy No. SLG-000784 (collectively "Defendants" or "the Plans"). Life Insurance Company of North America ("LINA") is the administrator of the Plans. Following a bench trial [*2] held June 13, 2007 and court-ordered supplemental briefing by the parties, this court affirmed LINA's decision to deny benefits. (Doc. No. 132.)

Plaintiff appealed the decision to the Ninth Circuit Court of Appeals. (Doc. No. 134.) The Ninth Circuit found this court had "correctly ruled that Neathery had exhausted her administrative remedies before filing suit, a ruling that LINA does not challenge." (Doc. No. 148, Mem. at 3.) However, the appellate court determined this court's reliance on the "Lewis Report," submitted by LINA several months after the closure of the administrative record, was in error. (Id.) As a result, the panel reversed this court's decision and remanded for further proceedings.

This court spread the mandate at a hearing held February 27, 2009. (Doc. Nos. 147, 150.) At the court's request, the parties thereafter submitted status reports (Doc. Nos. 151-152) in which they agreed proceeding to a bench trial would provide the most expeditious resolution of the matter. The parties filed opening trial briefs on June 19, 2009 and responsive trial briefs on July 16, 2009.^{1, 2} Defendants' response included objections to portions of Plaintiff's trial brief. (Doc. No. 161-2.) [*3] On July 23, 2009, Defendants lodged objections to Plaintiff's reply brief and requested the court consider a sur-reply trial brief, attached thereto. (Doc. No. 164.) On July 24, 2009, Plaintiff submitted a declaration from her counsel addressing some of Defendants' objections and opposing consideration of Defendants' sur-reply. (Doc. No. 165.) The objections and Defendants' sur-reply request are addressed below.

1 Plaintiff's submission included the Trial Brief (redacted) with accompanying appendices (Doc. No. 158, "Pl.'s Trial Br.") and notices of lodgment (Doc. No. 159). Unredacted copies of documents filed under seal were submitted to the court under separate cover. Defendant's trial brief was entered as Doc. No. 157 ("Def.' Trial Br.").

2 Plaintiff submitted her responsive trial brief (Doc. No. 162, "Pl.'s Resp.") and a corrected declaration from Teresa Neathery (Doc. No. 163, "Decl. T. Neathery"). Defendants filed their responsive trial brief (Doc. No. 161, "Def.' Resp.") and objections (Doc. No. 161-2).

I. BACKGROUND

A. Circumstances Surrounding Neathery's Death

On the morning of May 18, 2004, Plaintiff's husband, Robert N. Neathery ("Neathery"), an employee of ChevronTexaco, left [*4] home for his work as a pump operator of oil wells at ChevronTexaco's Kern River Field in Bakersfield, California. (AR 369, 958.)³ Neathery spoke to Plaintiff on the phone just before 10:00 a.m., and indicated no complaints or medical issues. (AR 959.) At approximately 12:24 p.m., Neathery left a company-sponsored lunch after completing his meal, got into his company-furnished truck, and began driving on China Grade Loop. Neathery had not mentioned any medical concerns to others at the lunch. A co-worker, Ede Pacaldo, followed Neathery in a separate company-furnished truck. Both Neathery's and Pacaldo's trucks traveled at approximately 10-15 miles per hour

along China Grade Loop when Pacaldo, out of the corner of her eye, observed Neathery's truck move across the road, over the curb, and into an oil pump located on Chevron Texaco private property. (AR 470, 492, 860-61, 865, 867.) Pacaldo also noted, as stated in her deposition, that as Neathery's truck approached the pumping unit, it neither sped up nor slowed. (AR 866.) The truck partially rode up the well's A-frame and as a result, rolled over onto its passenger side. (AR 336, 490, 491, 867.) Both airbags deployed. (AR 493.) Neathery's [*5] travel pattern toward the pump did not initially strike Pacaldo as unusual because employees often pull off to examine wells along the road. (AR 865, 866.)

3 All references to "AR" refer to page numbers in the Administrative Record. (Doc. Nos. 117 and 159-3.)

Pacaldo pulled over to investigate the scene. As Pacaldo grabbed her cell phone to call for help, the phone rang with an incoming call from another co-worker. Pacaldo answered the call, told the co-worker there had been an accident, and directed the co-worker to call 911. (AR 868.) Pacaldo then ran over to Neathery's truck and started screaming to him, pounding on the front windshield glass. (AR 869.) Neathery was unresponsive but appeared to Pacaldo to be "scared" and in distress. (AR 870-871.) Pacaldo observed Neathery's face was limp, his eyes were open, his mouth was open, and his arms were "twitching." (AR 870-71.) Another operator arrived on the scene by truck. (AR 870.) Pacaldo grabbed a tool from the operator's truck and broke through the back window of Neathery's truck. (AR 870.) Pacaldo attempted to locate Neathery's pulse but felt none. (AR 870.) Pacaldo noticed no signs of injury to Neathery, such as blood, bruising, [*6] or redness. (AR 878.) As Pacaldo held Neathery's head and searched for a pulse, Neathery expelled vomit onto the passenger side window. (AR 872-873.) Pacaldo did not notice any vomit in Neathery's truck before this point. (AR 874.) Although the truck rested on its passenger side, Neathery remained strapped into his three-point seat belt. (AR 873.)

