THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Commissioner T. Scott Beck
Commissioner Melody James
Commissioner Andrea C. Roche

W.C.C. File No. 0922072

Roger Dale Kelley, Employee, ...Appellant,

v.

The Kroger Company, Employer, and
The Kroger Co. c/o Sedgwick CMS, Carrier. .... Respondents.

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE COMMISSION DID NOT ERR BY FAILING TO APPLY THE SO-CALLED "HEAT RELATED INJURY TEST"?

II. WHETHER THE COMMISSION CORRECTLY FOUND THAT DR. WOODARD DID NOT STATE, TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, THAT HEAT AND OTHER CONDITIONS OF EMPLOYMENT INSIDE THE BAKERY WERE CONTRIBUTING FACTORS TO DECEDENT'S HEART ATTACK WHICH IS NOT COMPENSABLE?

III. WHETHER CLAIMANT'S ARGUMENT REGARDING REPETITIVE TRAUMA INJURY IS NEITHER PRESERVED FOR APPEAL NOR SUPPORTED BY SUBSTANTIAL EVIDENCE?

STATEMENT OF THE CASE

Roger Dale Kelley ("Decedent") was working for Respondent The Kroger Company ("Kroger") on April 4, 2009 when he suffered a fatal heart attack. On July 5, 2012, his wife, Lynn Kelley ("Claimant"), filed a claim for death benefits, alleging accidental injury caused by "[w]ork conditions of excessive heat, stress to produce product, hours of labor." (R. 30). Kroger and The Kroger Co. c/o Sedgwick CMS ("Respondents" herein) denied that Decedent's death was caused by a compensable work-related accident arising out of and in the course and scope of his employment. (R. 31-32).

The parties were heard by Single Commissioner Gene McCaskill on August 14, 2012. Relying on S.C. Code Ann. § 42-9-35, Claimant argued that Decedent's "job condition, combined with his pre-existing health problems, ultimately led to the fatal heart attack ..." (Decision and Order of Single Commissioner, filed October 17, 2012, R. 4-5 ("Single Commission Decision")) (*see also* R. 426, line 19 – 431, line 24) (R. 436, line 15 – 438, line 5). Respondents contended that Decedent's heart attack "was a result of events which were incidental to Decedent's normal job and not due to unusual or extraordinary events." (Single Commission Decision, R. 4) (*see also* R. 432, line 1 – 436, line 13).

On October 17, 2012, the Single Commissioner issued a Decision and Order denying the claim. Claimant timely appealed to the Full Commission, raising seven points of appeal. (R. 415). An Appellate Panel of the Full Commission heard oral argument on March 18, 2013 and issued its Decision and Order on June 4, 2013,

affirming the Single Commission Decision in its entirety. (Decision and Order of the Full Commission, filed June 4, 2013, R. 25 ("Commission Decision")).

Claimant timely appealed to this Court.

FACTUAL BACKGROUND

Decedent worked as a roll oven operator for Kroger in Anderson, South Carolina for approximately twelve years. (R. 443, line 22-23) (R. 368, line 18 – R. 369, line 9) (R. 358-359). He worked in fairly close proximity to the oven, which is warmer than most areas of the bakery but is nevertheless an open, well-ventilated area with an overhead swamp cooler blowing cooled water throughout the room, as well as with additional personal fans in the area. (R. 370, lines 16-25) (R. 378, lines 8-19) (R. 446, line 7 – 447, line 19) (*see also* R. 391-397 (color photos of bakery work area)). Decedent's job was to load product onto a conveyor, which then fed into the oven. (R. 380, lines 4-6) (R. 385, lines 11-16) (R. 462, lines 3-5). This was part of Decedent's normal job duties. (R. 360-362). Decedent was not always positioned near the oven, but was "constantly doing a full circle around the whole area." (R. 375, lines 3-8).

