THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner for the Appellate Panel

Appellate Case No. 2013-001324

Roger Dale Kelley, Appellant / Employee,

v.

The Kroger Company, Respondent

and

Sedgwick CMS Respondent / Carrier

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SC Court of Appeals

INITIAL BRIEF OF APPELLANT

August 2, 2013

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STATEMENT OF THE CASE

Roger Kelley worked for the bakery of The Kroger Company as a roll oven operator. Transcript of Proceeding Before Single Commissioner at 27:17-18, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (August 12, 2012). As part of his job, he rolled heavy racks of dough and loaded trays of dough weighing 30 pounds onto a conveyor belt that fed a hot oven. Transcript of Proceeding Before Single Commissioner at 26:24-28:5; Defense APA at 174, ¶¶2-3. The temperature in the oven was 400 degrees. Transcript of Proceeding Before Single Commissioner at 42:7-24. The oven areas where Mr. Kelley worked averaged 86-88 degrees during early April, based on temperature readings taken in 2012. Defense APA at 181-82. Temperatures could reach over 100 degrees in the oven area during the summer months. Transcript of Proceedings Before Single Commissioner at 42:25- 43:6. In comparison, on the day Mr. Kelley died, the outside temperature ranged from 41-68 degrees. Transcript of Proceedings Before Single Commissioner at 36:2-11. A former sanitation worker said that workers in Mr. Kelley's area would often be wringing wet with sweat. One worker would wring sweat out her shirt and bring an extra one to work. . Claimant APA at 263:8-20, Padget Dep. at 20:8-20, June 27, 2012.

Roger Kelley's supervisor stated that Roger Kelley would spend 95% of his time in his work area. Transcript of Proceeding Before Single Commissioner at 32:1-6. He only received three 10 minute breaks per eight or ten hour day, which included time for lunch. Claimant APA at 265:22- 266:4, Padget Dep. at 23:22-24:4. His supervisor stated that he worked around 10 yards from the opening of the oven. Transcript of Proceeding Before Single Commissioner at 32:11-17. The supervisor described Roger Kelley's work as "very heavy." Transcript of Proceeding Before Single Commissioner at 38:23-25, 39:10-13.

Roger Kelley had preexisting heart problems. He had a bundle branch blockage in his heart. Claimant APA at 58:7 – 59:10; Woodard Dep. at 52:7 – 53:10. Also, Mr. Kelley had high blood pressure and an enlarged heart. Claimant APA at 29:12-15; Woodard Dep. at 24:12-15.

At the end of March, 2009, work geared up for Easter season. Transcript of Proceeding Before Single Commissioner at 41:18-42:6, 44:15-19, 46:17-20; Claimant APA at 260:5-11, 275:1-4; Padget Dep. at 17:5-11, 32:1-4. In the days leading up to his death, Roger Kelley worker four 10 hour days and an almost nine hour day with only three 10 minute breaks per day. Claimant APA at 228, 265:22- 266:4, Padget Dep. at 23:22-24:4. On April 4, 2011, at 1:00 pm, Roger Kelley collapsed in the bakery with a heart attack while loading the hot oven. Transcript of Proceeding Before Single Commissioner at 28:6-8, 32:23 - 33:9; Defense APA at 210:18-19; Bryson Dep. at 9:18-19, April 30, 2012. Mr. Kelley was pronounced dead at the hospital. Defense APA at 165 (Autopsy Report)

Dr. Brett H. Woodard, a board certified forensic pathologist, performed an autopsy at the request of Anderson County Corner. During his deposition, Dr. Woodard testified ***three different times*** that the heat, when combined with the humidity and the heavy work conditions

inside the plant, contributed to Roger Kelley's fatal heart attack and was the proximate cause of Mr. Kelley's death to a reasonable degree of medical certainty. Claimant APA at 1, 63:25 – 64:24, 76:23 – 77:19, 79:9 – 80:4; Woodard Dep. at 63:25 – 64:24, 70:23 – 71:19, 73:9 – 74:4, June 14, 2012. Moreover, Dr. Woodard stated that the heat aggravated Mr. Kelley's underlying heart condition for the worse, and that ***Mr. Kelley would still be alive if he worked in an air conditioned office***. Claimant APA at 76:23 – 77:19, 79:9 – 80:4; Woodard Dep. at 70:23 – 71:19, 73:9 – 74:4. He stated, however, that the ***outside*** temperature of 41-68 degrees on the date of his death would not aggravate or contribute to his death, and that he would probably still be alive if he worked in an air conditioned office. Claimant APA at 53:2-23, Woodard Dep. at 47:2-23.

