

BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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ROGER KELLEY, )  
Employee/Claimant, )  
-vs- )  
THE KROGER )  
Employer, )  
and )  
SEDWICK CLAIMS MANAGEMENT )  
Carrier, )  
Defendants.)

WCC #0922072  
FULL COMMISSION  
TRANSCRIPT

The following hearing was taken before Kathryn B. Bostrom, Verbatim Court Reporter and Notary Public for the State of South Carolina, commencing at the hour of 1:36 p.m. on Monday, March 18, 2013 at The South Carolina Worker's Compensation Commission, Columbia, South Carolina.

Reported by  
Kathryn B. Bostrom

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APPEARANCES

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For the South Carolina  
Worker's Compensation  
Commission:

Andrea C. Roche, Chair  
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Melody L. James

For the Claimant:

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For the Defendant:

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Columbia, SC 29211

Reported by:

Kathryn B. Bostrom

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There were no exhibits marked during this hearing.

## PROCEEDINGS

1  
2 THE COURT REPORTER: Today is Tuesday, March 18,  
3 2013. This is South Carolina Workers' Compensation  
4 Case number 0922072. This is the case of Roger  
5 Kelley, the claimant, versus The Kroger, the  
6 employer, and Sedwick Claims Management is the  
7 carrier. The Appellant is the claimant,  
8 represented by Lola S. Richey. The Respondent is  
9 M. Chad Abramson. Each side is allowed ten minutes  
10 for oral argument and the appellant three minutes  
11 in reply. You are requested to argue the grounds  
12 of exception and stay within the record.

13 COMMISSIONER ROCHE: Ms. Richey.

14 MS. RICHEY: Yes, sir -- Yes, ma'am. First of  
15 all, thank you, Panel, for allowing me to argue my  
16 case on appeal in front of you today. I do  
17 appreciate this opportunity. What we have here is  
18 a gentleman. His name is Roger D. Kelley, Sr. He  
19 worked for Kroger since 1987. Now there is a few  
20 things that we do know from the file, and we can't  
21 dispute this -- now there's going to be agreements  
22 throughout the day, and to be quite frankly, some  
23 of those agreements are unrefuted. And in fact,  
24 some of those arguments that are going to be made  
25 today is not supported by any medical evidence to a

1 reasonable degree of medical certainty in the file.  
2 Now this is what we do know. This is what we know  
3 from the record. We know that he died suddenly at  
4 work on April the 4th, 2009, while loading heavy  
5 bread trays full of dough into the machine. We do  
6 know that he worked at the hottest part of the  
7 plant. That's unrefuted. We know that even though  
8 as the defendants will bring -- will -- will argue  
9 that there was fans and that there was cooling  
10 vents, but even their own temperature reading, even  
11 their own temperature reading showed by the oven  
12 that temperature was 88 degrees -- anywhere between  
13 86 degrees to 88 degrees -- and that's with all the  
14 fans, the coolants, etcetera. It's unrefuted that  
15 he worked in the hottest part of the factory. In  
16 fact, the date of his death, one of his co-workers  
17 saw him and said, "Roger, your face is all pale."  
18 And his shirt was often sweaty. Sweat to the core.  
19 We do know that the time of the injury, that the  
20 increased production -- he was working about 49.5  
21 hours the week before he died. That's unrefuted.  
22 And we also know that he had to -- he had to work  
23 an increased work demand as well. Now, one of the  
24 things that's going to come up is they're going to  
25 say, "well, didn't he have underlying heart