California Highway Patrol Officer Mark McGary ("CHP") arrived on the scene approximately 15 minutes after the accident and conducted an investigation. The resulting traffic collision report indicated the collision had occurred at 12:25 p.m. (AR 486.) The report further provided, "It appeared Neathery experienced a medical emergency . . . [t]his was suspected, in part, by the fact

Neathery had regurgitated inside vehicle # 1 and the absence of any obvious injury." (AR 492.) The report concluded, "Neathery experienced an apparent medical emergency. Due to Neathery's physical impairment, vehicle # 1 drifted to the left." (AR 492.) The "runaway vehicle[] traveled off of the roadway and collided with the pumping unit." (AR 494.)

Kern County paramedics also arrived on the scene. The paramedics' report concludes Neathery died from a cardiac arrest, [*7] AR 472, and noted central and peripheral cyanosis. (AR 470.)⁴

4 According to the coroner who conducted the decedent's autopsy, cyanosis "refers to the blue discoloration you get with unoxygenated or poorly oxygenated blood." (AR 812-13.)

The Kern County Coroner identified the cause of death as "asphyxia...due to aspiration of gastric contents." (AR 477.) According to the Death Certificate, the "place of injury" was "ChevronTexaco private property while operating vehicle." (AR 473.) The coroner's report stated, "The decedent vomited after the vehicle overturned. The vomitus was on the passenger side door and passenger window." (AR 477.) The coroner also noted Neathery had suffered from indigestion or heartburn two days' before the accident, and that Plaintiff had "stated that her husband would sometimes have to vomit while in the car and could not wait and just pull over on the roadway. This did not happen often." (AR 477.) Finally, after documenting Neathery had been previously diagnosed with a hiatal hernia and suffered a broken hand in 2003, the coroner reported Kaiser Permanente Medical Records revealed no other medical history. (AR 477.) The report concludes, "After completing an investigation [*8] in conjunction with the California Highway Patrol, the death of Robert Monroe Neathery was found to be an accidental death." (AR 477.)

In her appeal letter, Plaintiff argues Deputy Coroner Vicki Fennell misstated and mischaracterized what Plaintiff told her during a very brief, emotional conversation about her husband's history of vomiting. (AR 396.) Plaintiff contends she told Fennell her husband had vomited the previous Sunday when he "became car sick on a very winding curvy bumpy road after having several beers and she pulled over in case he had to vomit." (AR 396.) Plaintiff emphasizes Neathery "never threw up *in* the car, and she did not say that he could not wait to do so, and the only time it had occurred was if he

had too much beer at a lengthy party. That had occurred rarely during the years of their marriage." (AR 396.)

Dr. Armand Dollinger, a forensic pathologist, conducted the autopsy on Neathery. With respect to Neathery's cardiovascular system, Dr. Dollinger noted:

Left coronary dominance with no significant narrowing of the left main artery, less than 10% atheromatous narrowing of the left anterior descending branch, no significant narrowing of the left circumflex branch [*9] and no significant narrowing in the 1.5 mm diameter of the right coronary artery. . . .The pericardial surfaces are smooth and exhibit no abnormal fluid collections. The heart has the usual external configuration without dilatation. The myocardium is unremarkable. The valves exhibit no abnormalities. The coronary arteries are unremarkable. The aorta has the usual configuration and appearance. The great vessels, including pulmonary arteries, superior and inferior vena cavae are unremarkable as are the peripheral vessels.

(AR 482.) The heart tissue mass (365 grams) fell within normal limits. (AR 482.) Dr. Dollinger observed "[m]arked to very marked cyanosis of the head, neck and shoulders" as well as "[m]oderate cyanosis of the nail beds of the right hand." (AR 481.) In deposition testimony, Dr. Dollinger indicated "left coronary dominance with no significant narrowing" is a finding "indicative of coronary heart disease" but was of "minimal significance because there's no apparent occlusion or...significant narrowing." (AR 815.)

The autopsy revealed "no significant cerebral edema." (AR 482.) In describing the gastrointestinal system, the report states, "The pharynx and esophagus exhibit [*10] no abnormalities. The stomach and duodenum have no significant abnormalities such as ulceration, obstruction, tumor or hemorrhage." (AR 482.) Dr. Dollinger further found Neathery's lungs were "filled with gastric contents extending well into the bronchial tree and into the periphery of the lower lobe of the right lung." (AR 482.)

Dr. Dollinger reported two "significant negative

findings:" (1) "No evident natural disease accounting for or contributing to death"; and (2) "No evidence of trauma." (AR 484.) The report did point out "[p]arallel pressure marks passing diagonally across the left chest through the epigastric area and along the right costal margin consistent with shoulder restraints." (AR 481.) At deposition, Dr. Dollinger clarified that other than the "pressure mark from the restraint device," Neathery had "no apparent injuries [such as] fractures or evidence of blunt force trauma, no bruises." (AR 818.)

