

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0922072

Roger Kelley,)
)
 Claimant,)
)
 vs.)
)
 The Kroger Company, Employer,)
 Self-Insured,)
)
 Defendant.)
 _____)

TRANSCRIPT OF PROCEEDINGS

August 14, 2012

This hearing was held before Commissioner Gene McCaskill, reported by Kimberly T. Power, Court Reporter and Notary Public in and for the State of South Carolina; said proceedings were held at the South Carolina Workers' Compensation Commission, 100 North Main Street, Anderson County Court House, Anderson, South Carolina, on Tuesday, August 14, 2012.

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19
20
21
22
23
24
25
26
27

CONTENTS

PAGE

WITNESS: MELONIE BRYSON

Direct Examination by Mr. Abramson	27
Cross-Examination by Ms. Richey	38
Redirect Examination by Mr. Abramson	47

Certificate of Reporter	49
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1 THE COURT: Today's date is August 14, 2012.
2 This is the case of Roger D. Kelley, deceased, vs. The
3 Kroger Company. The Workers' Compensation Commission
4 File Number is 0922072. The claimant is represented by
5 Lola S. Richey and Robert L. Waldrep, Jr. The defendants
6 are represented by M. Chad Abramson. The carrier is --
7 they're self-insured?

8 MR. ABRAMSON: They are self-insured. The TBA
9 is Sedgwick, Your Honor.

10 THE COURT: Sedgwick. All right. The average
11 weekly wage and comp rate, are we in agreement on that?

12 MR. ABRAMSON: Yes, sir, Your Honor.

13 THE COURT: Average weekly wage is \$824.79.
14 Comp rate is \$549.89. This is a denied case, I believe.

15 MR. ABRAMSON: That's correct, Your Honor.

16 THE COURT: This is a denied case. Are there
17 any objections to jurisdiction, venue, or any APA
18 submissions?

19 MS. RICHEY: There is one. There is a
20 statement, an article, in the Defendant's APA on Page 250
21 and 251. It's an article. I haven't had an -- it was
22 basically an article looks like he got off the internet.
23 I didn't have a chance to cross-examine these doctors.
24 Again, we have the treating pathologist that actually did
25 his autopsy. We have his deposition. But this -- this

1 appears to be an article on Page 250 and 251 that he got
2 off the internet. Again, I have not had an opportunity
3 to cross-examine these doctors. We don't even have the
4 full -- full article. It just looks like an excerpt of
5 an article he downloaded. I do have an objection to
6 that. I will note my objections to Page 250 and 251 of
7 the Defendant's APAs.

8 THE COURT: You want to speak to that, Chad?

9 MR. ABRAMSON: Yes, sir, Your Honor. This is
10 simply information that's taken from two different Web
11 sites, PDR Health Physician's Desk Reference talking
12 about the risks of not taking cholesterol medication.
13 Bottom line is there will be evidence presented in the
14 medical records that you will review today that
15 Mr. Kelley had not been taking his cholesterol medication
16 three years prior to the heart attack. That's why we
17 think it is relevant and gives you an explanation of the
18 medical risks of not doing that. That's where we think
19 it is relevant evidence, and we would ask that you allow
20 it in.

21 As you know, this is an administrative
22 proceeding. The rules of evidence are relaxed.
23 Technically, they don't apply. So we would ask that you
24 would be liberal and allow it to come in and give it
25 whatever weight you would like. Same thing with Page

1 251. This is taken from the Mayo Clinic's Web site.
2 Obviously a reputable clinic. It explains what a bundle
3 branch block is. Clearly the medical evidence that you
4 will review today, the APAs, demonstrate that he had a
5 bundle branch block which is a pre-existing condition
6 which made him more susceptible to have a heart attack.

7 So we would ask again that you allow these
8 documents which were timely submitted to claimant's
9 attorneys be allowed in evidence.

10 THE COURT: Ms. Richey, anything else?

11 MS. RICHEY: The only problem I have with that
12 is if he's had the ample opportunity to take the
13 deposition of Dr. Campbell, Dr. Loudermilk, also
14 Cornerstone Family Practice which was his treating family
15 doctors and treating orthopedic, the treating doctors
16 that saw him as well as Dr. Woodard that was addressed at
17 the deposition in June of this year. So, Your Honor,
18 it's as if he pulls something off the Web site and it
19 wasn't -- we don't have the full excerpt.

20 Again, we haven't had the opportunity to
21 cross-examine this medical statement. I don't even say
22 it's a medical statement because, again, it's not stated
23 to a reasonable degree of medical certainty. It's
24 basically something he just downloaded off of the
25 internet. And no offense to the internet, but it's not

1 from a medical treatise. It would be different if it's
2 from a treatise, but, again, it's something he got from
3 the internet.

4 So, again, we've already got the deposition
5 testimony of Dr. Woodard in this case. He is the
6 pathologist. He had an opportunity to question him
7 specifically about this whole blockage issue and the
8 whole cholesterol issue. And for him to now come in and
9 put these two articles that basically I haven't had an
10 opportunity to cross-examine, I just don't think it's
11 fair. And if you do allow it, I think it should be
12 little, if any, weight given to that evidence given that
13 we actually have the deposition, sworn testimony, of
14 Dr. Woodard who is already addressing the very issues
15 he's trying to put forth here.

16 MR. ABRAMSON: I would just say it's pretty
17 benign. One is from the Mayo Clinic. I think that's a
18 reputable Web site. All it is, is a definition of a
19 bundle branch block. You may know what that is. I don't
20 know if you have knowledge of that particular ailment.
21 That's why it's submitted, just for your edification and
22 for the entire Commission's edification and any appellate
23 court, God forbid we go that far. Same thing with the
24 article related to the risks of one not taking -- one who
25 has elevated cholesterol not taking the medication.

1 Again, the preponderance of the medical
2 evidence demonstrates he had, A, a bundle branch block
3 and, B, he wasn't taking his cholesterol medication.
4 It's just for your edification. As a part of the record,
5 we think it's harmless. Those questions were raised in
6 Dr. Woodward's deposition. He's aware of it. So, again,
7 I don't think it's prejudicial to the claimant. I'm not
8 quite sure why they're so upset about it, but we would
9 respectfully ask that you allow it into the record.

10 THE COURT: Do you believe your client is
11 prejudiced by it?

12 MS. RICHEY: Well, I -- the fear is -- the
13 only thing is, Your Honor, again, we don't have the full
14 article. We only have excerpts or at least one page of
15 it. I believe he's prejudiced by it just because I
16 haven't had an opportunity to cross-examine -- I don't
17 even know if it was written by a doctor, so...

18 THE COURT: Well, if you feel that strongly
19 about it, Ms. Richey, we're going to take it out.

20 MR. ABRAMSON: Okay. Well, let me ask you
21 this before you rule, if I may. Do you deny that he had
22 a bundle branch block at the time of his heart attack?
23 Do you deny that?

24 MS. RICHEY: No. What I'm saying --

25 MR. ABRAMSON: Do you deny that he was not

1 taking his cholesterol medication at the time of his
2 heart attack?

3 MS. RICHEY: No. What I am going to state is
4 we had an opportunity to take the deposition of
5 Dr. Campbell. We also took the deposition of Dr. Woodard
6 which is who examined him, who treated him, who could
7 have given us good testimony about this. Not some
8 internet article. No offense to the internet. But,
9 again, it's an internet article. We don't even know if
10 it's written by a doctor. We don't know who wrote it.

11 THE COURT: She feels very strong about it,
12 she thinks it will prejudiced her client, and she makes
13 good points. I understand where you're coming from. But
14 given that she feels so strongly about it, we're going to
15 take it out.

16 Chad, do you have any objections?

17 MR. ABRAMSON: Yeah. I mean, I object to them
18 coming out. I mean, I --

19 THE COURT: I understand that. But I mean do
20 you have any other objections to anything other than
21 this?

22 MR. ABRAMSON: Well, I'm not going to waste
23 your time with my objection to Eva Padget's testimony
24 coming in. The deposition wasn't timely noticed. I told
25 Lola that. If we're going to be nitpicky --

1 MS. RICHEY: That's why we pulled the 50.
2 That's why we pulled the 50 last time so that he will
3 have an opportunity. That's why we pulled it because we
4 couldn't find --

5 MR. ABRAMSON: Listen, I'm not going to sit
6 here and waste your time.

7 MS. RICHEY: Okay. Let's go.

8 MR. ABRAMSON: Let's go on the record because
9 this is ridiculous.

10 MS. RICHEY: We're ready. We're ready.

11 MR. ABRAMSON: We've wasted enough time in
12 this case. They haven't met their burden of proof.
13 You'll see that when you review the medical records.

14 THE COURT: The Commission file becomes a part
15 of the record with the exception of self-serving
16 declarations and unstipulated medical reports.

17 Ms. Richey, how about state your client's
18 position for the record, please.

19 MS. RICHEY: Yes, sir, Your Honor. May it
20 please the Court. My name is Lola Richey. I'm here
21 representing the interest of Roger Dale Kelley, Sr. who
22 unfortunately died April 4, 2009 while loading bread pans
23 there at Kroger bakery by the oven. The whole issue here
24 today is whether or not his heart attack is a compensable
25 injury under the Act. We believe under the Act,

1 particularly under 42 -- Section 42-9-35 as well as the
2 appellate court opinions here in South Carolina of Holly
3 vs. Owens Corning Fiberglas found on Page 281 and 283 of
4 the Claimant's APAs, and Sweet vs. Marlboro Cotton Mills
5 found at Page 284 and 285 of the Claimant's APAs, and
6 also Dillingham vs. Yeargin Construction found at Page
7 286 and 288 of the Claimant's APAs will prove that in
8 this case Mr. Kelley worked in a very hot environment.
9 He worked in a very heavy environment. And when we
10 took -- and sometimes temperature readings by the
11 defendant's case own testimony -- because we had asked
12 them on numerous occasions would we have an opportunity
13 to get a temperature reading in the plant. We were able
14 to get one temperature reading that we got. It was taken
15 May 1st of 2012, and the reading by the oven -- and this
16 is looking at Page 181 of the Defendant's APAs. Right
17 around the oven and the bread area where Mr. Kelley
18 worked at, it was 88 degrees. That's with swamp coolers,
19 fans, water. It was 88 degrees. And according to
20 Dr. Brett H. Woodard, a treating pathologist who
21 actually -- who actually did the autopsy of Mr. Kelley,
22 he says that that is extremely hot.

23 And then we believe that -- because when you
24 take -- and according basically -- I'll step back. We
25 took the deposition of Dr. Brett H. Woodard, and he

1 stated in his deposition -- and I'm looking at Page 1 of
2 our APAs. We took his deposition in June of 2012 and
3 then we also did a follow-up question. We asked him,
4 Doctor, after taking a look at the number of different
5 reports, including the coronary -- your coroner's office
6 investigation, the toxicology reports, the autopsy and
7 other deposition, he stated on July 13th of 2012, he
8 stated the combined effects of the temperature, the work,
9 the load, as well as his underlying heart disease led to
10 his death.