On July 9, 2012, Lynn Kelley, filed a claim with the Workers' Compensation Commission alleging that her husband, Roger Kelley, suffered a fatal injury arising out of and during the course of his bakery employment with the Respondent/Defendant, The Kroger Company. In his claim, Lynn Kelley states that her husband's death resulted from "work conditions of excessive heat, stress to produce product, hours of labor." Workers' Compensation Claim, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (July 9, 2012). The Respondent denied liability, contending that Roger Kelley's heart attack was not the result of "unusual exertion, strain, or extraordinary condition of employment," and that there was no "causal link" between his heart attack and the bakery work conditions.

On August 12, 2012, the matter was heard before a Single Commissioner. Transcript of Proceeding Before Single Commissioner, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (August 12, 2012). On October 17, 2012, the Single Commissioner filed his order denying

liability on the basis that there was no evidence that his work environment aggravated a pre-existing condition that led to his heart attack, and that his injury did not "arise out of" extraordinary or unusual conditions of his employment. Decision and Order, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (October 17, 2012).

On October 23, 2012, the Appellant Roger Kelley filed a timely notice of appeal. Appellate Panel Decision and Order at 2, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013). A Hearing was held before the Full Commission on March 18, 2013. Appellate Panel Decision and Order at 2-3, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013). The Full Commission affirmed the decision of the Single Commissioner in its entirety. Appellate Panel Decision and Order at 15. In its summary of the testimony of Dr. Woodard, the Full Commission stated "Dr. Woodward would not state to a reasonable degree of medical certainty that the heat was a contributing factor to the claimant's death." Appellate Panel Decision and Order at 6-7, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013). In Finding of Fact 13 the Commission stated the "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 evidence submitted by both parties." Appellate Panel Decision and Order at 14, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013). In Finding of Fact 11 the Commission further stated "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." Appellate Panel Decision and Order at 13, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013). In Conclusion of Law 5, the Commission

stated the "Decedent failed to provide sufficient evidence to show that he suffered from a myocardial infarction as a result of extraordinary or unusual circumstances." Appellate Panel Decision and Order at 14, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013).

On June 12, 2013, Appellant filed a timely notice of Appeal.

ARGUMENT

Standard of Review

The South Carolina Administrative Procedures Act, S.C. Code Ann. Section 1-23-310, et seq. establishes the "substantial evidence" rule as the standard for judicial review of a decision of an administrative agency. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). S.C. Code Ann. Section 1-23-380 of the South Carolina Code governs appeals under the South Carolina Administrative Procedures Act. It provides:

> (5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380 (Supp. 2012).

The South Carolina Administrative Procedure Act (APA) governs appeals from the decisions of the Commission. Under the scope of review established in the APA, this court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but

may reverse or modify the Commission's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Swilling v. Pride Masonry of Gaffney, 401 S.C. 178, 184, 736 S.E.2d 672, 675 (Ct. App. 2012).

"Where the medical evidence conflicts, the findings of fact of the Commission are conclusive." Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 435, 458 S.E.2d 76, 78 (Ct. App. 1995). The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action. Id. at 435, 458 S.E.2d at 78-79. The decision of the Commission may be reversed only if substantial rights of the claimant have been prejudiced because the administrative findings are clearly erroneous in view of the substantial evidence on the record as a whole. Id. at 435, 458 S.E.2d at 79. While a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it. Edwards v. Pettit Constr. Co., 273 S.C. 576, 257 S.E.2d 754 (1979).

I. The Full Commission Erred By Failing to Apply The Heat Related Injury Test In Determining Whether Roger Kelley's Injury Arose Out Of His Employment

In order to be entitled to workers' compensation benefits, an injured worker must show he or she sustained an "injury by accident arising out of and in the course of the employment."

Owings v. Anderson County Sheriff's Dep't, 315 S.C. 297, 299, 433 S.E.2d 869, 871 (1993); S.C. Code Ann. § 42-1-160(A). See also Doe v. South Carolina State Hosp., 285 S.C. 183, 328 S.E.2d 652 (Ct.App.1985) (three criteria for determining whether injury is compensable are (1) accident; (2) arising out of employment; and (3) arising in the course of employment).