Like the coroner, Dr. Dollinger ultimately concluded Neathery's death was "accidental" and was caused by "asphyxia...due to aspiration of gastric contents." (AR 480.) In his April 2005 deposition, Dr. Dollinger confirmed such "aspiration could cause unconsciousness" but declined [*11] to speculate whether Neathery had aspirated before or after the truck overturned. (AR 820-823.) Dr. Dollinger explained when this kind of aspiration occurs, the person may remain conscious but experience a choking sensation. (AR 833.) The victim would likely panic from loss of breath, would become anoxic and ultimately would lose consciousness. (AR 833-34.) Alternatively, "aspiration will sometimes cause a laryngospasm or cardiac arrhythmia." (AR 833.) From those conditions, a lethal ventricular fibrillation could "occur in a matter of seconds." (AR 833.) In addition, Dr. Dollinger testified there was no circumstantial evidence indicating the decedent died from a cardiac event, noting "[t]he possibility is there because he did have some coronary artery disease but nothing that would indicate the likelihood of a cardiac event." (AR 824.) In fact, Dr. Dollinger expressly stated he saw no evidence Neathery had suffered a medical emergency of any kind. (AR 825.)

B. Plaintiff's Application for Accidental Death Benefits

Neathery, as a ChevronTexaco employee, held a "Voluntary Accident Group Insurance" plan (the "VAGI plan") and an "On-the-job Accidence Insurance" plan (the "OJA plan"). The [*12] Plans were funded through an insurance policy purchased by ChevronTexaco from LINA. LINA is both the administrator of the Plans and the Plans' funding source. Each of the Plans require any death on which a claim is submitted to be accidental and not caused by disease or illness. Specifically, the VAGI policy language provides:

Covered Accident -- A sudden,

unforeseeable external event that results, directly and independently of all other causes, in a Covered Injury or Covered Loss and meets all of the following conditions: . . . 2. is not contributed to by disease, Sickness, mental or bodily infirmity; 3. is not otherwise excluded under the terms of this policy.

Covered Injury -- Any bodily harm that result directly and independently of all other causes from a Covered Accident.

COMMON EXCLUSIONS

In addition to any benefit-specific exclusions, benefits will not be paid for any covered Injury or Covered Loss which, directly or indirectly, in whole or in part, is caused by or results from any of the following . . . (5) sickness, disease, bodily or mental infirmity, diagnosis or treatment thereof[.]

AR 315, 321. The OJA plan in turn provides:

"On-the-Job Accident" means an accident . . . that [*13] is caused directly and independently by external, violent and purely accidental means.

We agree to pay for a loss from bodily injuries;

a) caused by an accident which happens while an Insured is covered by this policy; and

b) which, directly and from no other causes, result in a covered loss. (See the Description of Coverage.)

We will not pay benefits if the loss was caused by:

a) sickness, disease or bodily infirmity; or b) any of the Exclusions listed.

EXCLUSIONS

Benefits shall not be paid for loss caused by or resulting from: . . . c)

Physical or mental illness or disease, or diagnosis or treatment of illness or disease[.]"

(AR 296, 298, 304.) Plaintiff was the named beneficiary of both plans.

In June 2004, Plaintiff submitted accidental death claims to Defendants pursuant to the VAGI and OJA policies. (AR 289.) On September 13, 2004, Defendants denied benefits on the ground that a medical crisis, not an accident, had caused her husband's death. (AR 468.) Specifically, Defendants concluded Neathery "experienced an illness of unknown etiology that caused him to vomit and aspirate the material causing his suffocation." (AR 468.) In making its decision, Defendants relied on (1) the VGAI and [*14] OJA policies, (2) Neathery's death certificate, (3) Plaintiff's claim form, (4) the CHP traffic collision report, and (5) the completed coroner's report including toxicology results. (AR 466.) Among other things, Defendants noted Plaintiff's account, documented in the CHP report, that Neathery took over the counter antacids and that Neathery had indigestion or heartburn the Sunday before the accident and that it had subsided. (AR 467.) Defendants further cited Plaintiff's comment, discussed above, that Neathery would sometimes, but not very often, have to vomit while in the car and could not wait until pulling over on the roadway. (AR 467.) Defendants concluded these facts, combined with the lack of trauma or injury, heightened levels of blood carbon monoxide levels indicative of hypoxia, the vehicle's path toward the pump, and Neathery's unresponsiveness after the rollover, demonstrated Neathery died from a medical event while driving on the roadway which caused him to lose control of the vehicle. (AR 468.) Because Defendants determined Neathery's death was "the direct result of a sickness or physical illness," payment of benefits was excluded under the Plans' terms. (AR 468.)

C. Administrative [*15] Appeal

After her initial claims were denied, Plaintiff retained an attorney and appealed the adverse benefit determination. LINA granted Plaintiff several extensions of time by LINA to perfect her appeal, which was mailed to LINA on May 19, 2005, and received on May 20, 2005. In her appeal documents, Plaintiff asserted Neathery's death was due not to a medical event, but rather Neathery purposefully pulled off the road to

inspect an oil well, misjudged the distance to the oil well or the size of the base unit, and accidentally crashed into the base. Plaintiff further argued the force of the seatbelt restraints and deployment of the truck's airbags caused Neathery to vomit and aspirate the vomit into his lungs. In support of these assertions, Plaintiff submitted the reports of Dr. Camilla Kochenderfer, an anesthesiologist, Dr. Fred J. Simon, a trauma surgeon, and Thomas Feiereisen, an accident reconstructionist.

