

APPELLATE PANEL DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0922072

Roger Dale Kelley, deceased

EMPLOYEE,
CLAIMANT/APPELLANT

VS.

The Kroger Company

EMPLOYER,

AND

The Kroger Co. c/o Sedgwick CMS

CARRIER,
DEFENDANTS/RESPONDENTS,

Appellate Panel Review held in Columbia, South
Carolina, on March 18, 2013 per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

6-4-13

APPEARANCES: Claimant/Appellant represented by Lola S. Richey, Esquire
Defendants/Respondents represented by M. Chad Abramson

RECEIVED

JUN 17 2013

SC Court of Appeals

STATEMENT OF THE CASE

Decedent/Appellant was employed with Defendant Kroger on April 4, 2009 when he suffered a fatal heart attack. Decedent's surviving spouse filed a claim for dependency death benefits pursuant to the South Carolina Workers' Compensation Act. Defendants denied that the Decedent's death was caused by a compensable work-related accident pursuant to S.C. Code Ann. §42-1-160. In particular, they argued that Decedent's heart attack was a result of events which were incidental to Decedent's job and not due to unusual or extraordinary events. Counsel for the Decedent argued that his heart attack was compensable pursuant to S.C. Code Ann. §42-9-35, and that Decedent's job condition, combined with his pre-existing health problems, ultimately lead to the fatal heart attack.

The case was heard on August 14, 2012 before the Single Commissioner pursuant to the Forms 52 and 53. In a Decision and Order dated October 17, 2012, the Single Commissioner found that Decedent failed to provide sufficient evidence to show that he suffered from a myocardial infarction (heart attack) as a result of extraordinary or unusual circumstances. The Single Commissioner also found that Decedent's work environment did not aggravate his pre-existing conditions which ultimately lead to his death, and that he failed to provide sufficient evidence to show that the myocardial infarction which resulted in his death was due to a work related injury. As such, the Single Commissioner issued an Order that Decedent did not suffer from a compensable injury that arose out of and in the course and scope of his employment but rather suffered an unrelated myocardial infarction which ultimately resulted in his death. Death benefits were therefore denied.

On October 23, 2012 the Decedent/Appellant timely filed a Form 30, Request for Commission Review. Both parties served timely briefs supporting their positions for review. A

Review Hearing was held before the Appellate Panel of the Workers' Compensation Commission (Full Commission) on March 18, 2013. The Order of the Full Commission is as follows:

EVIDENCE OF THE CASE

Before the Single Commissioner, evidence was introduced showing Decedent was hired by Kroger on or about October 27, 1987. He worked as an oven roll operator for twelve years and worked in the bakery for almost twenty-two years total. He worked in an open, well-ventilated area with an overhead "swamp cooler" and with fans blowing cooled water throughout the room. (Deposition Testimony of Melanie Bryson pp. 15-16). Decedent's job was described as loading and unloading baked goods in and out of ovens reaching temperatures of 400 degrees. This job was considered medium-to-heavy duty. (pp. 18-19; Defendants' APA p. 174-176). According to a co-worker, Decedent along with the entire production team would normally work eight hour shifts but transition to ten hour shifts during production increases, which were often, but not exclusively a result of upcoming holidays. (Deposition Testimony of Jody Sage pp. 9-10).

TESTIMONY OF MELANIE MARIE BRYSON

Ms. Bryson's deposition testimony was submitted into evidence at the Hearing before the Single Commissioner and she also testified in person at the Hearing. Ms. Bryson has been working at Kroger Anderson Bakery for approximately twenty-one years. (Hearing Transcript p.27, ln. 8). She is a production supervisor (Depo. Transcript p. 5, ln. 12-14) and was Mr. Kelley's supervisor for five to six years. (Hearing Transcript p. 27, ln. 12-13). Ms. Bryson testified that Decedent, Roger Kelley, was a hard worker. (Depo Transcript p. 5, ln 21-22). She described his job as an oven operator (Depo. Transcript p. 6, ln. 3-9) and opined that this is a

heavy duty job. (Depo. Transcript p. 6, ln. 15).

