

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

WCC #0922072

FULL COMMISSION
TRANSCRIPT

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

Reported by
Kathryn B. Bostrom

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There were no exhibits marked during this hearing.

PROCEEDINGS

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

COMMISSIONER ROCHE: Ms. Richey.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 COMMISSIONER BECK: Inside?

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

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

COMMISSIONER ROCHE: Ms. Richey.

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

1 COMMISSIONER BECK: Why is that unusual?

2 MS. RICHEY: Why is that unusual? Actually, Dr.
3 Woodward, in his deposition, he stated that when it
4 gets that hot, it causes your blood to thin out.
5 It causes your blood to be unusual. And that's why
6 he stated in the deposition when you -- because he
7 actually stated when it gets to 90 degrees, that
8 causes the heart to work harder. That causes --
9 that causes unusual and abnormal conditions in the
10 heart. And then when we presented that May 1st,
11 2012 reading from Kroger, and we looked at that,
12 Dr. Woodward says, "That sure is hot. That's hot."
13 And he worked there eight to ten to twelve hours a
14 day. Right by that oven. Even Dr. Woodward said
15 it's hot. Even his supervisor said it's hot. Even
16 his co-workers says he worked in the hottest plant
17 -- hottest part of the plant. That's -- that's
18 unrefuted. And that's why if -- if -- if you read
19 Dr. Woodward's deposition, that was one of the
20 things that came out. When we presented that
21 temperature reading, he says, "That's hot. That's
22 very hot." Can you imagine working in that
23 condition, lifting, pushing a thousand pounds,
24 lifting 30 pounds onto an oven, day in and day out,
25 eight to ten hours, twelve hours, increased

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

COMMISSIONER ROCHE: Okay. That concludes the hearing.

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

State of South Carolina)
 County of Richland) CERTIFICATE

I, Kathryn B Bostrom, a notary public for the State of South Carolina, duly commissioned and qualified as such, do hereby certify that the foregoing 17 pages represent a true and accurate transcript of the foregoing hearing taken on the 18th day of March, 2013.

That the oral hearing was duly taken and transcribed as to the questions propounded and the answers given.

That all the offered exhibits and objections, if any, involved in this case are duly attached or included herein.

I further certify that I am not counsel or kin to any of the parties to this cause of action, nor am I interested in any manner of its outcome.

In witness whereof, I have hereunto set my hand and seal this 11th day of June, 2013.

Kathryn B. Bostrom
 Notary Public for South Carolina
 My commission expires August 28, 2022

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