Dr. Kochenderfer, after expounding on medical principles related to airway anatomy and reflexes, opined that:

Mr. Neathery had a vehicle accident resulting in a loss of consciousness with an associated loss of protective airway reflexes. He regurgitated stomach contents from a [*16] full stomach, aspirated these stomach contents into his airways, thus blocking intake of air, and suffered anoxia (loss of oxygenation), asphyxia (suffocation) and death within minutes.

(AR 408.)

Dr. Simon reviewed Neathery's medical history and concluded, "Medical chronological history reveals only minor benign common afflictions most resolved with medical therapy." (AR 401.) Citing the presence of "parallel pressure marks across the epigastria," Dr. Simon concluded Neathery "died from a traumatic event secondary to a motor vehicle crash" during which pressure from the seatbelt caused a "Heimlich maneuver" phenomenon, resulting in aspiration of gastric contents. (AR 401.)

Thomas Feiereisen, Plaintiff's accident reconstructionist, reviewed the CHP traffic collision report, photographs of the scene, the coroner's report, correspondence between Defendants and Plaintiff, and transcripts from the depositions of Ede Pacaldo, CHP Officer Mark McGary, and Plaintiff. (AR 411.) Feiereisen observed, "The color of the pump structure is similar to the surrounding ground providing poor visual contrast between pump structure and the ground, particularly at the base." ⁵ (AR 411.) Based on the amount [*17] of damage to Neathery's truck, Feiereisen estimated the truck was traveling at 17 to 25 miles per hour at impact. (AR 412.) Feiereisen concluded the force

of the crash resulted in 900 to 1600 pounds of pressure on Neathery's abdomen from the seatbelt and 1500 to 2300 pounds of pressure on Neathery's torso from the airbag. (AR 413.)

5 This observation carries little weight, as Feiereisen never visited the accident scene. The supposedly poor contrast in the photograph could be just as much due to defects in the processing of the photograph as to poor contrast at the scene.

LINA received Plaintiff's appeal on May 20, 2005. Under applicable regulations, LINA had sixty days thereafter to render its decision, although LINA could extend this period up to sixty additional days if special circumstances required. 29 C.F.R. § 2560.503-1(i)(1). Accordingly, LINA's latest deadline for responding was September 20, 2005. LINA did not respond by this date.

D. The Instant Litigation

On September 30, 2005, before LINA decided her appeal, Plaintiff filed the instant suit. LINA litigated this lawsuit and continued to process Plaintiff's appeal in parallel.

On December 19, 2005, in connection with the appeal, [*18] Defendants provided to Plaintiff the report of forensic pathologist Dr. James Lewis (the "Lewis Report"), who opined that Neathery's death was caused by an acute myocardial event. In a January 27, 2006 letter, LINA issued its final decision on appeal, denying Plaintiff benefits on the ground that, based in part on the Lewis Report, Neathery had died from an acute myocardial event, or heart attack,⁶ and therefore benefits were not due under the policies' terms. As mentioned above, the Ninth Circuit has since ruled the Lewis Report is not part of the administrative record for the purposes of the instant litigation or this court's review.

6 This conclusion contrasts with the one provided in the initial denial of benefits, which was that Neathery had died from aspiration of gastric contents.

II. DISCUSSION

A. Standard of Review

Where an administrator fails to render a timely opinion on appeal, as here, the court's review of the appeal is done under a *de novo* standard. See *Abatie v.*

Alta Health & Life Ins. Co., 458 F.3d 955, 972 (9th Cir. 2006)(failure to exercise discretion warrants *de novo* review); *Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Protection Plan*, 349 F.3d 1098, 1102 (9th Cir. 2003). [*19] By Order dated May 5, 2009, the court confirmed a *de novo* standard of review applies to the court's review in this case. (Doc. No. 156.) Pursuant to the Ninth Circuit's mandate, the court will consider the administrative record as it stood at the time the litigation was initiated in September 2005.

B. Burden of Proof

In a trial to determine benefits, the beneficiary bears the burden of proving, by a preponderance of evidence, the insured's death resulted from a covered accident. *Ells v. Order of United Commercial Travelers of Am.*, 20 Cal. 2d 290, 304, 125 P.2d 457 (1942); *Spaid v. Cal-Western States Life Ins. Co.*, 130 Cal.App. 3d 803, 806-07, 182 Cal. Rptr. 3 (1982). Although Plaintiff implied in her papers and at oral argument that formal burden shifting would require Defendants to prove application of a policy exclusion, such shifting is relevant to a summary judgment determination rather than a bench trial.