Melanie Bryson, Decedent's supervisor, (R. 443, lines 9-11), testified that the temperature inside the bakery depends on the time of year, (R. 371, lines 4-13), because the outside temperature affects the temperature inside the bakery. (R. 451, lines 9-20). Historical data shows that the temperature on April 4, 2009 ranged from a low of 41 degrees[1] to a high of 68 degrees, with a mean temperature of 55 degrees. (R. 363-364). Both Ms. Bryson and a co-worker, Jody Sage, testified they did not recall the temperature being unusually hot on April 4, 2009. (R. 383, lines 15-18) (R. 389, lines 16-21). Although Kroger does not keep records of the temperature in the area of the

[1] All temperatures are expressed herein as Fahrenheit.

bakery where Decedent was working, (R. 450, line 23 – 451, line 3) (R. 384, lines 9-11), temperatures taken on May 1, 2012 indicate that the bread oven area was 88 degrees and the roll oven area was 86 degrees. (R. 365). Historical data shows that the outside temperature on May 1, 2012 ranged from a low of 61 degrees to a high of 87 degrees, with a mean temperature of 75.5 degrees, (R. 366-367), approximately 20 degrees hotter than on April 4, 2009.

Decedent's job was classified as medium to heavy-duty and consisted of loading and unloading baked goods into and out of ovens, 8-to-10 hours per day, adjusting to meet demand. (R. 369, lines 10-15) (R. 379, lines 23-25) (*see also* R. 388, lines 21-25 (co-worker testifying that he would characterize Decedent's job as tedious rather than heavy)). Along with everyone else on the production team, Decedent normally worked 8-hour shifts, but routinely transitioned to 10-hour shifts during "production increases" around certain holidays, although Easter was not one of the bakery's busiest holidays. (R. 386, line 11 – 387, line 17) (R. 373, line 8 – 374, line 14) (R. 382, line 22 – 383, line 1). By all accounts, the occasional 2-hour increase in shift times was "not unusual." (R. 174, line 15 – 175, line 23). Having worked as an roll oven operator for 12 years, Decedent would have been well accustomed to these minor seasonal increases in his work hours. (R. 383, lines 2-5) (R. 463, lines 2-23).

The bakery's tonnage reports for 2005, 2006, 2007, 2008, and 2009 indicate that production levels routinely fluctuated to meet demand throughout the year, every year, with fairly predictable pre-holiday production increases as described by both Mr. Sage and Ms. Bryson, and with March-April 2009 being no exception. (*See generally*, R. 398-414) (R. 485). For example, figures from 2005 to 2008 reveal several days in which total

tonnage exceeded 70,000; whereas the bakery did not reach 70,000 total tonnage at all in 2009 before Decedent's heart attack. (R. 485).

Decedent had a family history of heart problems. Both of his parents suffered fatal heart attacks – his mother at the age of 47 and his father at the age of 51. (R. 349-352). Of his five siblings, all but one sister has heart problems. (R. 352-353). In addition, prior to his heart attack, he had been diagnosed with a right bundle branch block. (R. 349-352). He had been on cholesterol medication, but "it tore his stomach up, [so he] quit taking [it]." (R. 354).

Decedent suffered a heart attack while at work on Saturday April 4, 2009, eight days before the 2009 Easter holiday. There is no evidence to indicate anything abnormal about production at the Kroger bakery on this date, or in the preceding few weeks, including the roll oven room temperature, the speed of the assembly line, production goals or hours worked per day for that time of year. Mr. Sage testified that nobody, including Decedent, was doing anything unusual or extraordinary on April 4, 2009, and that the operations room in which Decedent was working was at its normal temperature. (R. 389, line 5 – 390, line 3). Ms. Bryson also testified there was nothing unusual about April 4, 2009, and that Decedent normally worked on Saturdays. (*See* R. 371, line 18 – 372, line 1) (R. 376, line 20 – 377, line 1) (R. 381, line 23 – 382, line 9) (R. 383, lines 6-14) (R. 389, lines 5-11). According to Ms. Bryson's testimony, Decedent was performing his normal and regular job duties and working his normal hours during a typical holiday production cycle on April 4, 2009. (R. 382, line 22 – 383, line 14) (R. 449, line 10 – 450, line 18).