At the Hearing before the Single Commissioner, Ms. Bryson provided a detailed description of where Mr. Kelley worked to include photographs illustrating his work area. (Hearing Transcript p. 28, ln 13-25 and p. 29, ln 1-23; Defendants' APA p. 243-249). Ms. Bryson specifically testified that as an oven operator, Mr. Kelley's load during a ten-hour shift would depend on the variety [of bread]. (Depo. Transcript p. 13, ln 12). She said that Mr. Kelley worked in close proximity to the oven, which is hotter than most employees' [areas]. (Depo. Transcript p. 18, ln 1-4). However, she pointed out that the work area was cooled by fans. (Depo. Transcript p. 16, ln 14-16). Ms. Bryson said that the employer does not keep temperature readings in the regular course of their business. (Hearing Transcript p. 35, ln. 1). She did testify that the temperature inside the bakery is affected by the outside temperature. (Hearing Transcript p. 35, ln. 9-20). Defendants introduced an excerpt from an online weather service that indicates the temperature reading on April 4, 2009, the date the Decedent died, showed the minimum temperature was 41 degrees, the mean temperature was 55 degrees and the maximum temperature was 68 degrees. (Defendants' APA p. 179).

In particular to the accident, Ms. Bryson testified that on Saturday, April 4, 2009 there was nothing out of the ordinary about the work day. (Depo. Transcript p. 8-9, ln. 24-1). Mr. Kelley normally worked on Saturdays as this was a part of his normal job duties. (Depo. Transcript p. 9, ln 9). She saw Mr. Kelley on the morning of the accident and he appeared normal. (Hearing Transcript p. 41, ln. 16-17). Ms. Bryson indicates that Mr. Kelley had not made any complaints, (Depo. Transcript p. 9, ln. 20-23) nor does she recall him making complaints to her during the week prior to the incident. (Depo. Transcript p. 10, ln 1-2). In fact, he never made any complaints to her about his chest hurting, head hurting, feeling light headed, feeling dizzy, or

having headaches. (Depo. Transcript p. 10, ln 6-24). Ms. Bryson said that at the time Mr. Kelley suffered from his heart attack, he was proceeding to unload a rack (Hearing Transcript p. 32, ln. 23-25). She was called to the oven and [Mr. Kelley] had already collapsed on the floor. (Depo. Transcript p. 9, ln 3-5). There was not anything unusual about the activity that he was doing, it was a part of his normal job duties and he had been performing the same job duties as a roll oven operator consistently since 1997. (Hearing Transcript p. 33, ln. 10-23).

Ms. Bryson also discussed how production would increase certain times of the year usually before a holiday. In addition, they have distributions throughout the year where a product goes on sale and an ad is run in the paper. During the 12 years that Mr. Kelley worked as an oven operator, he was experienced in the periods of increased production. (Hearing Transcript p. 34, ln. 2-18).

SUMMARY OF MEDICAL EVIDENCE FROM BRETT H. WOODARD

At the Hearing before the Single Commissioner both parties submitted medical reports into evidence in support of their claim. In particular, the Claimant submitted the report of Brett H. Woodard, M.D. from Piedmont Pathology Associates. Dr. Woodard's report, indicates to a reasonable degree of medical certainty that the cause of death was an acute myocardial infarction in the distribution of the left anterior ascending coronary artery. This was related to atherosclerotic coronary artery disease (hardening of the arteries). Hardening of the arteries develops over multiple years if not decades. (Claimant's APA p. 1). Dr. Woodard also testified at his deposition that when you exert yourself, your heart has to do more work. So when asked whether doing more heavy work or heavy exertion or heavy stress, would that cause your heart rate to increase and also lead to heart problems or heart troubles, Dr. Woodard said that in people who have heart disease it would be more likely to have symptoms. (Deposition Transcript of Dr.