Section 42-1-160(A) states that "injury" includes only "injury by accident." The term "accident" is not defined in the Code. One of the most oft-quoted definition of "accident" in the context of a workers' compensation claim is found in Layton v. Hammond-Brown-Jennings Company, 190 S.C. 425, 434, 3 S.E.2d 492, 496 (1939). "The term accident as used in the Workers' Compensation Act has been defined as an unlooked for and untoward event which is not expected or designated by the person who suffers the injury." Also, the courts have defined an "injury by accident" to include not only an injury the means or cause of which is itself an accident, that is, an injury occurring unexpectedly from the operation of internal or subjective conditions without the prior occurrence of any external event of an accidental character. Linnen v. Beaufort County Sheriff's Department, 305 S.C. 341, 408 S.E.2d 248, 250 (Ct. App. 1991). The compensability of a particular event as an accident within the purview of the workers' compensation law is a question of law to be decided by the courts. Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct. App. 1995).

An accident "arises out of" the employment when the employment is a contributing proximate cause. Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960). See also Beam v. State Workmen's Compensation Fund, 261 S.C. 327, 200 S.E.2d 83 (1973) (accident "arises out of" employment when employment is contributing proximate cause). The phrase "arising out of" in the Workers' Compensation Act refers to the origin of the cause of the

accident. Loges v. Mack Trucks, Inc., 308 S.C. 134, 417 S.E.2d 538 (1992). Perhaps the most detailed definition of "arising out of" the employment was quoted by Douglas v. Spartan Mills, Startex Division, 245 S.C. 265, 140 S.E.2d 173 (1965) as follows:

> It [the injury] arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. Id. at 269, 140 S.E.2d at 175.

In other words, (a) the causative danger must be peculiar to the work and not common to the neighborhood; (b) incidental to the character of the business and not independent of the relation of the master and servant; and (c) it need not have been foreseen or expected, but after the event, it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. Crosby v. Wal-Mart Stores, Incorporated, 330 S.C. 489, S.E.2d 253 (Ct. App. 1999). In essence, the workers' compensation claimant would have not suffered injuries, but for his or her employment. Ardis v. Combined Ins. Co., 380 S.C. 313, 669 S.E.2d 628 (Ct. App. 2008). The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact for the Full Commission. Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App.1994). However, where the facts

are undisputed, the question of whether an accident is compensable is a question of law. Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73, 61 S.E.2d 654 (1950).

The general rule is that a heart attack constitutes a compensable injury if the employee can establish two elements: (1) that the employee was subjected to either unusual or extraordinary physical exertion, violence or strain in the course of the employment, or to unusual and extraordinary conditions of his employment; and (2) that a causal connection existed between this exertion, violence, strain, or unusual conditions to the claimant's heart attack. Black v. Barnwell County, 243 S.C. 531, 535-536, 134 S.E.2d 753, 755 (1964). Specifically, Section 42-1-160(C), (G) of the Code provides:

> (C) Stress, mental injuries, heart attacks, strokes, embolisms, or aneurisms arising out of and in the course of employment unaccompanied by physical injury are not considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations including, but not limited to, personnel actions by the employer such as disciplinary actions, work evaluations, transfers, promotions, demotions, salary reviews, or terminations, except when these actions are taken in ***an extraordinary and unusual manner.***
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> . . . .
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> (G) As used in this section, "medical evidence" means expert opinion or testimony stated **to a reasonable degree of medical certainty**, documents, records, or other material that is offered by a licensed health care provider. S.C. Code Ann. § 42-1-160(C) (Supp. 2012) (emphasis added)

Either unexpected strain or unusual and extraordinary conditions resulting in injury are compensable. "A heart attack suffered by an employee constitutes a compensable accident within the meaning of the Workers' Compensation Act if it is induced either by unexpected strain or overexertion in the performance of the duties of his employment or ***by unusual and extraordinary conditions in employment.***" Brown v. La France Industries, 286 S.C. 319, 330,

333 S.E.2d 348, 355 (Ct. App. 1985) (emphasis added). See also Walsh v. U.S. Rubber Co., 238 S.C. 411, 418, 120 S.E.2d 685, 689 (1961) ("if a heart attack results as a consequence of the ***ordinary exertion*** that is required in the performance of the duties of the employment in the ordinary and usual manner, and without any outward untoward event, it is not compensable"); Kearse v. South Carolina Wildlife Resources Dep't, 236 S.C. 540, 545, 11 S.E.2d 183, 186 (1960) (heart attack is not compensable if it results from ***ordinary exertion*** that is required in performance of the duties of the employment.").