The policies in play here provide coverage for harms caused by "accidental means" "directly and independently of all other causes." (See Plan provisions, *supra*.) In interpreting these seemingly strict standards, the Fourth Circuit promulgated the Adkins test, under which "a pre-existing infirmity or disease is [*20] not to be considered as a cause unless it substantially contributed to the disability or loss." *Adkins v. Reliance Standard Life Ins. Co.*, 917 F.2d 794, 797 (4th Cir. 1990). In *McClure v. Life Ins. Co. of N. Am.*, 84 F.3d 1129, 1136 (9th Cir. 1996), the Ninth Circuit adopted the Adkins test in cases where the restrictive language is conspicuous. Thus, even the existence of some pre-existing medical condition would not be fatal to an accidental death claim as long as that condition did not "substantially contribute" to the insured's death.

C. Parties' Substantive Arguments

Plaintiff argues she has met her burden of showing, by a preponderance of the evidence, that Neathery's death resulted from the accidental impact of his truck against the base of the oil pump, which in turn caused aspiration of Neathery's stomach contents and his ultimate asphyxiation. Plaintiff contends the trajectory and speed of Neathery's approach to the pump was consistent with

an intent to perform a "drive-by" of the pump and that, for some unknown reason Neathery misjudged the footprint of the pump (Plaintiff offers many speculative hypotheses of how this could have occurred). Pacaldo saw nothing unusual about [*21] Neathery's path until the truck hit the oil pump and overturned. Plaintiff's accident reconstructionist concluded the force of the seatbelt against Neathery's stomach, right after a meal, caused aspiration, and the force of the deployed airbag caused him to asphyxiate the gastric material. Neither Pacaldo or the authorities saw emesis in Neathery's lap, on the steering wheel, airbag, or elsewhere in the driver's area, but only on the passenger side window. Furthermore, the autopsy results showed no significant cardiac disease, damage to the esophagus or stomach lining, or cerebral issues which would indicate a pre-existing medical condition.

Defendants, in contrast, argue Neathery's death was not caused by an accident but rather by a medical emergency. Defendants point to the evidence cited in LINA's initial denial: the reports by CHP, the coroner, and the paramedics, deposition testimony of Pacaldo, the CHP officer, and the medical examiner, and Neathery's medical history. Defendants argue Neathery's vehicle, "without any apparent reason," drifted slowly across the "oncoming lane of traffic, over a curb and hit the pump." The evidence shows Neathery did not brake or slow as he approached [*22] the pump. While Pacaldo observed Neathery leaving the road at 10 to 15 miles per hour, Plaintiff's accident reconstructionist estimates that Neathery was driving at 17 to 25 miles per hour upon impact with the oil pump, which Defendants argue indicates Neathery actually sped up on approach. Defendants suggest the vehicle's path is consistent with CHP Officer McGary's conclusion that Neathery experienced a medical emergency which caused him to lose control of the vehicle, leave the roadway, and strike the pumping unit.

Defendants also note the emergency responders at the scene all concluded Neathery had suffered a medical event before impact with the well. The paramedics suspected Neathery died from myocardial infarction prior to the accident. (AR 470.) Officer McGary reported Neathery died from a medical emergency while driving which caused him to lose control of the vehicle. (AR 494.) Finally, the Deputy Coroner concluded Neathery had died from aspiration of gastric contents.

Furthermore, Defendants argue Neathery's medical history, along with Dr. Dollinger's autopsy report and deposition testimony, show Neathery's death was caused by a medical emergency. Defendants suggest Neathery [*23] had a significant medical history of irregular heart rhythm (including family history) and gastroesophageal reflux disease ("GERD"). Defendants therefore opine Neathery suffered "an acute myocardial event" which occurred either spontaneously or as a result of "an attack of GERD." (Defs.' Trial Br. at 16.) The autopsy showed no actual injury such as bruising, bone fractures, or the like. Defendants, in the absence of any medical rationale, suggest the cyanosis around Neathery's neck and upper body show "his heart had stopped working prior to impact." (Id. at 17.) Defendants also note Neathery was unresponsive when Pacaldo yelled and pounded on the windshield, he was limp and his arms were twitching, and that Pacaldo saw no indications he was breathing nor could she locate a pulse. Finally, Defendants characterize Dr. Dollinger's deposition testimony as follows: "Dr. Dollinger also testified that he could not exclude the possibility of a cardiac event."

In addressing Plaintiff's arguments, Defendants contend her theories about the cause of the crash are mere speculation, the accident reconstructionist's report is unreliable because: 1) the investigator never visited the crash site; 2) [*24] he relied on crash data from trucks of different models and years; 3) his calculation of 17-25 mph at impact was based on speculation; and 4) his calculation of peak forces applied to Neathery's body from the restraint and airbag are not converted into meaningful medical data. (Defs.' Trial Br. at 20-22.)

D. Objections

Defendants generally object to "speculative statements and evidence outside of the administrative record" used to shore up Plaintiff's theories on what may have caused Neathery's truck to hit the well. (Doc. No. 161-2.) These theories were presented in Plaintiff's appeal letter and therefore were part of the administrative record. Referring to the evidence on record, Plaintiff was entitled to present her theories just as Defendants were entitled to their theory that Neathery died of a "medical condition of unknown etiology." Plaintiff's hypotheses are indeed speculative, but the court may consider them in light of the factual evidence on record. Such arguments are not offered to supplement the evidence of record, as suggested by Defendants, but are only made in the

parties' attempts to explain that evidence. Defendants' objection is overruled.