Dr. Brett H. Woodard performed Decedent's autopsy. The autopsy report stated

that, "the cause of death was an acute myocardial infarction due to atherosclerotic coronary artery disease." (R. 355). In addition, the examination revealed an enlarged heart, and severe atherosclerosis. "The left anterior descending coronary shows 95% intermittent occlusion. The right coronary artery shows 90% atheromatous occlusion. The circumflex coronary artery shows 60% occlusion. The aorta and its major branches show moderate to severe arteriosclerotic changes." (R. 357). Furthermore, Dr. Woodard testified several times during his deposition that it was the physical activity of Decedent's job that aggravated his underlying heart condition. Decedent "came to that work or he came with this heart that was structurally injured because of hardening of his coronary arteries or atherosclerosis, and once he starts to do **physical work** he's more likely to have symptoms or a myocardial infarction than a person who doesn't have that, but it wouldn't make him have that." (R. 71, line 18 – 72, line 6) (emphasis added). Dr. Woodard agreed that the "**physical work** that was required of [Decedent] at his workplace aggravated his underlying symptoms and ultimately contributed ... in his death." (R. 73, lines 2-8) (emphasis added).

Dr. Woodard also agreed with Claimant's counsel that the combination of both physical activity and extreme heat would be more likely to cause a person who had underlying coronary disease to experience "symptoms, and the symptoms would range from headaches, dizziness, arm pain, chest pain, jaw pain, up and to the point of sudden death." (R. 76, lines 2-11). He also agreed that "heat stress could also be a contributing factor" to a heart attack. (R. 111, line 19 – 112, line 21) (emphasis added). However, Dr. Woodard clarified that he "never said or suggested [heat] **was** the proximate cause. I've stated that **if** there was a heat stress, that it **could** be a contributing factor, but the

causative factor was the underlying atherosclerosis, hardening of the arteries, and thereby reduction in blood flow to the heart and ischemia." (R. 110, lines 8-19) (emphasis added). Furthermore, Dr. Woodard agreed that he had seen no evidence of any unusual level of heat, stress or anxiety that would have led to Decedent's death. (R. 98, line 6 – 99, line 5) (R. 108, lines 5-9) (R. 114, line 7 – 115, line 5).

Dr. Woodard filled out a form, dated July 13, 2012, provided by Claimant's counsel and stating that, to a reasonable degree of medical certainty, Decedent's "job at Kroger Bakery aggravated his underlying symptoms and ultimately contributed to his death on April 4, 2009." He also hand-wrote on the form that, "Roger Kelley's death was caused by atherosclerotic coronary artery disease." (R. 37).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. §1-23-380(A)(5). Whether a particular event constitutes an "accident" within our Workers' Compensations Act ("Act") is a question of law, *see* Creech v. The Ducane Co., 320 S.C. 559, 562, 467 S.E.2d 114, 116 (Ct. App. 1995); however, the determination of whether a claimant's injuries arose out of and in the

course of employment is largely a factual matter for the Commission to decide. Wright v. Bi-Lo, Inc., 314 S.C. 152, 155, 442 S.E.2d 186, 188 (Ct. App. 1994).

The Administrative Procedures Act "mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts of the case." Rogers v. Kunja Knitting Mills, Inc., 312 S.C. 377, 381, 440 S.E.2d 401, 403 (Ct. App. 1994); Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989) (the Full Commission is the ultimate fact finder in workers' compensation cases). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). 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 same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010).