Woodard p. 24 ln. 1-5). Dr. Woodard testified that the Claimant's heart was enlarged which may have been related to the fact that he had high blood pressure. (Depo. Transcript p. 24 ln. 12-15). He said that heavy jobs or heavy exertion can enlarge your heart to a minor degree. (Id. ln. 16-19). Dr. Woodard goes on to indicate that a person with underlying heart problems performing the Claimant's job would make it more likely that heart problems would be present. (Id. p. 26 ln. 3-8).

Dr. Woodard also testified that if the ambient temperature was essentially in excess of ninety degrees Fahrenheit, he would be in a state of hemoconcentration and being such, his blood viscosity would go up and his heart would have to do more work and he would be more likely during that time period to have a myocardial infarction when he had atherosclerosis, when he had the underlying structural change in his heart. (Id. p. 30 ln. 1-9). Dr. Woodard would not testify that the type of work the Claimant was doing would lead him to have a heart attack. (Id. p. 30. 18-25). Dr. Woodard went on to say that the Claimant *came [to work] with this heart that was structurally injured because of hardening of his coronary arteries or atherosclerosis*, and once he starts to do physical work, he's more likely to have symptoms or a myocardial infarction than a person who doesn't have that, but it wouldn't make him have that. (Depo. Transcript pp. 30-31 ln 18-25 and ln 1-6).

On cross-examination, Defendants submitted as Exhibit 1 temperature readings of the bakery that were taken on May 1, 2012 of each area within the bakery. Defense counsel asked Dr. Woodard if any of the temperatures were in excess of ninety-degrees, and he responded none. (Depo. Transcript p. 45 ln. 1-6). He was then shown the recorded temperatures from an online source which exhibit the low, mean and high temperature on April 4, 2009. The document indicates that the maximum temperature was 76 degrees. Thus, Dr. Woodard would not state to a

reasonable degree of medical certainty that heat was a contributing factor to the Claimant's death. (Depo. Transcript p. 47 ln. 18-23).

Further, Defense counsel presented Dr. Woodard with medical evidence to indicate that the Claimant was suffering from a bundle block branch prior to his death. Dr. Woodard was not aware of this at the time he prepared his report to Claimant's counsel. (Depo. Transcript p. 52 ln. 8-11). He was also not aware of the fact that the Claimant was diagnosed with hyperlipidemia as far back as 2003. (Depo. Transcript p. 54 ln. 6-9). Dr. Woodard continued to testify that he has not seen any evidence to show that the area the Claimant worked was in excess of 100 degrees, (Depo Transcript p. 55 ln. 1) or that the Claimant was working in close proximity to the ovens (Depo. Transcript p. 55 ln 2-9) and that the area the Claimant was working was not cooled by swamp cooler and fans (Depo. Transcript p. 55 ln. 10-14). Further, Dr. Woodard was presented with two deposition testimonies from employees both neither indicate that the Claimant was exposed to excessive heat prior to his death. (Depo. Transcript p. 56 ln. 1-9). He also doesn't have any evidence that the Claimant was under an unusual amount of stress or anxiety. (Depo. Transcript p. 56 ln. 10-15). Thus, Dr. Woodard would not given an opinion to a reasonable degree of medical certainty that the Claimant's stress and anxiety was a contributing factor which accelerated his heart disease. (Depo. Transcript p. 56 ln 16-23).

Dr. Woodard did not know at the time of his report that the Claimant's mother and father both passed away at 51 and 47 respectively due to myocardial infarction. He testified that genetics play a role in myocardial infarctions. (Depo. Transcript p. 57 ln. 6-21). In summary, Dr. Woodard testified that heat was not the proximate cause of the Claimant's heart attack, but it could have been a contributing factor. The causative factor was the underlying atherosclerosis, hardening of the arteries, and thereby reduction in blood flow to the hart and ischemia. (Depo.