Defendants also argue Plaintiff [*25] improperly cited to the LINA AD&D Training Manual as evidence of LINA's internal procedures and methods of weighing evidence. (Doc. No. 161-2 at 3-4.) Defendants offer the Manual is not part of the administrative record and should not be considered by the court under *de novo* review. The court agrees. Defendants' objection to this evidence is sustained.

In a separate filing, Defendants challenged Plaintiff's responsive brief was too lengthy and improperly raised new arguments. (Doc. No. 164.) Defendants argue this court had issued a standing order limiting replies to ten pages and Plaintiff's responsive brief reached 25 pages. It appears Defendants are referring to a Minute Order entered April 12, 2007 with regard to the previous bench trial held in this case. (Doc. No. 115.) Plaintiff argues this order is no longer applicable and the court never specified page limits for briefing in this round. (Doc. No. 165, Decl. of Susan L. Horner at 2-3.) The court finds the most recent scheduling order, which did not set page limits for briefs, governs the parties' submissions for the upcoming bench trial. Accordingly, Defendants' objection is overruled. However, Defendants requested the court [*26] consider their sur-reply, which addresses the extensive arguments in Plaintiff's responsive brief. In the interest of deciding matters on their merits, the court grants Defendants' request. (Doc. No. 164-2.) The issues discussed in Plaintiff's responsive brief and Defendants' sur-reply are addressed below.

Defendants also objected to the Declaration of Teresa Neathery submitted by Plaintiff with her responsive trial brief as irrelevant to these proceedings. (Doc. No. 164 at 2; Decl. T. Neathery.) The declaration had been submitted to counter Defendants' assertion that Plaintiff had already received life insurance benefits from ChevronTexaco. (Decl. T. Neathery, PP 2-4.) The declaration sets forth information about Plaintiff's status with respect to other insurance policies and her present financial situation. The court finds this information, as submitted by Plaintiff *and* Defendants, is neither part of the administrative record nor relevant to the determination at hand. Defendants' objection is sustained.

E. Plaintiff Objects to Defendants' "New Theories"

In her Responsive Trial Brief, Plaintiff emphasizes

that Defendants are precluded under ERISA from offering new theories for claim [*27] denial for the first time in litigation. In particular, Plaintiff first argues LINA never relied on the provisions defining covered accidents to deny benefits. Second, Plaintiff suggests Defendants are now estopped from criticizing the medical and accident expert evidence she provided in her appeal because LINA never addressed that evidence during the administrative process. Third, Plaintiff contends the court may not consider Defendants' specific medical hypotheses, not presented in the claim denial, that Neathery suffered a cardiac event or GERD episode. According to Plaintiff, allowing Defendants to offer specific rationales at this point would deprive Plaintiff the opportunity to contest them on the record. In addition, Plaintiff suggests Defendants are improperly attempting to enter the content of the stricken Lewis report through their "post-hoc" arguments.

Plaintiff's general proposition is correct: during litigation, an insurer may not introduce novel theories for denial of benefits which were not part of the administrative record. See, e.g., *Cyr v. Reliance Std. Life Ins. Co.*, 525 F.Supp.2d 1165, 1178 (C.D.Cal. 2007). However, in the cases cited by Plaintiff, the new theories [*28] were completely unrelated to the issues addressed by the record. *Id.* (during the administrative process, insurer argued Plaintiff's requested wage adjustment was not allowed under the policy, yet in litigation pursued for the first time an "unclean hands" theory); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 974 (9th Cir. 2006) (Alta initially denied applicant's claim for procedural reasons, concluding "no waiver of premium application had been submitted" but later, on appeal, added a new, substantive rationale, that "Plaintiff had provided insufficient evidence to show" he had remained totally disabled over the relevant period).

Here, Defendants denied Plaintiff's claim because it determined Neathery "experienced a medical crisis while driving." (AR 468.) LINA, noting benefits were not payable for "losses caused by or resulting from sickness or physical illness[.]" concluded Neathery "experienced an illness of unknown etiology that caused him to vomit and aspirate" and his "death was the direct result of a sickness or physical illness." (AR 468.) As the court stated during oral argument, Defendants have maintained this theory of benefits denial, arguing again that Neathery's [*29] death did not qualify as a covered accident under the Plans because the "medical evidence

supports LINA's claim decision that Decedent died of a medical emergency." (Defs.' Trial Br. at 14.) Defendants *argue* simply that the medical emergency "likely" was "a lethal arrhythmia or an attack of GERD or both." Defendants have not attempted to introduce new evidence into the record but merely have presented arguments as to how the existing evidence might be interpreted. "When challenged in court, the plan administrator can defend his interpretation with any arguments that bear upon its rationality." *Gallo v. Amoco Corp.*, 102 F.3d 918, 922 (7th Cir. 1996). As the court stated during oral argument, while Defendants' legal arguments presented here are perhaps more detailed than the basis given in the denial letter, the arguments are "generally consistent" with Defendants' original position and thus, the court will entertain them. *Erven v. Blandin Paper Co.*, 473 F.3d 903, 907 *fn* 1 (8th Cir. 2007)(rejecting plan participants' argument that Defendant's litigation arguments were "post hoc rationalization" and should be disregarded).⁷

7 The court's commentary in Sections D and E demonstrates what [*30] can happen when emotional litigation runs amok. In this case, the parties submitted unsolicited briefing, vociferous objections, excessively lengthy trial briefs, redundant or unnecessary declarations, mischaracterizations and overstatements of the evidence, and numerous speculative hypotheticals, none of which have been helpful to this court in performing its review function.