11 Your Honor, when we took doctor -- when we
12 took Dr. Woodard's deposition, he stated on a number of
13 different occasions that you have somebody that is doing
14 a very heavy job like Mr. Woodard -- Mr. Kelley was
15 doing, that that will cause the blood flow that should be
16 going to the heart to have to go to other parts of his
17 body, and I'm looking at Page 28 and 29 of the Claimant's
18 APAs, that that will take away blood flow from the heart
19 which will make the heart work faster.

20 And that's why he went on to state when we
21 asked the doctor after we gave him a number of different
22 items and we asked him to look at everything, that's why
23 on Page 31 and 32 of the defendant's -- excuse me, of
24 Dr. Woodard's deposition he stated to a reasonable degree
25 of medical certainty that when you looked at the combined

1 effects of his work, the heat, and the type of job that
2 he did as well as his underlying condition, that all
3 combined to cause his death.

4 Your Honor, Mr. Kelley was -- I mean, he
5 wasn't -- he didn't drink, he didn't smoke, he really
6 didn't have -- he really didn't even have any significant
7 health issues because looking at Page 122 of the
8 Defendant's APAs, when asked about the -- as you can see
9 from Page 122 of the Defendant's APAs, and this was taken
10 in 2003 which when they go on the record they will say,
11 well, he had high cholesterol and all kinds of other
12 problems. But looking at their own evidence on Page 122,
13 his heart was normal. His cardiac silhouette was normal.
14 And that's Page 122.

15 On Page 134 of the Defendant's APAs when asked
16 about his siblings, he still has four other brothers and
17 sisters that are still living and they are all healthy
18 and he does not drink, he does not smoke, and he doesn't
19 use any illicit drugs. And that's Page 134 of the
20 Defendant's APAs. And, again, they reference the normal
21 cardiac silhouette. So his chest at that point was doing
22 just fine.

23 And, plus, his blood pressure wasn't up
24 because at Page 139 of the Defendant's APAs, his blood
25 pressure was 110 over 80. So he didn't have any high

1 blood pressure. And according to Page 140 of the
2 Defendant's APAs, he was at overall good health, low
3 blood pressure.

4 So, you know, the fact is they're saying -- as
5 we keep going on -- so he had no hypertension, he didn't
6 smoke, he didn't drink. But what we do have somebody
7 that will come in here and the parties in this case will
8 testify that he worked in a very hot environment. Ms.
9 Bryson who is going to be testifying shortly, she stated
10 in her deposition on page -- as well as in the
11 defendant's -- in the Claimant's APAs on Page 211 and 213
12 of our APAs that Mr. Kelley worked -- he worked a very
13 hard job, he worked a heavy job, and basically that heavy
14 work that he did led -- because he ended up having
15 several hernias because of that.

16 As far as the deposition transcript of
17 Dr. Woodard, which is what we're going to be relying on
18 pretty heavily, if you look at Page 69 of the Claimant's
19 APAs which is Page 61, he was -- he was asked about that
20 because we got the temperature reading in the plant which
21 was about 81 degrees and basically if you look at Page 69
22 of the APAs, that actually -- if you work in an
23 environment which is what his temperature was at, I mean,
24 the reading in the plant that we got was at least 88.
25 And sometimes I think Melonie in her deposition --

1 Ms. Bryson will tell you it was even sometimes hotter
2 than that, that it actually affected the blood and the
3 blood flow. And that's what Dr. Woodard stated in his
4 deposition, and that's on Page 69 of our APAs.

5 So, Your Honor, when you look at the entire
6 record and when you take a look at all the evidence in
7 this case, you will see that the evidence amply supports
8 that Mr. Kelley's job contributed to his death. And
9 that's just not our testimony. That's the testimony of
10 the treating pathologist who states this as to a
11 reasonable degree of medical certainty. He stated this
12 in his deposition and he stated it again on July 13,
13 2012. So, Your Honor, and that testimony is unrefuted.

14 The issue is -- that the defense is going to
15 raise is, well, did the -- no, it wasn't just one thing
16 that caused his death. It wasn't just -- it wasn't just
17 the high cholesterol. It wasn't that one thing because
18 Dr. Woodard will state that if he was working a sitdown
19 job and he had high cholesterol, that may not have caused
20 his death. But it was the combined effects of it. It
21 was the high temperatures, it was the heavy work, and it
22 was pre-existing. When you combine all that, that's why
23 Dr. Woodard states to a reasonable degree of medical
24 certainty that led to his demise.

25 THE COURT: Thank you. Mr. Abramson.

1 MR. ABRAMSON: Thank you, Commissioner. May
2 it please the Commission. Again, with all due respect to
3 Ms. Richey, I think that she is failing to understand
4 what the law is in South Carolina when it comes to
5 whether or not a heart attack claim is a compensable
6 injury by accident under our existing law.

7 First of all, I believe I wrote down that
8 Ms. Richey said that Mr. Kelley had, quote, no
9 significant health issues. I think that's what she said,
10 Commissioner. I don't want to waste any more time than
11 we need to by asking the court reporter to, you know,
12 read back what she said. But with all due respect, this
13 is a man who had a significant pre-existing problem with
14 his heart which is clearly outlined in the medical
15 evidence that you will review today.

16 Beginning at Page 133 of the Defendant's APAs,
17 this man was diagnosed under assessment on 2/6/03, he was
18 diagnosed with hyperlipidemia. He was diagnosed with an
19 incomplete right bundle branch block. A bundle branch
20 block is a condition in which there is a delay or
21 obstruction along the pathway that electrical impulses in
22 the heart travel to make a heart beat. Okay. An EKG
23 that was taken as far back as 2/6/03 indicates -- this is
24 at Page 134 of the Defendant's APAs. The EKG shows a
25 sinus rhythm with an incomplete right bundle branch

1 block. This is a pre-existing condition in the heart.
2 So to represent that he had no significant health issues
3 is simply not true.

4 Also at Page 134, it demonstrates,
5 Commissioner, that the claimant's mother died at age 47
6 because of a myocardial infarction. It's right there in
7 the record. The claimant's father died at age 51 due to
8 a myocardial infarction. That's a heart attack. The
9 claimant was 54 when he died of a heart attack.

10 Furthermore, I think she mentioned that the
11 claimant's siblings were in good health. Commissioner,
12 at Page 139, with all due respect to Ms. Richey, it's in
13 black and white. It says five siblings, all but one
14 sister has heart problems. She tried to represent that
15 this man didn't have a significant -- have significant
16 pre-existing problems with his heart is just not
17 factually accurate based on the clear evidence that you
18 will find in the record today.

19 Again, if you look at doctor -- if you look at
20 Page 165, the autopsy report, the cause of death, acute
21 myocardial infarction due to atherosclerosis coronary
22 artery disease. The man had pre-existing heart disease.
23 He was within the course and scope of his employment when
24 he suffered a heart attack. In order for the heart
25 attack to be compensable under the existing law in South

1 Carolina, the claimant has to prove that he was -- he or
2 she was engaged in unusual or extraordinary circumstances
3 at the time that the heart attack occurred and the
4 unusual or extraordinary circumstances led to the heart
5 attack. I've briefed this for you. You can read the
6 law. I'm not going to waste your time by citing the
7 cases. They're spelled out in my detailed memorandum --
8 two different memorandums of law that address the issue
9 and differentiate the Holly case that Ms. Richey relies
10 upon.

11 The second theory that the claimant is trying
12 to utilize today to try to prove that the heart attack is
13 compensable was that he was exposed to excessive heat
14 which led to the heart attack, i.e., some signs that he
15 was -- had a heatstroke or heat exhaustion which led to
16 the heart attack. Commissioner, if you look at
17 Dr. Woodard's deposition transcript at Page 74, it states
18 beginning at Line 8, quote, "But, again, you don't --
19 you're -- this is just conjecture because you don't know
20 what the temperature was inside the plant, correct?"
21 Dr. Woodard says, "That's correct."

22 My next question, "The autopsy report that
23 you've seen, is there anything in there that indicate
24 that he died due to" -- and then the doctor interrupted
25 me and his answer was, "He did not have," and my question

1 was, "Excessive heat exposure?" And the doctor states,
2 this is his testimony, "He did not have a heatstroke or
3 heat exhaustion. That was not a -- not an event that,
4 you know, was in his demise. And obviously at least in
5 looking at those pictures" -- and we'll show you today
6 pictures inside the plant where he was working that are
7 in our APAs that Ms. Bryson, the deceased's former
8 supervisor, will testify. Looking at those pictures that
9 we showed Dr. Woodard, it looks like this bakery is
10 pretty open and he's working at night and it's
11 actually -- if it was going turkey -- if I was going
12 turkey hunting that day, I would want my long johns
13 because you'd be a little chilly, et cetera, et cetera.

14 The doctor does not say to a reasonable degree
15 of medical certainty that the heart attack was caused by,
16 A, unusual or extraordinary circumstances within the
17 course and scope of his employment or, B, exposure to
18 excessive heat. He does say that the death was caused by
19 atherosclerosis coronary artery disease. He does say
20 that, you know, he was within the course and scope of
21 employment, he was doing work that elevated his heart.
22 That's not what the law requires in order for a heart
23 attack to be compensable. If I died right now in the
24 midst of this hearing, that wouldn't be compensable under
25 our law. I'm not doing anything unusual or

1 extraordinary. I'm doing my regular job duties.

2 So the point is the preponderance of the
3 evidence in this case clearly and unequivocally
4 demonstrates that, A, he was not doing anything unusual
5 or extraordinary at the time that he suffered the
6 unfortunate heart attack that led to his demise and, B,
7 there is no evidence to demonstrate that he was subjected
8 to excessive heat on the day of his heart attack which
9 led to that heart attack, which was the proximate cause
10 of that heart attack. Therefore, we believe that the
11 claimant has not met his burden of proof to demonstrate
12 that he has sustained a compensable heart attack injury
13 which would entitle him to benefits.

14 THE COURT: Anything else, Ms. Richey?

15 MS. RICHEY: Your Honor, again, if you look at
16 Page 36 and 37 on the Claimant's APAs, which is Page 31
17 and 32 of Dr. Woodard's deposition, "Okay. And this is
18 your opinion to a reasonable degree of medical certainty
19 after reviewing the Anderson County coroner's office
20 death investigation, after reviewing a copy of the
21 toxicology report and also a copy of the autopsy that you
22 prepared at the request of the Anderson County office --
23 Anderson coroner's office and also after reviewing the
24 documents that have been presented here today, your
25 opinion to a reasonable degree of medical certainty that

1 his job aggravated that underlying symptoms to cause his
2 demise?"