Accordingly, to constitute a compensable work-related injury, an employer (or his representative) must establish (1) the claimant was subjected to either unusual or extraordinary physical exertion, violence or strain, or an unusual or extraordinary condition of the employment while in the course of employment; and (2) that a causal connection existed between this exertion, violence, condition, or strain and the claimant's heart attack. The first element is commonly referred to as "legal causation," and the second element as "medical causation." Beard, Poteat, Lamar, Sumwalt, Bluestein, Sullivan, The Law of Workers' Compensation Insurance in South Carolina, Sixth Edition, 2012, p. 78. The showing of this unusual exertion, strain, or condition is deemed to satisfy the "by accident" requirement of Section 42-1-160(A). "When a heart attack is caused or aggravated by extreme temperatures or other extreme exposures, the injury is compensable even if the employee is normally exposed to high temperatures or extreme exposure." Id. at 80.

Generally, in determining whether a heart attack is caused by "unusual and extraordinary conditions," the court compares the work conditions that caused the heart attack to ordinary working conditions ***of that particular employee***. In Shealy v. Aiken County, 341 S.C. 448, 535

S.E.2d 438 (2000), the court noted that courts around the country have adopted three different standards when determining whether a condition is "unusual or extraordinary" under the "heart attack" test. Courts: "(1) compare whether the work conditions were unusual to the employee's normal strains; (2) compare whether the work conditions were unusual compared to the strains of employment in general; or (3) compare whether the work conditions were unusual as compared to the everyday wear and tear of non-employment life." Id. at 458, 535 S.E.2d at 443. The Court noted that South Carolina Courts had adopted the first standard, comparing the employee's normal work conditions with the work conditions at the time of the injury in determining whether the conditions were "unusual or extraordinary." Id.

In order to meet the first requirement under this test, the employee's heart attack must be "induced by unexpected strain or overexertion in the performance of the duties of his employment or by unusual and extraordinary conditions in the employment." The purpose behind the "unusual or extraordinary" rule is difficulty in proof. In Price v. B. F. Shaw Co., 224 S.C. 89, 77 S.E.2d 491 (S.C. 1953), the court stated:

> The "heart cases" where it is usually required to show some special effort as a precipitating cause of the attack, stand in a class by themselves, but they do so because their generalized nature makes it difficult factually to attribute the attack to the work .... These (heart) cases establish the requirement of proof of unusual strain or exertion in heart disease cases, grounded upon the judicially declared presumption that death from heart disease is ordinarily the result of natural physiological causes rather than trauma or particular effort." Id. at 96-97, 77 S.E.2d at 494.
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> In every case decided by this Court, involving benefits under the Workmen's Compensation Act resulting from heart conditions or other physiological bodily conditions in which award of benefits were adjudged, there was some unusual or extraordinary condition attached to the work environment, or unusual exertion and strain in the performance of the work, or of course, a definite traumatic injury; whereas in those cases in which this Court has denied compensation benefits there has been, in each instance, nothing unusual or extraordinary

attached to the work environment, no unusual exertion or strain, and ***where death or disability would have inevitably resulted from the same cause whether the employee was at work or engaged in other pursuits.*** (emphasis added). Id. at 98, 77 S.E.2d at 495.

Also, in Cline v. Nosredna Corp., Inc., 291 S.C. 75, 352 S.E.2d 291 (Ct. App. 1986), the court stated:

> Numerous cases have found a compensable injury where heart problems have resulted from extraordinary duties and an increase in hours worked over a period of time. . . . A heart attack from a preexisting pathology coupled with sudden, unusual exertion or strain is compensable. It is also true, as previously demonstrated, that a heart attack from a preexisting pathology coupled with unusual and extraordinary conditions of employment is also compensable. Id. at 76, 352 S.E.2d at 292.

In cases of heat or cold induced injury and heart attack, however, the "unusual or extraordinary" requirement has been relaxed and South Carolina Courts have compared the work conditions of the employee at the time of the injury to the normal conditions ***of an ordinary person***. The problems of proof in heat induced injuries are not as great, as extreme heat in and of itself can cause injuries. The South Carolina Courts have adopted a different rule for heat induced heart attacks, heat stroke, heat exhaustion, and sunstroke cases. See Floyd v. W. O. Greene Plumbing & Heating Co., 255 S.C. 352, 179 S.E.2d 28 (S.C. 1971); Beard, Poteat, Lamar, Sumwalt, Bluestein, Sullivan, The Law of Workers' Compensation Insurance in South Carolina, Sixth Edition, 2012, p. 198. In Holley v. Owens Corning Fiberglas Corp., 301 S.C. 519, 392 S.E.2d 804 (Ct. App. 1990), aff'd 302 S.C. 518, 397 S.E2d 377 (1990), the Court found

> [W]here the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts.... The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be

> exposed. . . . Other jurisdictions hold, with virtual unanimity, that when the conditions of employment expose the claimant to extreme heat or cold, injuries such as heatstroke, heat exhaustion, heat prostration, sunstroke, freezing, and frostbite are considered accidental.