F. Analysis

Upon *de novo* review of the entire administrative record, the court concludes a preponderance of evidence shows Neathery's death was caused by an accident covered under the Plans. The court finds the manner in which Neathery's truck left the roadway most likely indicates a purposeful trajectory toward the well pump. Pacaldo testified Neathery's driving pattern did not strike her as unusual because workers pull off the road regularly to check the wells. (AR 865.) That Neathery did not brake or signal was inconspicuous to Pacaldo in light of this common practice. In fact, this event was so unsuspecting that Pacaldo continued driving on, looking straight ahead, and only observed the accident through her peripheral vision. (AR 365.) According to Pacaldo and the CHP Officer's report, Neathery's truck made [*31] a relatively direct approach toward the pump, slightly angling toward a path parallel with the road and the pump unit, without

any abrupt swerving or weaving. (AR 490, 492, 865.) Based on the damage to the truck's left wheel and front axle, the deployment of the airbags, and the "post-impact travel distance," accident reconstructionist Feiereisen estimated the truck hit the pump base at between 17 and 25 miles per hour. (AR 412, 414.) Lay observer Pacaldo estimated Neathery's truck was traveling at about 10 to 15 miles per hour while on the roadway, and although she was not watching Neathery closely as he traveled between the roadway and the pump unit, she did not notice any appreciable acceleration or braking. (AR 865-866.) The court finds Pacaldo's and Feiereisen's speed estimates do not differ significantly given the circumstances under which Pacaldo made her observations.

The evidence in the record reveals Neathery's truck struck the base of the pumping unit with sufficient force to cause it to roll over onto its passenger side and to displace the left front wheel out of alignment with the front axle. (AR 338, 411.) Medical experts Drs. Simon and Kochenderfer concluded the velocity [*32] of the impact with the pump base caused significant pressure on Neathery's epigastric area from the seatbelt restraints. These conclusions are supported by the autopsy observations of parallel marking in Neathery's epigastric area. The sudden pressure of the restraints effectively caused Neathery to experience a "Heimlich maneuver," which forced aspiration of the recently-consumed gastric material. (AR 401, 407.) Deployment of the truck's airbags, while not creating any significant bodily injury, caused Neathery to experience a reduced level of consciousness, in turn undermining Neathery's normal swallowing reflexes and causing him to asphyxiate. (AR 401, 407.)

Defendants argue Neathery suffered a medical emergency, such as a heart attack or an attack of GERD, while driving on the roadway which caused him to drift over the curb and into the pump base. Defendants rely heavily on the accident report of CHP Officer McGary, the conclusions of the on-site paramedics, the coroner's report and death certificate issued by Deputy Coroner Vicki Fennell, the autopsy report and deposition testimony by Dr. Dollinger, and Neathery's medical records. After reviewing these resources, the court does [*33] not reach the conclusion advocated by Defendants.

In concluding Neathery suffered a medical emergency while on the paved roadway, CHP Officer

McGary, possessing no medical expertise, relied in part on the fact that Neathery had regurgitated inside the vehicle. (AR 492, 494.) However, Neathery expelled vomit only when Pacaldo held his head to search for a pulse, and then only onto the passenger side door. No other vomit was found in the vehicle. These facts indicate Neathery did not vomit while he was driving on the roadway, but did so only after the vehicle hit the pump. Deputy Coroner Fennell reached the same conclusion. (AR 477.) The CHP accident report also states Neathery left the road "[w]ithout any apparent reason," despite the fact that "Pacaldo did not notice anything unusual about the driving pattern" of Neathery's vehicle. (AR 492.) Pacaldo's testimony about the normal practices of well operators further undermines the officer's finding. Finally, Officer McGary relied on the lack of any visible physical injury to Neathery, but the court finds the nature of Neathery's physical injuries to be inconclusive in determining the order of events.

Defendants point out the on-site paramedics [*34] concluded Neathery died of a heart attack before the accident itself. (AR 470.) However, this conclusion was tentative ("possible MI prior to MVA") because the paramedics had "limited access" to Neathery since he was hanging by his seatbelt inside the vehicle. (AR 470.) While the medical personnel noted "central and peripheral cyanosis," this observation would be consistent with Neathery dying from asphyxiation regardless of whether it occurred before or after impact.