3 That -- the answer: "The physical work
4 required of him at the workplace aggravated his
5 underlying symptoms and ultimately contributed and -- and
6 contributed to the events leading to his death."

7 "Is that to a reasonable degree of medical
8 certainty?"

9 "That's correct."

10 Your Honor, we have Section 42-9-35 that was
11 passed by our fine General Assembly, that's the law in
12 the State of South Carolina. That's 42-9-35. It may not
13 have caused it, but that -- the combined effects of
14 everything aggravated it, and this is what Dr. Woodard
15 stated to a reasonable degree of medical certainty. I'm
16 not making this stuff up.

17 So that's black and white. That's the law of
18 the state. And I'm sure you're going -- you'll have an
19 opportunity to give your rendition of the law later on.
20 But that's -- that's the opinion of the treating
21 pathologist that did the autopsy. He stated that to a
22 reasonable degree of medical certainty. And this is just
23 one place that he stated it. He stated it a number of
24 different places in his deposition. I can go over the
25 number of different places which I'm sure you will have

1 an opportunity to read, but this is just not one. So the
2 fact that he's saying that it was not caused, no, the
3 doctor stated that. It wasn't caused. But the combined
4 effects of everything is what led to his death. Not just
5 one thing, but the combined effects of it.

6 MR. ABRAMSON: I would just reiterate,
7 Commissioner, with all due respect to Ms. Richey, that's
8 not the law in South Carolina. If that was the case,
9 anyone that was on the job doing their regular job duties
10 that included any kind of physical exertion and then they
11 suffered a heart attack, that would be a compensable
12 injury and you would have heart attack cases left and
13 right that would be in front of you. That -- she is
14 wrong about what the law says in South Carolina. They've
15 got to prove that the heart attack was caused by unusual
16 or extraordinary circumstances or that the heart attack
17 was caused by exposure to excessive heat, something
18 unusual or extraordinary. That is not what we have here
19 today.

20 So with all due respect to Ms. Richey, they
21 have not met their burden of proof and I'll leave it to
22 you to interpret the evidence that's put in front of you
23 today and the applicable law. And I'll leave it at that.
24 Thank you.

25 MS. RICHEY: And, again, we took the

1 deposition of Ms. Padget and she stated numerous times
2 throughout her deposition, "It's hot in there. It's hot
3 in there. It's hot in there." And even when Ms. Bryson
4 comes in -- because we're going to talk to her about her
5 deposition -- "It's hot in there. It was hot in there."
6 And when we tried to get in there to get our own
7 temperature reading, they wouldn't let us. But the
8 reading we do have, their own reading says it was 88
9 degrees in the area that he worked in. So it was hot in
10 there and sometimes it even got hotter.

11 THE COURT: Anything else?

12 MR. ABRAMSON: It's a bakery. I mean, it was
13 hot. We admit that. Again, they haven't met their
14 burden to demonstrate that the heart attack was caused by
15 exposure to excessive heat. So, again, I don't have
16 anything else, Commissioner. If you're ready for
17 testimony, I'll see if Ms. Bryson is available.

18 THE COURT: Anything else, Ms. Richey?

19 MS. RICHEY: Well, I just add -- I don't mean
20 to belabor the point. We put this in our brief. But the
21 case law here in South Carolina is very clear, most
22 people that have a heart attack have underlying
23 pre-existing heart conditions. That's what our appellate
24 court notes. They said most of the people that have
25 these heart conditions that we find compensable, most of

1 them have pre-existing problems. That's what we put in
2 there in our memorandum. That's what we -- that's why we
3 put the treatise in there. We want to let you read it.
4 Most of them have it like Mr. Kelley, he had it.

5 But that's why -- and when this -- this
6 indication about, well, everybody will come in here and
7 have a heart attack, no, the statute is very clear and
8 our General Assembly made it very clear, you better state
9 to a reasonable degree of medical certainty, you better
10 have medical certification. We've got it right here.
11 We've got it in his deposition. We've got it in his
12 statement. We've met our burden, Your Honor.

13 MR. ABRAMSON: I thought Ms. Richey said
14 earlier, quote, No significant health issues before the
15 heart attack occurred. So I'm kind of confused here.
16 But, anyway, we'll move on and call our first witness if
17 you're ready.

18 MS. RICHEY: Well, I'm just -- I'm sorry. I
19 don't mean to belabor the point and I don't mean to --
20 because we have his family doctor records here too and we
21 have several records in here where it's normal heart,
22 where Dr. Loudermilk looked at him. Just so you don't
23 think I'm concocting this stuff and bringing it out of
24 thin air, Page 152 of our APAs. When they looked at his
25 medical history, looks like everything was all right.

1 Looks like everything was checking out fine. Page 156 of
2 the APAs. Physical exam, normal, normal, normal.
3 Cardiovascular chest, normal. Chest, abdomen, normal,
4 normal. Page 156 of the APAs. And this report was in
5 2006 -- June 15th of 2006. That's just one of many
6 places in the APAs from the treating physicians that says
7 that this man was just a hard worker. He was doing his
8 job. He was going to work.

9 THE COURT: Anything else?

10 MR. ABRAMSON: No, sir, Your Honor. I've said
11 enough. I just respectfully request that you please pay
12 close exception -- or attention, rather, to my APAs which
13 spell out the significant pre-existing problems with this
14 gentleman's heart before his unfortunate heart attack.

15 THE COURT: Ms. Richey, do you have any
16 witnesses?

17 MS. RICHEY: No, sir, Your Honor. We're going
18 to be relying on our APAs and the deposition testimony.

19 THE COURT: And that's the claimant's case?

20 MS. RICHEY: Yes, Your Honor.

21 THE COURT: All right. Mr. Abramson, you have
22 a witness?

23 MR. ABRAMSON: Yes, sir. The defendants would
24 like to call Melonie Bryson to the stand.

25 THE COURT: I'm going to swear you in in a

1 minute. I've got a couple of requests for you. One of
2 them is that the acoustics in this room are pretty good,
3 so that's a good thing. But you will need to speak
4 loudly enough so that the attorneys, this young lady who
5 is making the record, and I can all hear you.

6 THE WITNESS: Sure.

7 THE COURT: Okay. And the other is if you are
8 asked a yes or no question by any of the attorneys, to
9 please answer with a yes or no.

10 THE WITNESS: Yes.

11 THE COURT: Uh-huh and unh-unh sometimes get
12 misunderstood. And if you shake or not your head,
13 especially in this configuration, she's going to have to
14 turn to look and then she has to enter that into the
15 record and that slows everything down. So yes or no
16 question, please answer with yes or no.

17 (MELONIE BRYSON, being duly sworn to tell the
18 whole truth and nothing but the truth, testified as
19 follows:)

20 THE COURT: Please state and spell your full
21 name for the record.

22 THE WITNESS: Melonie Marie Bryson.
23 M-E-L-O-N-I-E, B-R-Y-S-O-N.

24 THE COURT: All right. Mr. Abramson.

25 MR. ABRAMSON: Thank you, Commissioner.

DIRECT EXAMINATION

BY MR. ABRAMSON:

Q. Ms. Bryson, where are you employed?

A. Kroger Anderson bakery.

Q. And what is your position with the bakery?

A. Production supervisor.

Q. And how long have you worked there?

A. Twenty-one -- 21 years.

Q. And what was your relationship with Roger Kelley?

A. I was his supervisor.

Q. And how long did you supervise him?

A. Roughly five years, six years estimated.

Q. And were you working with him on April 4, 2009?

A. Yes.

Q. And what was Mr. Kelley's job title?

A. Oven operator.

Q. How long had he been employed with the Kroger bakery?

A. I believe since 1989.

Q. And how long had he been a roll oven operator?

A. Around 12 years.

Q. And what did his regular job duties as a roll oven operator require him to do on a daily basis?

1 A. The oven loader basically helped load the
2 oven. He pulled product racks. He changed recipes on
3 the oven, set up the depanner for the product to come out
4 of the pans, housekeeping. Anything that was asked
5 mostly.

6 Q. Where was Mr. Kelley in the bakery when his
7 heart attack occurred?

8 A. He was loading the oven.

9 MR. ABRAMSON: May I approach the witness,
10 Your Honor?

11 THE COURT: Certainly.

12 BY MR. ABRAMSON:

13 Q. I am -- I have some photographs from inside
14 the plant which are contained in my APA submissions.

15 MR. ABRAMSON: Commissioner, it looks like
16 it's Page 243.

17 BY MR. ABRAMSON:

18 Q. In this first photograph, what is that a
19 photograph of, Melonie?

20 A. They are loading the oven.

21 Q. The gentlemen that are in this picture, were
22 they working in the same capacity as Mr. Kelley did?

23 A. Yes.

24 Q. So they would -- what would they -- physically
25 what are they doing in this photograph?

1 A. They basically unload the rack from the top
2 down and feed onto this empty conveyor which transfers to
3 the apron which then a rake comes in and pushes all the
4 pans into the oven.

5 Q. So when they are unloading these trays, where
6 do they go? Can you explain in this photograph where the
7 trays actually go and where the oven is located in this
8 photograph?

9 A. Sure. Basically as they are unloading the
10 pans onto the empty conveyor, it comes around, turns and
11 makes a T transfer to maybe three or four other conveyors
12 before it hits this table top chain conveyor that has a
13 huge rack that comes around and pushes the pans in which
14 is a good, I don't know, 25, 30 feet away from where they
15 are standing.

16 Q. So was this the area where Mr. Kelley was on
17 the day that he suffered the heart attack?

18 A. Yeah, it was in here. Yes.

19 Q. Right in this area; is that right?

20 A. Yes, sir.

21 Q. So he was not adjacent to the oven; is that
22 right? He wasn't right beside the oven; is that correct?

23 A. No.

24 Q. The next photograph demonstrates the bakery
25 itself; is that right?

1 A. Yes. That's correct.

2 Q. In the area, again, where he was working?

3 A. Yes.

4 Q. Or where he would typically work as an oven
5 operator?

6 A. Yes.

7 Q. And what is this thing projecting down from
8 the ceiling in the photograph?

9 A. A fan.

10 Q. So would that fan be on --

11 A. Yes.

12 Q. -- most of the time?

13 A. Yes.

14 Q. All the time?

15 A. Most of the time. The second shift operators
16 usually cut it off when they're done with production for
17 the day.

18 Q. The next photograph, Photograph 3, what does
19 this demonstrate?

20 A. That is, again, another section of the
21 conveyor system that transfers the pans to the apron
22 which then goes into the tunnel oven.