Centers for Disease and Control Prevention (CDC) noted July 16, 2013:

> Workers who are exposed to extreme heat or work in hot environments may be at risk of heat stress. Exposure to extreme heat can result in occupational illnesses and injuries. Heat stress can result in heat stroke, heat exhaustion, heat cramps, or heat rashes. Heat can also increase the risk of injuries in workers as it may result in sweaty palms, fogged-up safety glasses, and dizziness. Burns may also occur as a result of accidental contact with hot surfaces or steam.
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> Workers at risk of heat stress include outdoor workers and workers in hot environments such as firefighters, bakery workers, farmers, construction workers, miners, boiler room workers, factory workers, and others. Workers at greater risk of heat stress include those who are 65 years of age or older, are overweight, have heart disease or high blood pressure, or take medications that may be affected by extreme heat.

In Sturkie v. Ballenger Corporation,, 268 S.C. 536, 235 S.E.2d 120 (1977), for example, the employee claimed that a heart and respiratory condition was caused by high humidity, fog, high temperatures, cement, dust, and short rain showers that occurred several times a day. The Court noted that "the exacerbation of a pre-existing disease or injury arising out of or in the course of the employment is compensable." Id. at 541, 235 S.E.2d at 122. In finding that the injury was compensable, the court stated "the test 'as to whether the injury or death arose out of or in the course of employment when caused or hastened by atmospheric conditions, is whether, under all circumstances, the employee was exposed to ***a greater risk*** by reason of his employment and duties than was imposed upon ***an ordinary member of the public***.'" Id. at 541-42, 235 S.E.2d at 122-23.

Likewise, in Heirs v. Brunson Construction Co., 221 S.C. 212, 70 S.E.2d 211(1952), the widow claimed that her husband's death from pneumonia was caused by his employer requiring him to work in frigid temperatures while he was suffering from a cold. The Court found that the employer required its workers to work under such conditions, and that the injury could therefore be compensable. Id. at 229, 70 S.E.2d at 219. It held "The test as to whether the injury or death arose out of or in the course of employment when caused or hastened by atmospheric conditions, is whether, under all the circumstances, the employee was exposed to a ***greater risk*** by reason of his employment and duties than was imposed upon ***an ordinary member of the public.***" Id. at 230, 70 S.E.2d at 219 (emphasis added).

Similarly, in Holley v. Owens Corning Fiberglass Corp., 301 S.C. 519, 392 S.E.2d 594 (Ct. App. 1990), the Court, citing North Carolina case of Dillingham v. Yeargin Construction Co., 320 N.C. 499, 358 S.E.2d 380 (1987), stated that there was an exception to the heart attack rule created by injuries resulting from occupational exposure to heat and cold. The Court noted that South Carolina's Workers' Compensation Act was tailored after the North Carolina Act. Id. at 523, 392 S.E.2d at 806. The Court stated the test is "whether employment subjects the workman ***to a greater hazard or risk*** than to which he would otherwise be exposed." Id. at 522-23, 392 S.E.2d at 806. The Court noted

> It is uniformly held that a workman who, while engaged in the performance of his usual duties, is subjected to an extreme and high temperature created by artificial means in a place where he is required to be, and while being subjected to such extreme and high temperature and while undergoing exertion is overcome by such heat as a causal result thereof, sustains an accidental injury. Id. at 521, 392 S.E.2d at 805-806.

This same rule has been applied in other states regardless of whether the source of the heat is natural or artificial. In Madison v. International Paper Co., 598 S.E.2d 196 (N.C. Ct. App. 2004), for example, an employee claimed that his heart attack was caused by heat exposure in working at a paper mill. The employee was required to vacuum lint filters in a pulp drier. Id. at 197. The process of cleaning the dryer took from thirty minutes to an hour. Inside the dryer the temperatures ranged from 220 to 300. With the doors closed, the dryer radiated heat in excess of 90 degrees. Id. at 198. An expert described the conditions as "very unsafe" and opening the doors to the filter like opening "a pizza oven." Id. at 199.