It is not within the appellate courts' purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Sharpe v. Case Prod., Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343

S.C. 487, 492-93, 541 S.E2d 526, 528 (2001). Furthermore, it is the Commission's prerogative to believe or disbelieve expert testimony. *See* Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 536, 673 S.E.2d 461, 466-67 (Ct. App. 2009) (observing that the "Commission need not accept or believe medical or other expert testimony, even when it is unanimous, uncontroverted, or uncontroverted"); *see also* Sharpe, 336 S.C. at 161, 519 S.E.2d at 106 (stating that "in compensation proceedings, where uncontroverted medical opinions are merely deductions drawn from certain symptoms, the final conclusion remains with the triers of fact"). Finally, "[w]hether a claimant's condition was accelerated or aggravated by an accidental injury is a factual matter for the Commission, and its finding of fact based on conflicting evidence may not be set aside." Owings v. Anderson Cnty Sheriff's Dept., 315 S.C. 297, 299-300, 433 S.E.2d 869, 871 (1993).

ARGUMENT

Both of Claimant's arguments, as listed in her Statement of the Issues on Appeal, relate to whether the Commission properly considered heat in its review of this case. However, as is explained in more detail below, Claimant failed to prove Decedent was exposed to extreme or excessive heat on April 4, 2009. The expert medical testimony presented by Claimant stops short of stating, to a reasonable degree of medical certainty, that heat either caused Decedent's heart attack or aggravated his heart condition in a manner that resulted in his demise.

In addition, although she makes passing arguments regarding the physical demands of Decedent's job and repetitive trauma injury, under S.C. Code Ann. § 42-1-172, these issues are not listed in her Statement of the Issues on Appeal and are not,

therefore, properly raised on appeal. In addition, her argument regarding repetitive trauma injury under Section 42-1-172 is not preserved because it was not raised or argued to the Full Commission. In any event, her arguments on all points fail.

I. The Commission did not err by failing to apply the so-called "Heat Related Injury Test."

To begin with, it is unclear precisely what Claimant means by the "Heat Related Injury Test." No South Carolina case employs that phrase and, to the extent Claimant is attempting to craft a new exception to the traditional heart attack rule, as stated in Black v. Barnwell Cnty, 243 S.C. 531, 134 S.E.2d 753 (1964) and its progeny, such should be rejected. The bottom line is that, because she failed to prove compensability under the traditional heart attack rule, Claimant attempts to revise the extreme or excessive heat exception to the traditional rule, as stated in Holley v. Owens Corning Fiberglas Corp., 301 S.C. 519, 392 S.E.2d 804 (Ct. App. 1990), so that she can fit the facts of this case within that exception. However, the evidence simply does not support her claim. Instead, substantial evidence supports the Commission's findings of fact that, "Decedent's working conditions were not excessive, and the temperature of the work area was less than 90 degrees," and that his fatal heart attack did not arise out of his employment with Kroger. (Commission Decision, R. 26). As a result, the Commission Decision should be upheld.

Claimant spends a good deal of time extrapolating the definition of "accident" as used in S.C. Code Ann. § 42-1-160(A), and correctly points out that there must be an accident, as that term is defined in the Act, that both arises out of and in the course of employment. Although interrelated to a certain extent, the two parts of the phrase "arising out of and in the course of employment" are not synonymous. Osteen v.

Greenville County Sch. Dist., 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998). Instead, they are two different requirements both of which must be met before compensation is allowed. Furthermore, both parts must exist simultaneously. The phrase "arising out of" refers to the injury's origin and cause, whereas the phrase "in the course of" refers to the injury's time, place, and circumstances. Id., at 50, 508 S.E.2d at 24. Here, the main dispute centers around whether Decedent's heart attack arose out of his employment.

The test of whether an injury arises out of employment is somewhat more complicated than a simple "but for" test, as is suggested by Claimant.[2] "The claimant, at the outset, is faced with the burden to show by competent testimony, not only the fact of the injury, but that it occurred in connection with his employment. And he must furnish substantial evidence from which the reasonable inference can legally be drawn that the injury arose out of and in the course of his employment." Fowler v. Abbott Motor Co., 236 S.C. 226, 235, 113 S.E.2d 737, 742 (1960); *see also* Jennings v. Chambers Dev. Co., 335 S.C. 249, 254, 516 S.E.2d 453, 456 (Ct. App. 1999) (the claimant bears "the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation"). A "possibility" that an injury arose out of employment is insufficient. Fowler, 236 S.C. at 234, 113 S.E.2d at 741.