23 Q. So is the oven -- where is the oven in this
24 photograph?

25 A. The big white thing.

1 Q. Where is it?

2 A. There. (Witness indicates.)

3 MR. ABRAMSON: Commissioner, can you see where
4 she's pointing?

5 THE COURT: Uh-huh.

6 BY MR. ABRAMSON:

7 Q. So that's down the end of this conveyor; is
8 that right?

9 A. Yes. That's, like I said, at least 25,
10 30 feet.

11 Q. And this next photograph is just showing the
12 bread going in?

13 A. Yes, the transfer conveyors.

14 Q. Now, Photograph 6, what is this large item
15 hanging down?

16 A. That is what we call our swamp coolers or
17 Bessamaire air cooler. It's another fan.

18 Q. It's just a fan that blows cool air?

19 A. Yes.

20 Q. So my question to you, Ms. Bryson, is, did
21 Mr. Kelley work right beside the ovens as a typical part
22 of his job duties? On a daily basis, how often would he
23 be right beside the ovens?

24 A. You're talking at the in-feed side or the
25 loading side?

1 Q. I'm talking about the loading side that you
2 just demonstrated -- that was demonstrated in that
3 photograph. How often would he be right there back the
4 actual oven itself?

5 A. He would load about 95 percent of his time
6 right there in that area.

7 Q. The area that was depicted in the photograph?

8 A. That is correct. Yes.

9 Q. At least -- you don't know the approximate --

10 A. No.

11 Q. -- feet from where he was to where the actual
12 oven was, is that right, the mouth of the oven?

13 A. Correct. Yes.

14 Q. But it was at least 25, 30 feet?

15 A. I'm guessing it was that far.

16 Q. It could be farther away?

17 A. It could be further, yes.

18 Q. But the bottom line was on the day of his
19 heart attack, he was not right beside the oven loading
20 bread -- loading these pans right directly into the oven;
21 is that right?

22 A. No, he was not.

23 Q. And what exactly was Mr. Kelley doing at the
24 time that the heart attack occurred?

25 A. I believe he was proceeding to unload a rack,

1 load -- load the oven.

2 Q. Which was depicted by the --

3 A. Yes.

4 Q. -- two employees in the photograph; is that
5 right?

6 A. Yes.

7 Q. That's where he was found when the heart
8 attack occurred?

9 A. Yes.

10 Q. Was there anything unusual about that activity
11 that he was doing?

12 A. No.

13 Q. Was that a part of his normal job duties?

14 A. Yes.

15 Q. So he was performing his regular job duties at
16 the time that the heart attack occurred --

17 A. Yes.

18 Q. -- is that right?

19 A. Yes.

20 Q. Had Mr. Kelley been performing the same type
21 job duties as a roll oven operator consistently since
22 1997 up until the time of his heart attack?

23 A. Yes.

24 Q. Did his job duties differ any during that time
25 period?

1 A. No.

2 Q. Now, as far as the production is concerned,
3 was it typical that at certain times of the year
4 production would increase?

5 A. Yes.

6 Q. And when did those time periods typically
7 occur?

8 A. Usually before a holiday or around a holiday.

9 Q. Okay. And --

10 A. And we also have distributions throughout the
11 year where a product goes on sale and they run an add in
12 our sales paper.

13 Q. So during the 12 years Mr. Kelley worked as a
14 roll oven operator, was he experienced in these periods
15 of increased production periodically throughout the year?

16 A. Yes.

17 Q. So that wasn't unusual, was it?

18 A. No.

19 Q. Do you know what the temperature was inside
20 the bakery and the area where Mr. Kelley was working at
21 the time of his heart attack?

22 A. No.

23 Q. Was the plant -- did the plant keep any type
24 of temperature readings as a regular part of the course
25 of their business --

1 A. No.

2 Q. -- at the time of his death?

3 A. No.

4 Q. Based on your recollection that day on
5 April 4th of 2009 when the heart attack occurred, was the
6 temperature inside the plant unusually hot that day; do
7 you remember?

8 A. I don't know. I don't recall.

9 Q. Let me ask you this, Ms. Bryson: Is the
10 temperature outside the bakery, does that effect the
11 temperature inside the bakery meaning --

12 A. Yes.

13 Q. -- meaning if it's 100 degrees outside, does
14 that typically result in the bakery being hotter than,
15 say, if it was 50 degrees outside?

16 A. Yes.

17 Q. And you know that based upon --

18 A. My years.

19 Q. -- having worked in the bakery for many years?

20 A. Yes.

21 MR. ABRAMSON: Commissioner, I would point out
22 Defendant's APAs, Page 179. May I approach the witness,
23 Your Honor?

24 THE COURT: Certainly.

25

1 BY MR. ABRAMSON:

2 Q. This is an excerpt from weathersource.com, and
3 it demonstrates in Anderson, South Carolina what the
4 temperature was on April 4th of 2009. Ms. Bryson, what
5 does the max temperature read for that day?

6 A. Sixty-eight degrees.

7 Q. What's the mean temperature for that
8 particular day?

9 A. Fifty-five degrees.

10 Q. And the minimum temperature?

11 A. Forty-one.

12 Q. Okay. So based upon this subjective data, do
13 you have any reason to believe that the bakery would have
14 been excessively hot on April 4th of 2009 based upon the
15 information you've been presented with respect to what
16 the temperature was in Anderson, South Carolina outside
17 the plant that day?

18 A. No.

19 MR. ABRAMSON: And finally, Commissioner, I'm
20 referencing Page 181 of the Defendant's APAs.

21 BY MR. ABRAMSON:

22 Q. It is true that your colleagues at Kroger
23 bakery took a sample of the temperature readings inside
24 the bakery on April -- on May 1, 2012; is that right?

25 A. Yes.

1 Q. Can you tell me what the temperature reading
2 was on that particular day around the area where --
3 depicted in the photographs that you were shown earlier
4 where Mr. Kelley was working at the time that the heart
5 attack occurred?

6 A. Yes. The oven area, 86 degrees.

7 Q. Under rolls; is that right?

8 A. That's correct.

9 Q. So it's not --

10 A. It wouldn't be muffins or bread or shipping
11 under that heading. Rolls.

12 Q. So it was on May 1, 2012, at least at that
13 time it was 86 degrees?

14 A. That's correct.

15 Q. When that temperature was tested?

16 A. Yes.

17 Q. But we don't know what the temperature was on
18 April 4th of 2009, do we?

19 A. No, we do not.

20 MR. ABRAMSON: All right. Ms. Bryson, that's
21 all the questions I have for you. Thank you for
22 answering my questions.

23 THE COURT: Ms. Richey.

24 MS. RICHEY: Yes, sir, Your Honor. May I
25 approach the witness?

1 THE COURT: Certainly.

2 MS. RICHEY: Thank you, Your Honor. May it
3 please the Court.

4 CROSS-EXAMINATION

5 BY MS. RICHEY:

6 Q. Ms. Bryson, thank you for allowing us to talk
7 with you this afternoon. I've just got a few questions
8 for you just to make sure I understand this.

9 Do you remember mister -- do you remember
10 Mr. Kelley?

11 A. I do.

12 Q. Do you remember what he looks like?

13 A. Yes.

14 Q. What kind of worker was Mr. Kelley?

15 A. He was a hard worker. He was responsible. He
16 always came to work. I don't recall him one to be absent
17 from work. Reliable.

18 Q. I think you testified to that in your
19 deposition that he was a hard worker.

20 A. He was.

21 Q. And what type of job did he work?

22 A. He was the oven operator.

23 Q. And how did you classify that job? I think
24 you classified it as a heavy job. Do you recall that --

25 A. Yes.

1 Q. -- in your deposition?

2 A. Heavy, yes.

3 Q. Why do you classify that as a heavy job? And
4 I'm looking at Page 106 and 107 of the Claimant's APAs.
5 Why did you classify that as a heavy job that Mr. Kelley
6 worked?

7 A. Basically you have to pull the racks into
8 position to where you can unload them and the racks are a
9 little heavy.

10 Q. So he worked a very heavy job; is that
11 correct? I think that's what your deposition testimony
12 said.

13 A. Yes.

14 Q. And, now, can you recall -- this is also in
15 the Claimant's APAs. Does this look like Mr. Kelley?
16 Can you make it out?

17 A. Yes.

18 Q. That was Mr. Kelley?

19 A. Yes.

20 Q. Can you make out exactly where this was taken
21 or where this was at? Can you recall or make that out?

22 MR. ABRAMSON: Which page is this?

23 MS. RICHEY: I'm sorry. It's in the back of
24 our APAs. It's in the pictures. This would be 208 -- I
25 mean, 238 and 239 of the Claimant's APAs.

1 MR. ABRAMSON: Thank you.

2 BY MS. RICHEY:

3 Q. Do you recall any of those?

4 A. I don't, but he's wearing gloves. So whatever
5 he's handling, it's probably hot or dirty.

6 Q. Hot or dirty?

7 A. I'm not sure where the area. It's too dark.
8 But it's near conveyors, of course.

9 Q. Okay. Is this -- is this the oven or a
10 conveyor?

11 A. That's not the oven. The back side of our
12 oven is -- you have a higher interface there and then you
13 have a rake that comes around. So I don't think he would
14 be standing that close. I can't say for sure.

15 Q. But this looks like this may be around the
16 oven area?

17 A. Yeah. There's conveyor systems there. That
18 looks like the cooler actually.

19 Q. All right. And do you recall -- when he died,
20 do you remember how he died?

21 A. He collapsed and it was said that he had had a
22 heart attack.

23 Q. Did he say how he had a heart attack? Do
24 you -- I'm looking at Page 104 of the Claimant's APAs.
25 Do you recall seeing something like this, an accident

1 report that stated how he died?

2 A. No, I've never seen this report.

3 Q. So were you in the area at the time of his
4 death?

5 A. I was called to the area. I wasn't there when
6 it happened, no.

7 Q. So you were in -- were you in the vicinity
8 when it happened?

9 A. I can't say exactly where I was. When I was
10 called to the area, I saw him on the floor.

11 Q. Did you see Mr. Kelley the day of his death?
12 Did you see him before he died?

13 A. Yes, yes.

14 Q. Before he died?

15 A. Yes.

16 Q. What was he like that morning?

17 A. Normal.

18 Q. And do you know what's the schedule like? I'm
19 assuming this is right around the Easter season; do you
20 recall?

21 A. Yeah.

22 Q. Isn't -- aren't they required to work
23 increased hours right around the holiday season like
24 Easter?

25 A. Usually we do holiday products, the hours do

1 increase and during distribution times. Yes.

2 Q. And so isn't it true that right around the
3 holiday season, he worked sometimes in excess of ten hour
4 days, if not more?

5 A. I think we work either eights, tens, no more
6 than 12 in one day.

7 Q. In this area, do you know how hot the oven is?
8 If you don't remember, I can actually pull your
9 deposition.

10 A. I believe it's 400 degrees in each zone. We
11 have five zones.

12 Q. And so right around that oven area, I think
13 you testified that the oven reaches about 400 degrees; is
14 that correct?