Transcript p. 68 ln. 8-19). His heart attack was not caused by exposure to excessive stress or anxiety based upon his review of the record (Depo. Transcript p. 68-69 ln. 24-25 and 1-9). Based upon the evidence that he's reviewed today, the Claimant had an underlying heart disease that while he was doing his normal job duties had a heart attack. (Depo. Transcript p. 69 ln. 4-11).

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE SINGLE

COMMISSIONER

Based upon the testimony and evidence submitted by both parties, the Single Commissioner made the following Findings of Fact and Conclusions of Law:

1. The parties hereto are subject to and bound by the South Carolina Workers' Compensation Commission.

2. Decedent's average weekly wage is Eight hundred twenty-four and 79/100 (\$824.79) Dollars with a corresponding compensation rate of Five Hundred Forty-Nine and 89/100 (\$549.89) Dollars.

3. Decedent alleges that the conditions in his work environment on April 4, 2009 were such that he suffered a myocardial infarction which resulted in his death.

4. Defendants deny that Decedent suffered from a myocardial infarction that arose out of and in the course and scope of his employment. Defendants submitted photographs, testimony and temperature records which further rebut Decedent's claim.

5. Decedent was employed as an oven operator for the employer. However, his work consisted of feeding product into the conveyor belt which carried product to the oven. Decedent did not work directly in front of or adjacent to the oven. Further, there were swamp cooler fans blowing down on Decedent's work area. This finding is based upon the testimony of Melanic Bryson and Defendants' APA p. 174-176.

6. The greater weight of the evidence shows that Decedent's working conditions were not excessive, and the temperature of the work area was less than 90 degrees. This finding is based upon the Deposition Testimony of Dr. Brett H. Woodard, testimony of Melanie Bryson, and Defendants' APA p. 179-180.

7. Decedent suffered from pre-existing coronary artery disease. I base this finding on the medical evidence submitted by the parties.

8. Both of Decedent's parents died from myocardial infarctions, his father at age 47 and his mother at age 51. Out of five siblings, four of them also suffer from heart problems. This finding is based on the medical evidence submitted at the hearing, in particular Defendants' APA p. 134, p. 138-139

9. Decedent tested positive for a right bundle branch block on February 6, 2003. I base this finding on the medical evidence submitted, Defendants' APA p. 133.

10. Decedent has worked as an oven operator for the employer since approximately 1987. I base this finding on the testimony of Melanie Bryson.

11. There is no evidence that Decedent was required to perform tasks out of the normal for his job description. Additionally there is no evidence that any of this equipment malfunctioned on that day. This finding is based on the testimony of Melanie Bryson and the deposition testimony of Jody Sage.

12. Decedent suffered from a myocardial infarction which resulted in Decedent's death that did not arise out of or in the course and scope of his employment. This finding is based on the greater weight of the evidence submitted by both parties.

13. Decedent's death was caused by his pre-existing heart condition, and there is no evidence in the record that his heart condition was aggravated by his work environment or job

requirement. This finding is based on the greater weight of the evidence submitted by both parties.

CONCLUSIONS OF LAW OF THE SINGLE COMMISSIONER

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
2. Pursuant to S.C. Code Ann. Section 42-1-40 and Section 42-1-50, the Claimant's average weekly wage was \$824.79 with a corresponding compensation rate of \$549.89.
3. Pursuant to S.C. Code Ann. Section 42-1-160, the Decedent failed to provide sufficient evidence to show that his myocardial infarction (heart attack) was an injury which arose out of and in the course and scope of his employment.
4. Pursuant to S.C. Code Ann. Section 42-1-160 the Decedent's myocardial infarction (heart attack) was a result of an event or series of events which were incidental to normal employer/employee relations.
5. Pursuant to S.C. Code Ann. Section 42-1-160 the Decedent failed to provide sufficient evidence to show that he suffered from a myocardial infarction as a result of extraordinary or unusual circumstances.
6. Pursuant to S.C. Code Ann. Section 42-1-160, the Decedent suffered from coronary artery disease and as such was the cause of his myocardial infarction which ultimately resulted in his death.
7. Pursuant to S.C. Code Ann. Section 42-1-160, Decedent suffered from a right bundle branch block which also contributed to the cause of his myocardial infarction.
8. Pursuant to S.C. Code Ann. Section 42-9-35, Decedent's work environment did not aggravate his pre-existing conditions which ultimately lead to his death.