Furthermore, general pronouncements and quotes defining when an accident "arises out of" employment do not provide the entire test for determining whether a heart attack is compensable under the Act. Section 42-1-160(C) provides, in pertinent part, that "heart attacks ... arising out of and in the course of employment unaccompanied by

[2] In fact, Ardis v. Combined Ins. Co., 380 S.C. 313, 669 S.E.2d 628 (Ct. App. 2008) considered and analyzed at length the traveling employee, personal comfort and substantial deviation doctrines.

physical injury are not considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations ..." S.C. Code Ann. § 42-1-160(C). None of the cases cited by Claimant in her general discussion of whether an injury arises out of employment dealt with heart attacks. (App. Br. pp. 5-8).[3] As such, they are of peripheral assistance only in this case.

In South Carolina, "a coronary attack suffered by an employee constitutes a compensable accident within the meaning of the Workmen's Compensation Act if it is induced by unexpected strain or over-exertion in the performance of the duties of his employment, or by unusual and extraordinary conditions in the employment." Black, 243 S.C. at 535, 134 S.E.2d at 755. Thus, in a heart attack case, a claimant must prove both a causal connection between his work and the heart attack, **and** that the activity that caused the heart attack "constituted an unusual and extraordinary exertion on his part," or "unusual and extraordinary conditions in the employment." Id. at 535-36, 134 S.E.2d at 755. The claimant bears "the burden of proving the death arose out of employment by establishing it was brought about by unexpected exertion or strain or by unusual and extraordinary conditions in employment." Jennings, 335 S.C. at 258, 516 S.E.2d at 458 (supporting the Commission's finding that, on the day of his heart attack, the claimant "performed no work that involved any unexpected exertion or unusually stressful conditions"); *see also* Lorick v. South Carolina Elec. & Gas Co., 245 S.C. 513, 525, 141 S.E.2d 662, 668 (1965) (the burden is on the claimant "to establish a causal connection between the decedent's employment and his fatal coronary attack ..."). If he cannot prove either prong, his heart attack is not compensable.

[3] Although the claimant in Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994) died of a heart attack, the analysis in that case centered on whether the claimant had violated a direct prohibition of the employer.

Whether a heart attack is the result of unexpected strain or over-exertion in the performance of the duties of his employment, or by unusual and extraordinary conditions in the employment is a question of fact for the Commission. *See* Cline v. Nosredna Corp., Inc., 291 S.C. 74, 80, 352 S.E.2d 291, 294 (Ct. App. 1986) (explaining that whether an accident occurred is a factual determination, and upholding the Commission's determination regarding unusual and extraordinary work conditions as supported by substantial evidence). Here, the Commission found, based on substantial evidence in the record, that there was "no evidence that Decedent was required to perform tasks out of the normal for his job description," and that there was "no evidence that any of this equipment malfunctioned on that day." (Commission Decision, R. 26). Claimant has not effectively challenged this finding; however, as it is relevant to some of her other arguments, Respondents address it briefly here.

In order to determine whether work conditions were unusual or extraordinary, courts look to the conditions and demands of a worker's particular employment. Shealy v. Aiken Cnty, 341 S.C. 448, 457, 535 S.E.2d 438, 443 (2000); Black, 243 S.C. at 536, 134 S.E.2d at 755; Sims v. S.C. State Comm'n of Forestry, 235 S.C. 1, 3, 109 S.E.2d 701, 702 (1959). In fact, in Sims, there was medical testimony that the exertion of climbing the steps of a 100-foot fire tower caused or triggered the claimant's heart attack. Nonetheless, the Supreme Court denied compensation in light of the fact that "climbing up and down the tower steps was not unusual in decedent's work; it was usual and the very thing he had been doing for sixteen years." 235 S.C. at 3, 109 S.E.2d at 702. The Court confirmed that, "in heart attack cases, to be compensable, the attack must have been induced by unusual strain or exertion at work ..." Id.; *see also* Black (climbing