The Court, in finding the injury was compensable under the Workers' Compensation Act, discussed ***both*** "heart attack" cases and cases involving heat induced injuries. Citing Wall v. North Hills Properties, Inc., 125 N.C.App. 357, 361, 481 S.E.2d 303, 306 (1997), the Court stated "[W]here the employment subjects a workman to a special or particular hazard from the elements, such as excessive heat or cold, likely to produce sunstroke or freezing, death or disability resulting from such cause usually comes within the purview of the compensation acts.... The test is whether the employment subjects the workman to a greater hazard or risk than that to which he otherwise would be exposed." Id. at 201 See also Reaves v. Industrial Pump Service, 671 S.E.2d 14, 20 (N.C. Ct. App 2009)(In a case involving heat induced heart attack, "the test ... focuses on whether the hazardous conditions to which the employee was exposed are greater than those conditions encountered ***by the general public.***") (emphasis added)

Likewise, in Southern Express v. Green, 509 S.E.2d 836 (Va. 1999), the claimant received injuries as a result of working in a cooler. Quoting Byrd v. Stonega Coke and Coal Co., 28 S.E.2d 725 (Va. 1943), a case involving a heat induced heart attack caused by pulling coke

and coal out of a furnace for ten hours, the court stated "if injury or death results from, or is hastened by, conditions of employment exposing the employee to hazards to a degree beyond that ***of the public at large***, the injury or death is construed to be accidental within the meaning of the [Act]." Id. at 840. (emphasis added)

In this case, the Commission clearly applied the wrong standard, and required proof that the heat to which Mr. Kelley was exposed on the date of his heart attack was greater than he normally encountered ***in his particular job***. Fact Finding 11 of the Full Commission states "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." Conclusion of Law 5 states "Decedent failed to provide sufficient evidence to show that he suffered from a myocardial infarction as a result of extraordinary or unusual circumstances." Nowhere in any of the findings of fact or law is there any comparison between the conditions of Mr. Kelley and the public at large with regards to heat. It is indisputable that the Full Commission compared the heat conditions of Mr. Kelley on the date of his heart attack to his normal work conditions and not the conditions of the general public. The Commission applied an incorrect legal standard and should therefore be reversed and the case remanded.[1]

1 Appellant also made for repetitive trauma under 42-1-172(D) ***in addition*** to claiming that Mr. Kelley's death was caused by a single incident of heat exposure. Section 42-1-172(D) provides: "A "repetitive trauma injury" is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury." S.C. Code. Ann. § 42-1-172(D) (Supp. 2012). The Commission, for the same reasons, applied the wrong standard in Appellant's repetitive trauma claim and should therefore be reversed.

II. The Full Commission Clearly Erred In Finding That Dr. Brett Kelley Did Not State, To A Reasonable Degree Of Medical Certainty, That Heat Was A Contributing Factor In Roger Kelley's Death.

"The requisite showing for compensability in heart attack cases consists of two distinct parts--medical and legal--each of which relates to causation.... In general, the legal component is established when the law defines what type of exertion or circumstance of employment satisfies the "arising out of" test, while the required medical showing resolves the question of whether the exertion or particular circumstance in fact caused the injury. " South Carolina Second Injury Fund v. Liberty Mutual Insurance Co., 353 S.C. 117, 125-126, 576 S.E.2d 199, 204 (Ct. App. 2003).

It is not necessary for an injury to result from a single, isolated event to be compensable. A prolonged or repeated exposure to heat or cold or other contaminant resulting in an injury is compensable. See Sturkie v. Ballenger Corporation, 268 S.C. 536, 235 S.E.2d 120 (1977) (repeated exposure to dust, fog and heat resulting in heart disease and emphysema). In Sturkie, the Court discussed at length the case of Stawhorn v. Chapman Construction Co., 202 S.C. 43, 24 S.E.2d 116 (1943), in which a painter recovered under the Workers' Compensation Act for repeated exposure to paint dust containing lead. The Court stated: "In the majority of jurisdictions, no slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself considered the compensable accident." Sturkie 268 S.C. at 540, 24 S.E.2d at 122.