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disease?" Yes, he did have underlying heart disease. But the doctor in this case -- now, this is not some hired gun that we go out and we just ramp this stuff up. This was the treating pathologist that was hired by Anderson County. He examined Mr. Kelley on the date of his death. He reviewed the symptoms, and we had a very long deposition of Dr. Woodward there in Anderson County where we -- we presented numerous items, numerous tests, numerous records, numerous production records, and this is what Dr. Woodward stated: He stated to a reasonable degree of medical certainty that the combination of Mr. Kelley's job there pushing -- and this is also unrefuted -- pushing racks that weigh up to a thousand pounds that -- and this is also unrefuted -- that he had to lift heavy trays onto the hot oven, and he worked by the hottest part of the plant. And if he -- and knowing all of this, the doctor stated to a reasonable degree of medical certainty that that caused the demise and the death of Mr. Kelley. Now even though we're bound -- one of the things that's going to come up in this case and one of the things that I think that was not addressed properly is Mr. Kelley has four other siblings. They're all still

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alive. Because one of the things that came up in this case was well, Mr. Kelley's mom and dad, they died of a heart disease. Now I don't know what's the circumstances behind his father and his mother dying, but what we do know is that Mr. Kelley's other brothers and sisters, they're still alive. And this is what we also do know: That under 46 -- under 42-1-160, with these heart attacks cases, and particularly, this is probably considered a complex medical case, you have to make that determination based on the reasonable degree of medical certainty. The reality is, is that evidence that we presented by Dr. Woodward, there's no other evidence in the file that contradicts that. In essence, we meet the standard. We meet Section 42-1-60 (as spoken). We also -- and one of things that's also -- that we need to bring to the Court's attention too, is that Mr. Kelley worked right by the hottest oven, the hottest place in the plant. That oven was about 400 degrees. And even with all the fans, even with all the cooling, even with the hot -- insulation area, they would like to argue, "well, it wasn't that hot." Well, why would one of his co-workers say that Mr. Kelley's shirt was often times sweaty. Well, why would -- why would

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his own co-workers say he worked less than ten feet away from the hottest part of the plant. His own condition put him at a higher and greater risk than most people in the -- in the world. And in fact, he was at a greater risk and a greater exposure. And we've -- and there's appellate decisions that says that because of that extraordinary or that unusual exposure, that brings him -- that makes his condition of work extraordinary and unusual. So now the question turns to well, is it connected? Well, Dr. Woodward said it was to a reasonable degree of medical certainty. Now, there's some language in the brief that says, "no, the standard should be more probable." No, that's not what the statute says, and that's not what the South Carolina Supreme Court stated. It stated it must be to a reasonable degree of medical certainty. And Dr. Woodward stated that over and over and over and over again. Now, even if you may say, "well, did the heat cause his death?" No. Dr. Woodward stated that it was a combination of things. He stated that it was an underlying heart disease, which I don't deny that and Dr. Woodward even acknowledged that. He did have a weakened heart state, but I also want to bring this the

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Commission's decision, when you look at the defendant's briefs, even though that he was well into his 50s, he had a pretty good -- he didn't have a high -- his blood pressure was not high. His blood pressure averaged anywhere from between 105 to 112 at the highest mark. He was a nonsmoker. He didn't drink. Actually you will find very -- throughout the defendant's records that he was actually in very good health often times, when he went to see the family doctor -- to see his doctor. And the question is, "well, he had these clogged arteries?" Dr. Woodward says, "you're right, he did." But he also said -- so the question then came: "well, would someone with these conditions would have caused his death?" And Dr. Woodward said no. If he was working in an cool environment like we often times work here, Dr. Woodward stated, "no, that would have not caused his death." What caused his death was him working in a hot environment, less than ten yards or ten feet away from an oven that's about 400 degrees. And the next argument that's going to come up: "well, Ms. Richey, the temperature outside was -- was in the 40s or 50s or 60s." Mr. Kelley did not work outside. That's one of the things that we