15 A. Per zone.

16 Q. And then it's about 200 degrees when it comes
17 out of the oven; is that correct?

18 A. Yes, the product is.

19 Q. The product?

20 A. Yes.

21 Q. So right around that area, the oven is 400
22 degrees. And then when it comes out, the product is
23 about 200 degrees; is that correct?

24 A. Yes.

25 Q. And do you recall how hot it gets sometimes in

1 that plant? If not, I'll show you pages of your
2 deposition transcript. I think you said sometimes it can
3 reach over 100 degrees?

4 A. Probably, yes, in the summertime like now.

5 Q. It can reach over 100 degrees?

6 A. It can get hot, yes.

7 Q. And I think it depends on the time of the
8 year, but it can get hotter. I think you said it can get
9 over 100 degrees in that plant. And didn't Mr. Kelley
10 work in the hottest part of the plant?

11 A. The oven areas are pretty warm, yes.

12 Q. It's pretty hot?

13 A. Yeah.

14 Q. And so I think when we talked about this and I
15 think when I asked you about this, just so that I can be
16 clear, you said it's going to be hotter than normal. Do
17 you recall that? I'm looking at Page 18 of your
18 deposition.

19 A. Hotter than normal?

20 Q. One moment. I'll turn it to you so you can
21 take a look at it.

22 MR. ABRAMSON: What line?

23 MS. RICHEY: I'm looking at Page 18, Line 1
24 and looking at the bottom of Page 17. If you look at
25 Line 23 and on to Page 18.

1 BY MS. RICHEY:

2 Q. "Yes, ma'am. But around the area where
3 Mr. Kelley was at, in your opinion because he's not in
4 the oven but -- but in a close proximity to the oven, is
5 it going to be hotter than normal, than most employees?"
6 I think you said sure.

7 A. Yeah.

8 Q. So he works in the hottest part of the plant,
9 he works a heavy job. Is that your testimony?

10 A. That is my testimony, yes.

11 Q. And I think your testimony says that he would
12 oftentimes work ten hours a day typically around high
13 production time?

14 A. Eights, tens, or 12s, yes.

15 Q. And typically during increased work schedules
16 and around holidays like that Easter time?

17 A. Yes.

18 Q. Is that correct?

19 A. Yes.

20 Q. Now, did you guys keep a log?

21 A. Of what?

22 Q. Of temperature?

23 A. No.

24 Q. Were you supposed to?

25 A. Not that I'm aware of.

1 Q. I think when you were -- you were supposed
2 to -- I'm looking at Page 188 of the Defendant's APAs.
3 Were you supposed to have some type of permits around the
4 area that was missing at the time of your OSHA
5 inspection?

6 A. That hot work permit.

7 Q. Can you explain that?

8 A. Yeah. A hot work permit is basically a type
9 of work that you have to do inside the oven. So it's
10 like a confined space-type ordeal.

11 Q. So you didn't have any of those documents that
12 OSHA says that you were supposed to have?

13 A. We have a safety coordinator and we never have
14 been required, that I'm aware of, to keep temperature
15 readings inside the plant. Now, like you -- we do have
16 hot work permits that were done because any time someone
17 goes into a space like that -- and hot work permits,
18 basically if you're going to do some welding, things of
19 that sort, I believe that's what that is, hot work
20 permit.

21 Q. Just so I'm clear about this and I just want
22 to make sure I understand this from your deposition
23 transcript, he worked in the hottest part of the plant;
24 is that correct?

25 A. Around -- in my opinion. That's what I said.

1 He's next to ovens, so...

2 Q. He's next to the oven. That's correct.

3 A. But he's not actually loading into the oven.
4 Like I say, he's still loading onto conveyors that's
5 taking into the oven.

6 Q. Into the oven. And the oven is about 400
7 degrees; is that correct?

8 A. Yes.

9 Q. And the products coming out of the oven is
10 about 200 degrees; is that correct?

11 A. Yes.

12 Q. And he's working around -- particularly around
13 this time that he died, he was working an increased
14 production schedule; is that correct?

15 A. I don't know. I don't know what the hours
16 were at that time.

17 Q. Did production go up around that time? You
18 want me to turn to the page in your deposition?

19 A. Well, I think we took tonnage reports. So if
20 production was up, yeah.

21 MS. RICHEY: I have no further questions, Your
22 Honor.

23 THE COURT: Anything else?

24 MR. ABRAMSON: Just briefly, Your Honor.

25 REDIRECT EXAMINATION

1 BY MR. ABRAMSON:

2 Q. So, again, Ms. Bryson, it was not unusual for
3 production to increase around the time that Mr. Kelley
4 passed away; is that right?

5 A. Holidays and if we had higher hours at that
6 time, no, it was not.

7 Q. And I believe the tonnage reports that we
8 submitted into evidence that you've seen demonstrate that
9 production levels increased and decreased throughout the
10 year; is that right?

11 A. Yes.

12 Q. And that was the years prior to the year he
13 passed away in which there were fluctuations with
14 increases and decreases of the tonnage and production; is
15 that right?

16 A. Yes.

17 Q. So Mr. Kelley was used to working around the
18 holidays at increased production levels; is that right?

19 A. Yes.

20 Q. So it was not -- so he wasn't doing anything
21 unusual or extraordinary at the time that the heart
22 attack occurred; is that right?

23 A. No.

24 MR. ABRAMSON: I don't have anything else.

25 Thank you, Your Honor.

1 THE COURT: Ms. Richey?

2 MS. RICHEY: I don't think I have anything
3 else either, Your Honor.

4 THE COURT: All right. Thank you, ma'am. Any
5 other witnesses?

6 MR. ABRAMSON: No, sir, Your Honor.

7 MS. RICHEY: No, Your Honor.

8 THE COURT: That concludes this hearing.

9 (The hearing was concluded.)

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CERTIFICATE OF REPORTER

I, Kimberly T. Power, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing transcript of proceedings was taken before me on the date and at the time and location stated on page 1 of this transcript; that the witness was duly sworn to testify to the truth, the whole truth, and nothing but the truth; that the testimony of the witness and all objections made at the time of the proceeding were recorded stenographically by me and were thereafter transcribed; that the foregoing transcript of proceedings as typed is a true, accurate and complete record of the testimony and of all objections made at the time to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 26th day of September, 2012, at Richland County, South Carolina.

Kimberly T. Power, Court Reporter
Notary Public, State of South Carolina
My Commission Expires: 07/22/2015

A	APPEARANC...			16:17	
	affixed 49:13 afternoon 38:7 age 17:5, 17:7 aggravated 21:1 21:4, 21:14 agreement 4:11 ailment 7:20 air 24:24, 31:17 31:18 allow 5:19, 5:24 6:7, 7:11, 8:9 allowed 6:9 allowing 38:6 ample 6:12 ample 15:7 Anderson 2:17 2:18, 20:19 20:22, 20:23 27:4, 36:3 36:16 21:3, 26:9 26:16 answering 37:22 anyway 24:16 APA 4:17, 4:20 28:14 APAs 5:7, 6:4 11:4, 11:5, 11:7 11:16, 12:2 12:18, 13:8 13:9, 13:15 13:20, 13:24 14:2, 14:11 14:12, 14:19 14:22, 15:4 16:16, 16:24 19:7, 20:16 24:24, 25:2 25:4, 25:6 25:12, 25:18 35:22, 36:20 39:4, 39:15 39:24, 39:25 40:24, 45:2	2:30 appears 5:1 appellate 7:22 11:2, 23:23 applicable 22:23 approach 28:9 35:22, 37:25 approximate 32:9 April 10:22 27:14, 35:5 36:4, 36:14 36:24, 37:18 apron 29:3 30:21 area 11:17, 23:9 29:16, 29:19 30:2, 32:6, 32:7 34:20, 37:2 37:6, 40:7 40:16, 41:3 41:5, 41:10 42:7, 42:12 42:21, 44:2 45:4 areas 43:11 artery 17:22 19:19 article 4:20 4:21, 4:22, 5:1 5:4, 5:5, 7:24 8:14, 9:8, 9:9 articles 7:9 asked 11:11 12:3, 12:21 12:22, 13:8 13:15, 14:19 16:18, 28:4 43:15 asking 16:11 Assembly 21:11 24:8 assessment	16:17 assuming 41:19 atherosclerosis 17:21, 19:19 attack 5:16, 6:6 8:22, 9:2, 10:24 16:5, 17:8, 17:9 17:24, 17:25 18:3, 18:5 18:12, 18:14 18:16, 19:15 19:23, 20:6 20:8, 20:9 20:10, 20:12 22:11, 22:12 22:15, 22:16 23:14, 23:22 24:7, 24:15 25:14, 28:7 29:17, 32:19 32:24, 33:8 33:16, 33:22 34:21, 35:5 37:5, 40:22 40:23, 47:22 attention 25:12 attorneys 2:32 2:24, 6:9, 26:4 26:8 August 2:8, 2:19 4:1 autopsy 4:25 11:21, 12:6 17:20, 18:22 20:21, 21:21 available 23:17 average 4:10 4:13 aware 8:6 44:25, 45:14 best 49:10 better 24:8, 24:9 big 30:25 black 17:13 21:17 block 6:3, 6:5 7:19, 8:2, 8:22		
B			B		
B-R-Y-S-O-N			B-R-Y-S-O-N		
back 11:24			back 11:24		