"Where a latent or quiescent weakened, but not disabling, condition resulting from disease is by accidental injury in the course and scope of employment aggravated or accelerated or activated, with resulting disability, such disability is compensable." Kearse, 236 S.C. at 547,

11 S.E.2d at 187. "A heart attack suffered by an employee constitutes a compensable accident within the meaning of the Workers' Compensation Act... even though there is a pre-existing pathology that may have been a contributing factor." Brown, 286 S.C. at 330, 333 S.E.2d at 355. See also Sharpe v. Case Produce Co., 329 S.C. 534, 549, 495 S.E.2d 790, 797 (Ct. App. 1997) ("Pre-existing disease or infirmity of the employee does not disqualify a claim under the "arising out of" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought.")

"A condition is compensable ***unless it is due solely to the natural progression*** of a pre-existing condition. It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as it finds him or her." Mullinax, 318 S.C. 437, 458 S.E.2d at 80 (emphasis added). "[A]ggravation of a pre-existing condition is compensable where disability is continued for a longer time, even though no disability would normally have resulted from the injury alone, or even if the aggravation would have caused no injury to an employee who was not afflicted with the condition." Id. (*citing A*rthur B. Custy, The Law of Workmen's Compensation in South Carolina § 9.1 (1977) and Green v. Bennettsville, 197 S.C. 313, 15 S.E.2d 334 (1941)).

"When the testimony of medical experts is relied upon to establish a causal connection between an accident and subsequent disability, the opinion must be at least that the disability "most probably" resulted from the accidental injury." Sharpe, 329 S.C. at 546, 495 S.E.2d at 796. The phrase "more likely than not" has been held to met this standard. Springs Industries v. South Carolina Second Injury Fund, 296 S.C. 359, 362-63, 372 S.E.2d 915, 917 (Ct. App. 1988). Likewise, the phrase "very likely probability," when combined with other testimony, has

been held to satisfy the standard. Id. (citing Cline v. Nosrenda Corporation, Inc., 291 S.C. 75, 352 S.E.2d 291 (Ct. App. 1986)).

However, when "a repetitive trauma injury" is alleged, the standard of proof is heightened. Section 42-1-172 of the South Carolina Code provides:

> (B) An injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury. S.C. Code Ann. § 42-1-172(B) (Supp. 2012)

Section 42-1-172(C) provides:

> (C) As used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician. S.C. Code Ann. § 42-1-172(C) (Supp. 2012)

See also Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012)(Commissioner must make finding by preponderance of evidence of causal connection that is established by medical evidence to a reasonable degree of medical certainty); Murphy v. Owens Corning, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011) (Commission erred by failing to make a specific determination under § 42-1-172(B), but holding affirmed because section substantially complied with in Commission's findings).

In this case, Fact Finding 13 of the Full Commission's Order states "Decedent's death was caused by his preexisting 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 evidence submitted by both parties." Appellate Panel Decision

and Order at 14, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013) (emphasis added).

In summarizing the testimony of Dr. Brett Woodard, the Commission only more forcefully stated that there was ***NO EVIDENCE*** that heat was a contributing factor in the heart attack. The Commission stated "Dr. Woodward would not state to a reasonable degree of medical certainty that the heat was a contributing factor to the claimant's death." Appellate Panel Decision and Order at 6-7, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (June 4, 2013). The cite in the transcript to which it referred, however, referred to temperatures ***outside*** the building. Claimant APA at 52:15–53:23; Woodard Dep. at 46:15-47:23

The court completely ignored the multiple times Dr. Woodard said heat ***within the building*** was a contributing factor. Dr. Woodard would not testify that the ***outside*** temperatures on the day of Mr. Kelley's heart attack, a mean of 59.5 with a high of 76, were a contributing factor. Claimant APA at 53:2-23; Woodard Dep. at 47:2-23 June 14, 2012. Dr. Woodard testified that the ***inside*** temperature where Roger Kelley Worked, when combined with the humidity typical of that time of year would be a contributing factor ***to a reasonable degree of medical certainty.*** Claimant APA at 69:25 – 70:24; Woodard Dep. at 63:25 – 64:24. Later on in his Deposition, Dr. Woodard ***for a second time*** testified ***to a reasonable degree of medical certainty,*** that the temperature of 88 degrees in the area where he worked was a contributing factor in his myocardial infarction and that if he had been in an air conditioned office, "he probably wouldn't have died." Claimant APA at 76:23 – 77:19; Woodard Dep. at 70:23 – 71:19. Still later in his deposition, ***for a third time***, Dr. Woodard testified, ***to a reasonable degree of medical certainty***, that the heat of 88 degrees would "aggravate" his pre-existing heart condition

and "contribute" to his death. Claimant APA at 79:9 – 80:4; Woodard Dep. at 73:9 – 74:4. The Full Commission was clearly in error when it stated there was ***NO EVIDENCE*** that heat was a contributing factor in Roger Kelley's death. It clearly erred in stating in its summary of the evidence "Dr. Woodward would not state to a reasonable degree of medical certainty that the heat was a contributing factor to the claimant's death." Dr. Woodward stated it was a contributing factor three separate times.