Defendants suggest the death certificate states conclusively that Neathery died of asphyxiation which "occurred while the decedent was operating his vehicle." (Defs.' Trial Br. at 8.) However, the phrase "while operating vehicle" is clearly used to describe the "place of injury" and not the circumstances of death. (AR 473.) Deputy Coroner Fennell reported Neathery had suffered from indigestion or heartburn two days' before the accident, and would occasionally have to vomit while driving. (AR 477.) The report does not use this information to assess whether Neathery died before or after impact with the well. Furthermore, Fennell's characterization of Plaintiff's statement is undermined by Plaintiff's comments in her appeal [*35] letter. (AR 396.) Plaintiff contends she told Fennell only that Neathery had become car sick the weekend before his death "on a very winding curvy bumpy road after having several beers and she pulled over in case he had to vomit." (AR 396.) Plaintiff strenuously denies Neathery ever vomited in the

car. (AR 396.) Although Plaintiff's contentions were not part of her deposition, the court finds them persuasive, particularly in light of Neathery's medical history, discussed below.

Of consequence, following the autopsy on Neathery, Dr. Dollinger reported he found no significant abnormalities in Neathery's cardiovascular system. At deposition, Dr. Dollinger indicated "left coronary dominance with no significant narrowing" is a finding "indicative of coronary heart disease" but concluded these findings were of "minimal significance because there's no apparent occlusion or...significant narrowing." (AR 815.) In particular, Dr. Dollinger testified there was no circumstantial evidence indicating the decedent died from a cardiac event, noting "[t]he possibility is there because he did have some coronary artery disease but nothing that would indicate the likelihood of a cardiac event." (AR 824.) [*36] Dr. Dollinger found no damage to the esophagus or stomach which might indicate long-term distress. Ultimately, Dr. Dollinger concluded there was "[n]o evident natural disease accounting for or contributing to death." (AR 484.) In fact, Dr. Dollinger expressly stated he saw no evidence Neathery had suffered a medical emergency of any kind. (AR 825.) Defendants' initial denial of benefits expressly noted Dr. Dollinger's conclusion. (AR 468, "The autopsy revealed no other contributing medical condition or injury that would have caused Mr. Neathery's death.")

Defendants strenuously argue Neathery suffered "severe" GERD "dating back to 1999" and suggest Neathery had an attack just two days before his death. (Defs.' Trial Br. at 5.) As mentioned above, although Neathery had a stomach issue two days before his death, there is no indication it was anything more than carsickness combined with alcohol overindulgence. Furthermore, Defendants' characterization of Neathery's medical history overstates the information in his records. On December 13, 1999, Neathery was diagnosed with severe GERD, was put on once-a-day Prilosec. (AR 554.) Just three weeks later, Neathery reported his symptoms had resolved [*37] and his physician reported his GERD was stable. (AR 555.) Over the next 12 months, Neathery reported he suffered symptoms "on and off" but had a good response from treatment with Prilosec or Zantac. (AR 556-557, 559, 561-562.) During that period, Neathery was diagnosed with and treated for an *H. pylori* infection. (AR 560.) Neathery reported no GERD-related complaints between December 2000 and March 2002.

(AR 563.) In a March 28, 2002 visit, Neathery complained of heartburn, and expressly denied other symptoms, such as chest pain, shortness of breath, nausea, vomiting, or dizziness. (AR 140, "Pt denies CP, SOB, N/V/D/C H/A or dizziness." ⁸) In the subsequent two years up until his death in May 2004, there is no record Neathery complained of any GERD symptoms. While Neathery's medical history does show he suffered from GERD, the condition was noted as severe only for a brief period and was well-controlled by medications. Even with this history, there is no indication Neathery ever suffered from vomiting as a result of his GERD issues. In any case, Dr. Simon, the trauma surgeon, noted, "Gastroesophageal reflux has no support in the world's trauma literature for being a risk factor for [*38] any reason in a traumatic event." (AR 400.) The court concludes nothing in Neathery's medical history indicates any medical condition or sickness contributed to his death.

⁸ The court takes judicial notice of the following common medical abbreviations: CP, chest pain; SOB, shortness of breath; N/V/D/C, nausea, vomiting, diarrhea, constipation. See Adrian Padurean, *Medical Abbreviations* pocket, 2d ed., Borm Bruckmeier Publishing, 2005.

In sum, Plaintiff has met her burden of showing, based on a preponderance of the evidence in the administrative record at the time this action was initiated, that Neathery's death was caused by a covered accident

under both Plans. ⁹

⁹ At oral argument, Defendants noted the court previously concluded the denial of benefits was not unreasonable and would survive even under *de novo* review. (Doc. No. 132 at 14, 17.) However, the court's prior review contemplated a greatly expanded administrative record, including the Lewis Report to which this court accorded substantial weight, all of which has since been excluded from consideration.

III. CONCLUSION

For the reasons set forth above, the court finds, based on a *de novo* review of the administrative record in place [*39] at the time this litigation was initiated, Neathery's death was caused by an "accident" covered under the Plans. LINA's denial of benefits to Plaintiff under the Plans is therefore **REVERSED**. The Clerk of Court is directed to enter judgment in favor of Plaintiff.

IT IS SO ORDERED.

DATED: August 11, 2009

/s/ Jeffrey T. Miller

Hon. Jeffrey T. Miller

United States District Judge