16:19, 16:20 17:1	called 41:5 41:10	circumstances 18:2, 18:4 19:16, 22:16	42:22 coming 9:13 9:18, 9:24, 46:9 Commission 2:2 2:17, 4:3, 10:14 16:2, 49:20 Commission's 7:22
blockage 7:7 blood 12:15 12:18, 13:23 13:24, 14:1	Campbell 6:13 9:5 capacity 28:22 cardiac 13:13 13:21	21:25, 22:25 23:25, 24:25 25:25, 26:25 27:25, 28:25 29:25, 30:25 31:25, 32:25 33:25, 34:25 35:25, 36:25 37:25, 38:25 39:25, 40:25 41:25, 42:25 43:25, 44:25 45:25, 46:25 47:25, 48:25 49:25	Commissioner 2:13, 16:1 16:10, 17:5 17:11, 18:16 22:7, 23:16 26:25, 28:15 31:3, 35:21 36:19 comp 4:11, 4:14 Company 2:8 4:3 compensable 10:24, 16:5 17:25, 18:13 19:23, 19:24 20:12, 22:11 23:25
14:3, 15:2, 15:3 blows 31:18 body 12:17 bottom 5:13 32:18, 43:24 branch 6:3, 6:5 7:19, 8:2, 8:22 16:19, 16:19 16:25	Cardiovascular 25:3 Carolina 2:2 2:15, 2:16, 2:18 2:24, 2:24, 11:2 16:4, 18:1 21:12, 22:8 22:14, 23:21 36:3, 36:16 49:3, 49:14 49:19 carrier 4:6 case 4:2, 4:14 4:16, 7:5, 10:12 11:8, 11:11 14:7, 15:17, 18:9 20:3, 22:8 23:21, 25:19 cases 18:7 22:12 cause 12:15 13:3, 17:20 20:9, 21:1 49:11 caused 15:16 15:19, 19:15 19:18, 21:13 22:2, 22:3 22:15, 22:17 23:14 CCR 2:26, 2:24 3:26, 4:25, 5:25 6:25, 7:25, 8:25 9:25, 10:25 11:25, 12:25 13:25, 14:25 15:25, 16:25 17:25, 18:25 19:25, 20:25	claimant 2:6 2:32, 4:4, 8:7 17:9, 18:1 18:11, 20:11 claimant's 6:8 11:4, 11:5, 11:7 12:17, 14:11 14:18, 17:5 17:7, 17:11 20:16, 25:19 39:4, 39:15 39:25, 40:24 classified 38:24 classify 38:23 39:3, 39:5 clear 17:17 23:21, 24:7 24:8, 43:16 45:21 clearly 6:3 16:14, 20:3 client 8:10, 9:12 client's 10:17 clinic 6:2, 7:17 Clinic's 6:1 close 25:12 40:14, 44:4 collapsed 40:21 colleagues 36:22 Columbia 2:24 combine 15:22 17:1 combined 12:8 12:25, 13:3 15:20, 21:13 22:3, 22:5 come 5:24, 7:8 14:7, 24:6, 28:3 comes 16:4 23:4, 29:3 29:10, 29:13 40:13, 42:16	Commission's 7:22 Commissioner 2:13, 16:1 16:10, 17:5 17:11, 18:16 22:7, 23:16 26:25, 28:15 31:3, 35:21 36:19 comp 4:11, 4:14 Company 2:8 4:3 compensable 10:24, 16:5 17:25, 18:13 19:23, 19:24 20:12, 22:11 23:25 Compensation 2:2, 2:17, 4:3 complete 49:9 concerned 34:2 concluded 48:9 concludes 48:8 connecting 24:23 condition 6:5 13:2, 16:20 17:1 conditions 23:23, 23:25 configuration 26:13 confined 45:10 confused 24:15 conjecture 18:19 consistently 33:21
call 24:16, 25:24 31:16	C		

Construction 11:6	couple 26:1	44:12, 49:13	demise 15:24	different 5:10
contained 28:14	COURSE 2:24	days 42:4	demonstrate 6:4	7:1, 12:4, 12:13
CONTENTS	19:17, 19:20	death 12:10	20:7, 20:11	12:21, 18:8
3:1	34:24, 40:8	13:3, 15:8	23:14, 30:19	21:24, 21:25
contributed	court 2:14, 2:18	15:16, 15:20	47:8	differentiate
15:8, 21:5, 21:6	4:1, 4:10, 4:13	17:20, 19:18		18:9
conveyor 29:2	4:16, 5:8, 6:10	20:20, 21:6	demonstrated	Dillingham 11:6
29:10, 29:12	7:23, 8:10, 8:18	22:4, 35:2, 41:4	32:2, 32:2	Direct 3:4, 27:1
30:21, 31:7	9:11, 9:19	41:11	demonstrates	directly 32:20
40:10, 40:17	10:14, 10:20	deceased 4:2	8:2, 17:4, 20:4	dirty 40:5, 40:6
conveyors 29:11	11:2, 15:25	deceased's 19:7	29:24, 36:3	disease 12:9
31:13, 40:8	16:11, 20:14	declarations	denied 4:14	17:22, 17:22
46:4	23:11, 23:18	10:16	4:16	19:19
cool 31:18	23:24, 25:9	decreased 47:9	deny 8:21, 8:23	distribution
cooler 31:17	25:15, 25:19	decreases 47:14	8:25	42:1
coolers 11:18	25:21, 25:25	Defendant 2:9	depanner 28:3	distributions
31:16	26:20, 26:24	defendant's	depends 43:7	34:10
coordinator	26:7, 26:11	4:20, 5:7, 11:11	depicted 32:7	doctor 8:17
45:13	28:11, 31:5	11:16, 12:23	33:2, 37:3	9:10, 12:4
copy 20:20	35:24, 37:23	13:8, 13:9	deposition 4:25	12:11, 12:21
20:21	38:1, 38:3	13:15, 13:20	6:13, 6:17, 7:4	17:19, 18:24
Cornerstone	46:23, 48:1	13:24, 14:2	7:13, 8:6, 9:4	19:1, 19:14
6:14	48:4, 48:8, 49:3	14:11, 16:16	9:5, 9:24, 11:25	22:3, 24:20
Corning 11:3	49:19	16:24, 35:22	12:1, 12:2, 12:7	doctors 4:23
coronary 12:5	Cross-Examina...	36:20, 45:2	12:12, 12:24	5:3, 6:15, 6:15
17:21, 19:19	3:4, 38:4	defendants 2:24	14:10, 14:16	documents 6:8
coroner's 12:5	cross-examine	4:5, 25:23	14:25, 15:4	20:24, 45:11
20:19, 20:23	4:23, 5:3, 6:21	defense 15:14	15:12, 18:17	doing 5:18
correct 4:15	7:10, 8:16	definition 7:18	20:17, 21:24	12:13, 12:15
18:20, 18:21	cut 30:16	degree 6:23	23:1, 23:2, 23:5	13:21, 19:21
21:9, 29:22		12:24, 15:11	24:11, 25:18	19:25, 20:1
30:1, 32:8		15:23, 19:14	38:19, 39:1	20:4, 22:9, 25:7
32:13, 37:8		20:18, 20:25	39:11, 42:9	28:25, 32:23
37:14, 39:11		21:7, 21:15	43:2, 43:18	33:11, 47:20
42:14, 42:17		21:22, 24:9	45:22, 46:18	downloaded 5:5
42:23, 44:18		degrees 11:18	Desk 5:11	6:24
45:24, 46:2		Dr 6:13, 6:13	detailed 18:7	Dr 6:13, 6:13
46:7, 46:10		23:9, 35:13	diagnosed 16:17	6:16, 7:5, 7:14
46:14		35:15, 36:6	16:18, 16:18	8:6, 9:5, 9:5
Cotton 11:4		36:9, 37:6	died 10:22, 17:5	11:20, 11:25
counsel 49:11		37:13, 42:10	17:7, 17:9	12:12, 12:24
20:19, 20:22		42:13, 42:16	18:24, 19:23	14:17, 15:3
49:14		42:22, 42:23	40:19, 40:20	15:18, 15:23
		43:3, 43:5, 43:9	41:1, 41:12	18:17, 18:21
		46:7, 46:10	41:14, 46:13	19:9, 20:17
		delay 16:20	diff 33:24	21:14, 24:22

drink 13:5	engaged 18:2	exhaustion	Fiberglass 11:3	25:14
13:18, 14:6	enter 26:14	18:15, 19:3	Fifty-five 36:9	gentlemen
drugs 13:19	entire 7:22, 15:5	existing 16:6	file 2:3, 4:4	28:21
due 16:2, 16:12	entitle 20:13	17:25	10:14	give 5:24, 21:19
17:7, 17:12	environment	experienced	finally 36:19	given 7:12, 7:12
17:21, 18:24	11:8, 11:9, 14:8	34:14	find 10:4, 17:18	9:7, 9:14
22:7, 22:20	14:23	Expires 49:20	23:25	gives 5:17
duly 26:17, 49:6	especially 26:13	explain 29:6	fine 13:22	gloves 40:4
duties 20:1, 22:9	ESQUIRE 2:33	45:7	21:11, 25:1	go 7:23, 10:7
27:24, 31:22	2:24	explains 6:2	first 16:7, 24:16	10:8, 12:16
33:13, 33:15	estimated 27:13	explanation	28:18	13:10, 21:24
33:21, 33:24	et 19:13, 19:13	5:17	five 17:13, 27:13	29:6, 29:7
	Eva 9:23	exposed 18:13	42:11	46:17
	event 19:3	exposure 19:1	floor 2:24, 41:10	God 7:23
	events 21:6	19:17, 22:17	flow 12:15	goes 30:22
	49:12	23:15	12:18, 15:3	34:11, 45:17
earlier 24:14	everybody 24:6	extraordinary	fluctuations	going 8:19, 9:3
37:3	evidence 5:13	18:2, 18:4	47:13	9:14, 9:22, 9:25
Easter 41:19	5:19, 5:22, 6:3	19:16, 20:1	follow-up 12:3	10:5, 12:16
41:24, 44:16	6:9, 7:12, 8:2	20:5, 22:16	follows 26:19	14:5, 14:9
edification 7:21	13:12, 15:6	22:18, 47:21	forbid 7:23	14:17, 15:14
7:22, 8:4	15:7, 16:15	extremely 11:22	foregoing 49:5	18:6, 19:11
effect 35:10	17:17, 20:3		49:8	19:11, 21:18
effects 12:8	20:7, 22:22	F	former 19:7	23:4, 25:8
13:1, 15:20	47:8		forth 7:15	23:17, 25:25
21:13, 22:4	exactly 32:23		Forty-one 36:11	26:13, 31:12
22:5	39:20, 41:9	fact 14:4, 22:2	found 11:3, 11:5	43:16, 44:5
eights 42:5	exam 25:2	factually 17:17	11:6, 33:7	45:18
44:14	Examination	failing 16:3	four 13:16	good 9:7, 9:13
either 42:5, 48:3	3:4, 3:5, 27:1	fair 7:11	29:11	14:2, 17:11
EKG 16:22	46:25	family 6:14	front 22:13	26:2, 26:3
16:24	examined 9:6	6:14, 24:20	22:22	29:14
electrical 16:21	exception 10:15	fan 30:9, 30:10	full 5:4, 5:4	GOUDELOCK
elevated 7:25	25:12	31:17, 31:18	6:19, 8:13	2:24
19:21	excerpt 5:4	far 7:23, 14:16	26:20	Greenville 2:24
elicit 13:19	6:19, 36:2	16:23, 32:15	further 32:17	guessing 32:15
employed 27:3	excerpts 8:14	34:2	46:21, 49:11	guys 44:20
27:19	excess 42:3	further 32:16	17:10	H
employees 33:4	excessive 18:13	faster 12:19		
44:5	19:1, 19:18	father 17:7		
Employer 2:8	20:8, 22:17	feared 8:12	G	hand 49:13
employment	23:15	feel 8:18	Gene 2:13	handling 40:5
17:23, 19:17	excessively	feels 9:11, 9:14	General 21:11	hanging 31:15
19:21	36:14	feet 29:14, 31:10	24:8	happened 41:6
empty 29:2	excuse 12:23	32:11, 32:14	gentleman's	41:8
29:10	exertion 22:10			hard 14:13, 25:7
ended 14:14				