9. Pursuant to S.C. Code Ann. Section 42-1-110, the Decedent failed to provide sufficient evidence to show that the myocardial infarction which resulted in his death was due to a work related injury.

10. Pursuant to S.C. Code Ann. Section 42-9-290, Decedent's dependents are not entitled to death benefits as the Decedent's death did not result proximately from a work related accident.

As stated above, within the Statutory period, Decedent/Appellant filed an Application for Review in the case, copies of which were furnished to all parties. By appeal, Appellant respectfully contends the Hearing Commissioner erred in the following manner:

1. Did the Single Commissioner fail to fairly and properly review the record, weigh the facts and apply the law surrounding the death of the decedent?
2. Did the Single Commissioner fail to apply S. C. Code Ann. 42-1-110, 42-1-160 and 42-9-35?
3. Did the Single Commissioner fail to fairly and properly weigh and consider the deposition testimony and medical evidence of the treating pathologist?
4. Did the Single Commissioner fail to apply the appellant laws surrounding environmental hazards that proximately caused and led to the death of the decedent?
5. Did the Single Commissioner fail to fairly and properly weigh the decedent's work records, medical health history, and work hazards that led to his untimely death?
6. Did the Single Commissioner base his Decision and Order only on surmise, conjecture, and speculation?
7. Did the Single Commissioner willfully disregard and fail to consider the substantial evidence and appellant law that support compensability of the decedent's heart attack?

All proffered testimony and documentary evidence has been taken and delivered to the individual members of the Appellate Panel for their study and consideration. In addition, the parties have briefed and orally argued their positions before the Panel.

In an Appellate Panel review under S. C. Code Ann. § 42-17-50, the Commission's Appellate Panel shall review the award, weigh the evidence as presented at the initial Hearing, and, if good grounds be shown therefore, make its own findings and conclusions consistent with or inconsistent with those of the Single Commissioner.

After careful review of the record in this case, the Commission, by unanimous vote, has determined that all of the Single Commissioner's Findings of Fact and Conclusions of Law are correct as stated. The Single Commissioner's Order is affirmed in its entirety, and the Commissioner's Findings of Fact and Conclusions of Law and Order, as set forth below, are hereby the law of this case.

FINDINGS OF FACTS

1. The parties hereto are subject to and bound by the South Carolina Workers' Compensation Commission.
2. Decedent's average weekly wage is Eight hundred twenty-four and 79/100 (\$824.79) Dollars with a corresponding compensation rate of Five Hundred Forty-Nine and 89/100 (\$549.89) Dollars.
3. Decedent alleges that the conditions in his work environment on April 4, 2009 were such that he suffered a myocardial infarction which resulted in his death.
4. Defendants deny that Decedent suffered from a myocardial infarction that arose out of and in the course and scope of his employment. Defendants submitted photographs, testimony and temperature records which further rebut Decedent's claim.
5. Decedent was employed as an oven operator for the employer. However, his work consisted of feeding product into the conveyor belt which carried product to the oven. Decedent did not work directly in front of or adjacent to the oven. Further, there were swamp cooler fans

blowing down on Decedent's work area. This finding is based upon the testimony of Melanie Bryson and Defendants' APA p. 174-176.