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have to bring to the Court's attention. He didn't work outside. And even if you say, "well, what was the temperature at the date of his death?" We asked repeatedly for that temperature. We subpoenaed those records on numerous occasions, but they couldn't come up with it. So we don't know what the temperature was at the date of his death back in 2009. But what we do know is at the time of his death in 2009, he was working -- at least -- he was working about 49 hours. He was working in an excessive work schedule. Now you may say "well, isn't that normal?" To a certain degree, it is, but at the time of his death, he was working a little bit normal hours, because his work schedule -- and that's unrefuted -- was eight to ten hours a day. It increases during seasonal -- during seasonal production. In other words, there are sometimes during the holidays, the season goes up. And at the time of his death, he was. He was working increased hours. He was working next to the hottest part of the plant. And basically, that's why Dr. Woodward stated when you combine all of those things together, that caused his demise. And he has stated that repeatedly throughout the deposition. We believed the Mr. Kelley meets his

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burden. He met his burden. And there's no evidence in the records that unrefutes that. In fact, the appellate courts has opined that that evidence must be weighed. Even in you don't like me, even if you don't like Mr. Kelley, the Supreme Court and the Statute, as enacted by the General Assembly says you must be able to establish by this by a reasonable degree of medical certainty, which is what Mr. Kelley does. That evidence is unrefuted. There is no other evidence in the file that says to the contrary. Nothing. Nothing. And all of the arguments that the defense is going to raise here today, those are the same arguments they presented to Dr. Woodward at his two and half hour deposition in Anderson last spring where we talked extensively with Dr. Woodward about all of these issues that's going to be raised here today. And he stated over and over again: "If he was working in a normal environment, even with an underlying heart condition, would it have caused his demise?" He stated, "No, it would have not." Now, this is the kind of worker we need here in South Carolina. We need somebody that's going to come to work, that's going to work hard, that's going to do their best, and going to serve their -- going to serve

1 the company. And that's what Mr. Kelley did.

2 COMMISSIONER ROCHE: All right. Thank you. Mr.  
3 Abramson.

4 MR. ABRAMSON: May it please the Commission. The  
5 defendants in this case respectfully request that  
6 the appellate panel uphold the single  
7 commissioner's decision in this case denying the  
8 compensability of this claim. As the commission is  
9 aware, this case is controlled by South Carolina  
10 Code Annotated Section 42-1-160 which states in  
11 part that heart attacks, in order to be compensable  
12 in South Carolina, a claimant must establish that  
13 first, that he or she was subjected to unusual or  
14 extraordinary physical exertion in the workplace as  
15 a condition of their employment. And B) If that is  
16 established, then a claimant has to establish a  
17 causal connection between the actual physical  
18 exertion and that exertion causing the actual heart  
19 attack. In this case, we believe the preponderance  
20 of the evidence demonstrates that the claimant was  
21 not exposed to unusual or extraordinary  
22 circumstances on the day of his unfortunate heart  
23 attack. The claimant worked for my client, The  
24 Kroger Company, at a bakery for 12 years. And the  
25 preponderance of the evidence demonstrates that

1  
2 consistently he would, as a baker, work in a warm  
3 environment. Ms. Richey is correct. We did not  
4 have actual temperature readings on the day of his  
5 heart attack within the plant. We did not have  
6 that available. We looked for that; could not  
7 produce that. What we did is we took a sample last  
8 year around the same time of year in the bakery and  
9 it demonstrated at that time that the temperature  
10 was between 86 and 88 degrees, I believe, during  
11 that particular reading. But that burden is on the  
12 claimant to produce evidence of what the  
13 temperature was on that day. We did do some  
14 research of the temperature outside the plant in  
15 the Anderson area on the day of his heart attack  
16 that demonstrated temperatures that were somewhere,  
17 I believe, in the 55 - 60 degrees outside. It was  
18 not unusually hot outside the plant that particular  
19 day, so. We believe --

19 COMMISSIONER BECK: What's the relevance of that?

20 MR. ABRAMSON: Well, because the claimant was trying  
21 -- as a part of his argument was trying to  
22 demonstrate that the heart attack was caused by  
23 exposure to excessive heat, Commissioner. And  
24 we've --