38:15, 38:19 harmless 8:5 head 26:12 heading 37:11 health 5:11 13:7, 14:2, 16:9 17:2, 17:11 24:14 healthy 13:17 hear 26:5 hearing 2:13 19:24, 48:8 48:9 heart 5:16, 6:6 8:22, 9:2, 10:24 12:9, 12:16 12:18, 12:19 13:13, 16:5 16:14, 16:22 16:22, 17:1 17:8, 17:9 17:14, 17:16 17:22, 17:24 17:24, 18:3 18:4, 18:12 18:14, 18:16 19:15, 19:21 19:22, 20:6 20:8, 20:9 20:10, 20:12 22:11, 22:12 22:15, 22:16 23:14, 23:22 23:23, 23:25 24:7, 24:15 24:21, 25:14 25:14, 28:7 29:17, 32:19 32:24, 33:7 33:16, 33:22 34:21, 35:5 37:4, 40:22 40:23, 47:21 heat 13:1, 18:13 18:15, 19:1 19:3, 19:18	20:8, 22:17 23:15 heartstroke 18:15, 19:2 heavy 14:18 heavy 11:9 12:14, 14:13 14:13, 15:21 38:24, 39:2 39:3, 39:5, 39:9 39:10, 44:9 held 2:13, 2:16 helped 28:1 hereunto 49:13 hernias 14:15 high 13:11 13:25, 15:17 15:19, 15:21 44:12 higher 40:12 16:22, 17:1 47:5 history 24:25 hits 29:12 holiday 34:8 34:8, 41:23 41:25, 42:3 holidays 44:16 47:5, 47:18 Holly 11:2, 18:9 Honor 4:9, 4:12 4:15, 5:9, 6:17 8:13, 10:19 12:11, 13:4 15:5, 15:13 20:15, 21:10 24:12, 25:10 25:17, 25:20 28:10, 35:23 37:24, 38:2 46:22, 46:24 47:18 increases 47:14 48:6, 48:7 47:25, 48:3 hot 11:8, 11:22 14:8, 23:2, 23:2 23:3, 23:5, 23:5 23:9, 23:13	35:6, 36:14 40:5, 40:6, 42:7 42:25, 43:6 43:12, 45:6 45:8, 45:16 45:17, 45:19 hotter 15:1 23:10, 35:14 43:8, 43:16 43:19, 44:5 hottest 43:10 44:8, 45:23 hour 42:3 hours 41:23 41:25, 44:12 46:15, 47:5 House 2:18 housekeeping 28:4 huge 29:13 hunting 19:12 hyperlipidemia 16:18 hypertension 14:5 impulses 16:21 in-feed 31:24 included 22:10 including 12:5 incomplete 16:19, 16:25 increase 34:4 42:1, 47:3 increased 34:15 41:23, 44:15 46:13, 47:9 47:18 increases 47:14 indicate 18:23 indicates 16:23 31:2 indication 24:6 infarction 17:6	17:8, 17:21 information 5:10, 36:15 injury 10:25 16:6, 20:12 22:12 inside 18:20 19:6, 28:13 34:19, 35:6 35:11, 36:23 45:9, 45:15 inspection 45:5 interest 10:21 interested 49:11 interface 40:12 internet 4:22 5:2, 6:25, 6:25 7:3, 9:8, 9:8, 9:9 interpret 22:22 interrupted 18:24 investigation 12:6, 20:20 issue 7:7, 7:8 10:23, 15:14 18:8 issues 7:14, 13:7 16:9, 17:2 24:14 item 31:14 items 12:22 J job 12:14, 13:1 14:13, 14:13 15:8, 15:19 20:1, 21:1, 22:9 22:9, 25:8 27:17, 27:24 31:22, 33:13 33:15, 33:21 33:24, 38:21 38:23, 38:24 39:3, 39:5 39:10, 44:9	Johs 19:12 Jr 4:5 July 12:7, 15:12 June 6:17, 12:2 25:5 jurisdiction 4:17 K keep 14:5, 34:23 44:20, 45:14 Kelley 2:5, 4:2 5:15, 10:21 11:8, 11:17 11:21, 12:14 13:4, 14:12 16:8, 24:4 27:10, 28:6 28:22, 29:16 31:21, 32:23 33:20, 34:13 34:20, 37:4 38:10, 38:14 39:5, 39:15 39:18, 41:11 43:9, 44:3, 47:3 47:17 Kelley's 15:8 27:17 Kimberly 2:14 2:26, 2:24, 3:26 4:25, 5:25, 6:25 7:25, 8:25, 9:25 10:25, 11:25 12:25, 13:25 14:25, 15:25 18:25, 19:25 20:25, 21:25 24:25, 25:25 26:25, 27:25 28:25, 29:25 30:25, 31:25 32:25, 33:25 34:25, 35:25 36:25, 37:25 38:25, 39:25 40:25, 41:25 42:25, 43:25 44:25, 45:25 46:25, 47:25 48:25, 49:25 kind 22:10 24:15, 38:14 kinds 13:11 know 5:21, 7:19 7:20, 8:17, 9:9 9:10, 14:4 16:11, 18:19 19:4, 19:20 29:14, 32:9 34:19, 35:8 35:17, 37:17 41:18, 42:7 46:15, 46:15
---	---	---	--	--

34:25, 35:25 36:25, 37:25 38:25, 39:25 40:25, 41:25 42:25, 43:25 44:25, 45:25 46:25, 47:25 48:25, 49:3 49:19, 49:25 kimberlypowe... 2:27, 2:24, 3:27 4:25, 5:25, 6:25 7:25, 8:25, 9:25 10:25, 11:25 12:25, 13:25 14:25, 15:25 16:25, 17:25 18:25, 19:25 20:25, 21:25 22:25, 23:25 24:25, 25:25 26:25, 27:25 28:25, 29:25 30:25, 31:25 32:25, 33:25 34:25, 35:25 36:25, 37:25 38:25, 39:25 40:25, 41:25 42:25, 43:25 44:25, 45:25 46:25, 47:25 48:25, 49:25 kind 22:10 24:15, 38:14 kinds 13:11 know 5:21, 7:19 7:20, 8:17, 9:9 9:10, 14:4 16:11, 18:19 19:4, 19:20 29:14, 32:9 34:19, 35:8 35:17, 37:17 41:18, 42:7 46:15, 46:15	knowledge 7:20 Kroger 2:8, 4:3 10:23, 27:4 27:19, 36:22 L lady 26:4 large 31:14 49:3 law 16:4, 16:6 17:25, 18:6 18:8, 19:22 19:25, 21:11 21:17, 21:19 22:8, 22:14 22:23, 23:21 leading 21:6 leave 22:21 22:23 led 12:9, 14:14 15:24, 18:4 18:14, 18:15 20:6, 20:9, 22:4 left 22:12 levels 47:9 47:18 liberal 5:24 line 5:13, 18:18 32:18, 43:22 43:23, 43:25 Listen 10:5 little 7:12, 19:13 39:9 living 13:17 LLC 2:24 load 12:9, 28:1 32:5, 33:1, 33:1 loader 28:1 loading 10:22 28:8, 28:20 31:25, 32:1 32:19, 32:20 46:3, 46:4 located 29:7 location 49:5	log 44:20 Lola 2:33, 4:5 9:25, 10:20 long 19:12, 27:7 27:12, 27:19 27:22 look 12:4, 12:22 14:18, 14:21 15:5, 15:6 17:19, 17:19 18:16, 20:15 26:14, 39:15 43:21, 43:24 looked 12:25 24:22, 24:24 looking 11:16 12:1, 12:17 13:7, 13:12 19:5, 19:8, 39:4 40:24, 43:17 43:23, 43:24 45:2 looks 4:22, 5:4 19:9, 24:25 25:1, 28:15 38:12, 40:15 40:18 Loudermilk 6:13, 24:22 loudly 26:4 low 14:2 M M-E-L-O-N-I-E 26:23 ma'am 44:2 48:4 Main 2:17, 2:24 making 21:16 26:5 man 16:13 16:17, 17:15 17:22, 25:7 Marie 26:22 Marlboro 11:4	max 36:5 Mayo 6:1, 7:17 MCANGUS 2:24 McCasill 2:14 mean 9:17, 9:18 9:19, 13:4 14:23, 23:12 23:19, 24:19 24:19, 36:7 mean, 238 39:25 meaning 35:11 35:13 medical 5:14 5:18, 6:3, 6:21 6:22, 6:23, 7:1 8:1, 10:13 10:16, 12:25 15:11, 15:23 16:14, 19:15 20:18, 20:25 21:7, 21:15 21:22, 24:9 24:10, 24:25 medication 5:12 5:15, 7:25, 8:3 9:1 Melonie 3:3 33:13, 41:17 14:25, 25:24 26:17, 26:22 44:5 28:19 memorandum 18:7, 24:2 memorandums 18:8 mentioned 17:10 met 10:12 20:11, 22:21 23:13, 24:12 midst 19:24 Mills 11:4 minimum 36:10 minute 26:1 missing 45:4 mister 38:9	misunderstood 26:12 moment 43:20 morning 41:16 mother 17:5 mouth 32:12 move 24:16 muffins 37:10 myocardial 17:6 17:8, 17:21 N name 10:20 26:21 near 40:8 need 16:11, 26:3 neither 49:11 never 41:2 45:13 night 19:10 nitpicky 9:25 normal 13:13 13:13, 13:20 24:21, 25:2 25:2, 25:2, 25:3 25:3, 25:4 33:13, 41:17 43:16, 43:19 44:5 North 2:17 Notary 2:15 49:3, 49:19 note 5:6 notes 23:24 noticed 9:24 number 4:4 12:4, 12:12 12:21, 21:23 21:25 numerous 11:12 23:1 O object 9:17
---	---	--	--	---