Further, it is undisputed that Roger Kelley worked in the hottest part of the bakery. Transcript of Proceedings Before Single Commissioner at 44:8-10, Kelley v. The Kroger Co., W.C.C. File No. 0922072 (August 14, 2012). It is undisputed that the temperature where Mr. Kelley worked would reach over 100 degrees during the summer months. Transcript of Proceedings Before Single Commissioner at 42:25- 43:6. It is undisputed that the oven that Mr. Kelley fed via a 25 foot conveyor belt, reached temperatures of 400 degrees. Transcript of Proceedings Before Single Commissioner at 42:7-18. .

Mr. Kelley often worked 8, 10 or 12 hour days during high production times of the year. Transcript of Proceedings Before Single Commissioner at 44:11-14. The week he died, he pulled 4 ten hour days and almost a 9 hour day. Claimant APA at 228. During this time he received only 3 ten minute breaks, which included his lunch break. Claimant APA at 265:22- 266:4, Padget Dep. at 23:22-24:4, June 27, 2012. During work, Mr. Kelley's and other workers' shirts would be soaked with sweat. Claimant APA at 263:3-22, Padget Dep. at 20:3-22. Dr. Woodard was completely justified in concluding three different times in his deposition that heat was an aggravating factor that contributed to Roger Kelley's death.

Dr. Woodard's testimony clearly met the standard of proof required for a repetitive trauma injury under section 42-1-172. He testified to a reasonable degree of medical certainty ***three times*** that heat was a contributing factor in Mr. Kelley's death. He further testified that the heat aggravated Roger Kelley's heart condition to a reasonable degree of medical certainty. He went further and stated that the temperatures outside the plant were not a contributing factor to Mr. Kelley's death. The Commission clearly erred in failing to make any findings under section 42-1-172 of the South Carolina Code.

Dr. Woodard clearly went beyond the legal standard required in a ***single incident*** heat induced injury case. He didn't say that to a reasonable medical certainty the heat inside the bakery "most probably" contributed to Roger Kelley's death, or that, to a reasonable degree of medical certainty, there was a "very likely probability" that heat inside the bakery contributed to his death. Dr. Woodard said categorically that to a reasonable degree of medical certainty heat inside the bakery ***did*** contribute to Roger Kelly's death.

Considering the record as a whole, a reasonable mind could not reach the same decision as the Commission. The Full Commission clearly erred in concluding there was ***NO EVIDENCE*** that heat was a contributing factor in Roger Kelley's death. The Commission clearly erred in concluding in Fact Finding 13 that Dr. Woodard would not state to a reasonable degree of medical certainty that heat was a contributing factor. Dr. Woodard stated ***it three times***. The Full Commission's decision must be remanded for further proceedings because it clearly erred.

Conclusion

For the reasons stated above, Appellant respectfully requests that this Court reverse the Full Commission and remand this case for further proceedings.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner for the Appellate Panel

Appellate Case No. 2013-001324

Roger Dale Kelley, Appellant / Employee,

v.

The Kroger Company, Respondent

and

Sedgwick CMS Respondent / Carrier

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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Decision and Order of October 17, 2012;
2. Appellate Panel Decision and Order of June 4, 2013;
3. W.C.C. Form 52 Employee Notice of Claim and/or Request for Hearing, Death Case;
4. W.C.C. Form 53 Employer's Answer to Request for Hearing, Death Case;
5. W.C.C. Form 58 Prehearing Briefs and Notice of Witness and Written Medical Reports;
6. Transcript of Single Commissioner Hearing, pages 1 through 49;
7. Transcript of Appellate Panel, pages 1 through 18;
8. Claimant's APA Submissions and Exhibits, pages 1 through 304.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 2, 2013

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PROOF OF SERVICE OF INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

I certify that I have served the Initial Brief and Designation of Matter to be Included in the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on Friday, August 2, 2013, addressed to their attorney of record,

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