25 COMMISSIONER BECK: Inside?

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MR. ABRAMSON: Inside the plant, yes, sir. But we produced temperature readings outside to demonstrate that -- that the temperature outside the plant was not excessively hot on that particular day. Because obviously from our perspective, if it's an unusually hot day outside, as we can see typically in the summertime here in South Carolina, that can potentially impact the temperature inside of a plant -- potentially. Anyway, from our perspective, the claimant was not doing anything unusual or extraordinary on the day of his heart attack. He was doing his regular job duties. If you examine the tonnage reports on that particular day, they were actually in the 25,000 range, which was really less production wise than what he had been doing up to that point. So we believe that the claimant, unfortunately, has not met his burden of proof in this case. He was doing his regular job duties on the day of his heart attack, despite Ms. Richey's contention. We do not believe that she has met -- or the claimant, rather, has met his particular burden of establishing that the claimant was doing unusual or extraordinary tasks at the time of his heart attack, which in turn caused or led to the heart

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attack. That's the standard under the law -- the case law and the Statute in South Carolina. We believe that the commissioner correctly ruled that this -- that the preponderance of the evidence does not demonstrate that the claimant sustained a compensable heart attack injury in this case. And I'll answer any questions that any of you may have with respect to anything in the record. Thank you.

COMMISSIONER ROCHE: Ms. Richey.

MS. RICHEY: Yes, ma'am, Your Honor. Your Honor, fellow Panel, we are respectfully asking that this Commission to reserve the decision by the single commissioner and remand this case, or in the alternative, to find this case compensable. What's the burden? We must find that the unusual condition of his employment contributed to his death. And there is a medical causal connection. We've met that. The case law in this case, we've cited. There's the Holly case that says by working in a very hot environment, thereby meets the burden that it's extraordinary and unusual. Mr. Kelley worked by an oven that was about 400 degrees. And in a plant -- he worked, as we know, despite what the condition was outside, we know that he worked in a condition that is 88 to 86 degrees.

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COMMISSIONER BECK: Why is that unusual?

MS. RICHEY: Why is that unusual? Actually, Dr. Woodward, in his deposition, he stated that when it gets that hot, it causes your blood to thin out. It causes your blood to be unusual. And that's why he stated in the deposition when you -- because he actually stated when it gets to 90 degrees, that causes the heart to work harder. That causes -- that causes unusual and abnormal conditions in the heart. And then when we presented that May 1st, 2012 reading from Kroger, and we looked at that, Dr. Woodward says, "That sure is hot. That's hot." And he worked there eight to ten to twelve hours a day. Right by that oven. Even Dr. Woodward said it's hot. Even his supervisor said it's hot. Even his co-workers says he worked in the hottest plant -- hottest part of the plant. That's -- that's unrefuted. And that's why if -- if -- if you read Dr. Woodward's deposition, that was one of the things that came out. When we presented that temperature reading, he says, "That's hot. That's very hot." Can you imagine working in that condition, lifting, pushing a thousand pounds, lifting 30 pounds onto an oven, day in and day out, eight to ten hours, twelve hours, increased

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production. That's why Dr. Woodward stated to a reasonable degree of medical certainty, and that's unrefuted. And that's the -- and those -- when you -- and that's why we meet our burden. That's why we meet the appellate burden. That's why we meet the statute burden. Because those conditions alone make it unusual and extraordinary. And we've got the medical causation to support it as well. And therefore, we believe that we meet our burden by preponderance of the evidence. There's no evidence -- there's no evidence in the file, Your Honor, that says otherwise. There's no evidence in the file. No evidence was presented in this case that says otherwise. So even if -- Your Honor, Panel, I respectfully ask that this matter be reversed, this case be found compensable, or at the least, that this matter be remanded.

COMMISSIONER ROCHE: Okay. That concludes the hearing.

(Whereupon, at 1:55 p.m., the hearing in the above-entitled matter was concluded.)