objection 5:5 9:23 objections 4:17 5:6, 9:16, 9:20 49:7, 49:9 obstruction 16:21 obviously 6:2 19:4 occasions 11:12 12:13 occur 34:7 occurred 18:3 24:15, 28:7 32:24, 33:8 33:16, 35:5 37:5, 47:22 offense 6:25, 9:8 office 12:5 20:19, 20:22 20:23 official 49:13 offentimes 44:12 Okay 8:20, 10:7 16:22, 20:17 26:7, 34:9 36:12, 40:9 open 19:10 operator 27:18 27:22, 27:25 30:5, 33:21 34:14, 38:22 operators 30:15 opinion 20:18 20:25, 21:20 44:3, 45:25 opinions 11:2 opportunity 5:2 6:12, 6:20, 7:6 7:10, 8:16, 9:4 10:3, 11:12 21:19, 22:1 ordel 45:10 order 17:24 19:22	orthopedic 6:15 OSHA 4:4 45:12 outlined 16:14 outside 35:10 35:13, 35:15 36:16 oven 10:23 11:15, 11:17 27:18, 27:22 27:25, 28:1 28:2, 28:3, 28:8 28:20, 29:4 29:7, 29:21 29:22, 30:4 30:22, 30:23 30:23, 32:4 32:12, 32:12 32:19, 32:20 33:1, 33:21 34:14, 37:6 38:22, 40:9 40:11, 40:12 40:16, 42:7 42:12, 42:13 42:17, 42:21 43:11, 44:4 44:4, 45:9, 46:2 46:3, 46:5, 46:6 46:6, 46:9 ovens 31:21 31:23, 46:1 overall 14:2 Owens 11:3	13:14, 13:15 13:19, 13:24 14:1, 14:10 14:11, 14:18 14:19, 14:21 15:4, 16:16 16:24, 17:4 17:12, 17:20 18:17, 20:16 20:16, 24:24 25:1, 25:4 28:16, 35:22 36:20, 39:4 39:22, 40:24 43:17, 43:23 43:24, 43:25 45:2, 46:18 49:6 pages 43:1 pans 10:22, 28:4 29:4, 29:10 29:13, 30:21 32:20 paper 34:12 part 8:4, 10:14 31:21, 33:13 34:24, 43:10 44:8, 45:23 particular 7:20 36:8, 37:2 particularly 11:1, 46:12 parties 14:7 parts 12:16 party 49:11 passed 21:11 47:4, 47:13 pathologist 4:24 7:6, 11:20 15:10, 21:21 pathway 16:21 pay 25:11 PDR 5:11 pending 49:11 people 23:22 23:24	percent 32:5 performing 33:15, 33:20 period 33:25 periodically 34:15 periods 34:6 34:14 permit 45:6 45:8, 45:20 permits 45:3 45:16, 45:17 photograph 28:18, 28:19 28:25, 29:6 29:8, 29:24 30:8, 30:18 30:18, 30:24 31:11, 31:14 32:3, 32:7, 33:4 photographs 28:13, 37:3 physical 21:3 22:10, 25:2 physically 28:24 Physician's 5:11 physicians 25:6 picture 28:21 pictures 19:5 19:6, 19:8 39:24 place 21:23 places 21:24 21:25, 25:6 plant 11:13 14:20, 14:24 18:20, 19:6 28:14, 34:23 34:23, 35:6 36:17, 43:1 43:9, 43:10 44:8, 45:15 45:23 please 10:18 10:20, 16:2 25:11, 26:9	26:16, 26:20 38:3 plus 13:23 point 13:21 20:2, 23:20 24:19, 35:21 pointing 31:4 points 9:13 position 10:18 27:5, 39:8 Power 2:14 2:26, 2:24, 3:26 4:25, 5:25, 6:25 7:25, 8:25, 9:25 10:25, 11:25 12:25, 13:25 14:25, 15:25 16:25, 17:25 18:25, 19:25 20:25, 21:25 22:25, 23:25 24:25, 25:25 26:25, 27:25 28:25, 29:25 30:25, 31:25 32:25, 33:25 34:25, 35:25 36:25, 37:25 38:25, 39:25 40:25, 41:25 42:25, 43:25 44:25, 45:25 46:25, 47:25 48:25, 49:3 49:19, 49:25 Practice 6:14 pre-existing 6:5 15:22, 16:13 17:1, 17:16 17:22, 23:23 24:1, 25:13 prejudiced 8:11 8:15, 9:12 prejudicial 8:7 prepared 20:22 preponderance
--	--	---	--	---

8:1, 20:2 presented 5:13 20:24, 36:15 pressure 13:23 13:25, 14:1 14:3 pretty 7:16 14:18, 19:10 26:2, 43:11 43:12 prior 5:16 47:12 probably 40:5 43:4 problem 6:11 16:13 problems 13:12 17:14, 17:16 24:1, 25:13 proceeding 5:22 32:25, 49:7 proceedings 2:7 2:16, 49:5, 49:8 product 28:2 28:3, 34:11 42:18, 42:19 42:22 production 27:6 30:16, 34:2 34:4, 34:15 44:13, 46:14 46:17, 46:20 47:3, 47:9 47:14, 47:18 products 41:25 46:9 projecting 30:7 proof 10:12 20:11, 22:21 prove 11:7, 18:1 18:12, 22:15 proximity 20:9 proximity 44:4 Public 2:15 49:3, 49:19 pull 39:7, 42:8	10:10, 23:16 24:17 really 13:5, 13:6 reason 36:13 reasonable 6:23 12:24, 15:11 15:23, 19:14 20:18, 20:25 21:7, 21:15 21:22, 24:9 recall 35:8 38:16, 38:24 39:14, 39:21 40:3, 40:19 40:25, 41:20 42:25, 43:17 recipes 28:2 recollection 35:4 record 8:4, 8:9 10:8, 10:15 10:18, 13:10 15:6, 17:7 17:18, 26:5 26:15, 26:21 49:9 recorded 49:8 records 5:14 10:13, 24:20 24:21 Redirect 3:5 46:25 reference 5:11 13:20 reaches 42:13 read 16:12, 18:5 22:1, 24:3, 36:5 reading 11:13 11:14, 11:15 14:20, 14:24 23:7, 23:8, 23:8 37:1 readings 11:10 34:24, 36:23 45:15 ready 10:10	5:19 Reliable 38:17 relies 18:9 relying 14:17 25:18 remember 35:7 38:9, 38:9 38:12, 40:20 42:8 rendition 21:19 report 17:20 18:22, 20:21 25:4, 41:1, 41:2 reported 2:14 reporter 2:14 3:7, 16:11, 49:1 49:3, 49:19 reports 10:16 12:5, 12:6 37:24, 38:2 38:5, 39:23 17:14 represented 4:4 4:6 48:1, 48:2, 48:7 Richland 49:14 ridiculous 10:9 right 4:10 11:16, 16:19 16:25, 17:6 19:23, 22:13 24:10, 24:25 25:21, 26:24 29:19, 29:19 29:22, 29:22 29:25, 31:8 31:21, 31:23 32:3, 32:6 32:12, 32:19 32:20, 32:21 33:5, 33:18 36:24, 37:7 37:20, 40:19 41:19, 41:23 42:2, 42:12 42:21, 47:4 47:10, 47:15	5:19 Reliable 38:17 relies 18:9 relying 14:17 25:18 remember 35:7 38:9, 38:9 38:12, 40:20 42:8 rendition 21:19 report 17:20 18:22, 20:21 25:4, 41:1, 41:2 reported 2:14 reporter 2:14 3:7, 16:11, 49:1 49:3, 49:19 reports 10:16 12:5, 12:6 37:24, 38:2 38:5, 39:23 17:14 represented 4:4 4:6 48:1, 48:2, 48:7 Richland 49:14 ridiculous 10:9 right 4:10 11:16, 16:19 16:25, 17:6 19:23, 22:13 24:10, 24:25 25:21, 26:24 29:19, 29:19 29:22, 29:22 29:25, 31:8 31:21, 31:23 32:3, 32:6 32:12, 32:19 32:20, 32:21 33:5, 33:18 36:24, 37:7 37:20, 40:19 41:19, 41:23 42:2, 42:12 42:21, 47:4 47:10, 47:15
--	--	---	---

21:3, 25:8, 30:4	Yeargin 11:6	152 24:24	27 3:4	6
31:21, 38:16	years 5:16, 27:8	156 25:1, 25:4	28 12:17	6 31:14
38:17, 38:21	27:13, 27:13	15th 25:5	281 11:3	61 14:19
41:22, 42:5	27:23, 34:13	165 17:20	283 11:3	69 14:18, 14:21
43:10, 44:12	35:18, 35:19	17 43:24	284 11:5	15:4
44:15, 45:6	47:12	179 35:22	285 11:5	
45:8, 45:9	young 26:4	18 43:17, 43:23	286 11:7	
45:16, 45:17		43:25	288 11:7	7
45:19	Z	181 11:16, 36:20	29 12:17	
worked 11:8		188 45:2	29201 2:24	74 18:17
11:9, 11:18	zone 42:10	1989 27:21	29601 2:24	
14:8, 14:12	42:15	1997 33:22		8
14:12, 14:13	zones 42:11	1st 11:15	3	
23:9, 27:7				8 18:18
34:13, 35:19	0	2	3 30:18	80 13:25
39:6, 39:10			30 29:14, 31:10	81 14:21
42:3, 45:23	07/22/2015	2/6/03 16:17	32:14	824,79 4:13
worker 25:7	49:20	16:23	301 2:24	86 37:6, 37:13
38:14, 38:15	0922072 2:3, 4:4	200 42:16, 42:23	31 12:23, 20:16	88 11:18, 11:19
38:19		46:10	32 12:23, 20:17	14:24, 23:8
Workers 2:2	1	2003 13:10	36 20:16	
2:16, 4:3		2006 25:5, 25:5	37 20:16	9
working 15:18	1 12:1, 36:24	2009 10:22	38 3:4	95 32:5
19:6, 19:10	37:12, 43:23	27:15, 35:5		
27:14, 28:22	49:6	36:4, 36:14	4	
30:2, 34:20	100 2:17, 35:13	37:18		
37:4, 46:12	43:3, 43:5, 43:9	2012 2:8, 2:19	4 10:22, 27:14	
46:13, 47:17	104 40:24	4:1, 11:15, 12:2	400 42:10, 42:13	
workplace 21:4	106 39:4	12:7, 15:13	42:21, 46:6	
works 44:8	107 39:4	36:24, 37:12	42 11:1	
44:9	10th 2:24	49:13	42-9-35 11:1	
written 8:17	110 13:25	208 39:24	21:10, 21:12	
9:10	12 27:23, 34:13	21 27:8	47 3:5, 17:5	
wrong 22:14	42:6	211 14:11	49 3:7	
wrote 9:10, 16:7	122 13:7, 13:9	213 14:11	4th 35:5, 36:4	
	13:12, 13:14	23 43:25	36:14, 37:18	
	12s 44:14	239 39:25		
	13 15:12	24 2:24	5	
	1301 2:24	243 28:16		
yeah 9:17, 29:18	133 16:16	25 29:14, 31:9	50 10:1, 10:2	
40:17, 41:21	134 13:15, 13:19	32:14	35:15	
43:13, 44:7	16:24, 17:4	250 4:20, 5:1	51 17:7	
45:8, 46:20	139 13:24, 17:12	5:6	54 17:9	
year 6:17, 34:3	13th 12:7	251 4:21, 5:1	549,89 4:14	
34:11, 34:15	14 2:8, 2:19, 4:1	5:6, 6:1		
43:8, 47:10	140 14:1	26th 49:13		
47:12				