6. The greater weight of the evidence shows that Decedent's working conditions were not excessive, and the temperature of the work area was less than 90 degrees. This finding is based upon the Deposition Testimony of Dr. Brett H. Woodard, testimony of Melanie Bryson, and Defendants' APA p. 179-180.

7. Decedent suffered from pre-existing coronary artery disease. This finding is based on the medical evidence submitted by the parties.

8. Both of Decedent's parents died from myocardial infarctions, his father at age 47 and his mother at age 51. Out of five siblings, four of them also suffer from heart problems. This finding is based on the medical evidence submitted at the hearing, in particular Defendants' APA p. 134, p. 138-139

9. Decedent tested positive for a right bundle branch block on February 6, 2003. This finding is based on the medical evidence submitted, Defendants' APA p. 133.

10. Decedent has worked as an oven operator for the employer since approximately 1987. This finding is based on the testimony of Melanie Bryson.

11. There is no evidence that Decedent was required to perform tasks out of the normal for his job description. Additionally there is no evidence that any of this equipment malfunctioned on that day. This finding is based on the testimony of Melanie Bryson and the deposition testimony of Jody Sage.

12. Decedent suffered from a myocardial infarction which resulted in Decedent's death that did not arise out of or in the course and scope of his employment. This finding is based on the greater weight of the evidence submitted by both parties.

13. Decedent's death was caused by his pre-existing heart condition, and there is no evidence in the record that his heart condition was aggravated by his work environment or job requirement. This finding is based on the greater weight of the evidence submitted by both parties.

CONCLUSIONS OF LAW

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
2. Pursuant to S.C. Code Ann. Section 42-1-40 and Section 42-1-50, the Claimant's average weekly wage was \$824.79 with a corresponding compensation rate of \$549.89.
3. Pursuant to S.C. Code Ann. Section 42-1-160, the Decedent failed to provide sufficient evidence to show that his myocardial infarction (heart attack) was an injury which arose out of and in the course and scope of his employment.
4. Pursuant to S.C. Code Ann. Section 42-1-160 the Decedent's myocardial infarction (heart attack) was a result of an event or series of events which were incidental to normal employer/employee relations.
5. Pursuant to S.C. Code Ann. Section 42-1-160 the Decedent failed to provide sufficient evidence to show that he suffered from a myocardial infarction as a result of extraordinary or unusual circumstances.
6. Pursuant to S.C. Code Ann. Section 42-1-160, the Decedent suffered from coronary artery disease and as such was the cause of his myocardial infarction which ultimately resulted in his death.
7. Pursuant to S.C. Code Ann. Section 42-1-160, Decedent suffered from a right bundle branch block which also contributed to the cause of his myocardial infarction.

8. Pursuant to S.C. Code Ann. Section 42-9-35, Decedent's work environment did not aggravate his pre-existing conditions which ultimately lead to his death.

9. Pursuant to S.C. Code Ann. Section 42-1-110, the Decedent failed to provide sufficient evidence to show that the myocardial infarction which resulted in his death was due to a work related injury.

10. Pursuant to S.C. Code Ann. Section 42-9-290, Decedent's dependents are not entitled to death benefits as the Decedent's death did not result proximately from a work related accident.

ORDER

IT IS HEREBY ORDERED that the Decedent/Appellant did not suffer from a compensable injury that arose out of and in the course and scope of his employment but suffered a myocardial infarction which ultimately resulted in his death; and

IT IS FURTHER ORDERED that a claim for death benefits is hereby denied as the Decedent's death was not due to a work related injury.

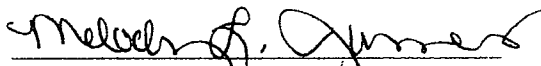
THE SINGLE COMMISSIONER'S ORDER IS AFFIRMED IN ITS ENTIRETY.

AND IT IS SO ORDERED.



Commissioner T. Scott Beck, Chairman
For the Appellate Panel

WE CONCUR:



Commissioner Melody James



Commissioner Andrea C. Roche

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on June 4, 2013