stairs seven or eight times within the span of an hour not unusual or extraordinary exertion); Pellum v. W.C. Chaplin Transp., 249 S.C. 348, 351, 154 S.E.2d 432, 433 (1967) (finding increase in demand for petroleum products in the winter normal and expected); DeBruhl v. Kershaw Cnty Sheriff's Dept., 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990) (heart attack not compensable where job was normally stressful). As was the case in Jones v. Williamsburg Cnty, here Decedent's work conditions at the time of his heart attack, although perhaps "strenuous and uncomfortable, were usual and ordinary incidents of his employment." 245 S.C. 434, 437, 141 S.E.2d 100, 102 (1965).

Claimant is correct that, even where there is a "preexisting pathology which may have been a contributing factor," a heart attack or stroke may constitute "a compensable 'accident' if it is induced by unexpected strain or over-exertion in the performance of the duties of his employment or by unusual and extraordinary conditions in the employment." Kearse v. South Carolina Wildlife Resources Dept, 236 S.C. 540, 544, 115 S.E.2d 183, 186 (1960); Brown v. La France Indus., 286 S.C. 319, 330, 333 S.E.2d 348, 355 (Ct. App. 1985) (same). However, it is equally well-established that, "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 as an accident. The fact that due to a weakened heart condition, the exertion required for the ordinary performance of the work is too great for the particular employee ... does not make it a compensable accident." Walsh v. U.S. Rubber Co., 238 S.C. 411, 418, 120 S.E.2d 685, 689 (1961).

Claimant erroneously asserts that her claim falls within the "exception" stated in Holley v. Owens Corning Fiberglas Corp., 301 S.C. 519, 392 S.E.2d 804 (Ct. App. 1990).

Holley stands for the proposition that an employee who "is subjected to an **extreme and high temperature** ... and while being subjected to such **extreme and high temperature** and while undergoing exertion" suffers a heart attack, may be found to have suffered a compensable injury under the Act. 301 S.C. at 522, 392 S.E.2d at 806 (emphasis added). This exception, carved out of the traditional heart attack rule, applies where "excessive heat in the place of ... employment" is proven. 301 S.C. at 523, 392 S.E.2d at 807. Simply adducing testimony that the part of the bakery where Decedent worked was warmer than other parts of the bakery is insufficient. Even the North Carolina cases that Claimant relies on refer to "excessive" or "extreme" heat, which the claimant must prove. *See* Dillingham v. Yeargin Constr. Co., 320 N.C. 499, 503, 358 S.E.2d 380, 382 (N.C. 1987) (discussing rule that where "the conditions of employment expose the claimant to **extreme heat** or cold ...") (emphasis added); Fields v. Plumbing Co., 224 N.C. 841, 842-43, 32 S.E.2d 623, 624 (N.C. 1945) (discussing "where the employment subjects a workman to a special or particular hazard from the elements, such as **excessive heat** or cold ...") (emphasis added). Here, Claimant failed to prove that Decedent was exposed to extreme or excessive heat in his job on April 4, 2009.

The Commission did not apply an incorrect legal standard, as Claimant asserts. (App. Br. p. 16). The Commission properly considered whether Decedent's working conditions, including temperature, were excessive. The Commission was clearly comparing the temperatures to which Decedent was exposed to those the general public experiences. Compare Finding of Fact 6 (which Claimant conveniently omits): "The greater weight of the evidence shows that Decedent's working conditions were not excessive, and the temperature of the work area was less than 90 degrees," with Finding

of Fact 11: "There is no evidence that Decedent was required to perform tasks out of the normal **for his job description** ..." (Commission Decision, R. 26) (emphasis added). The Commission clearly and properly compared the tasks Decedent was required to perform to his normal job description Finding of Fact No. 11, whereas there is no reference or suggestion in Finding of Fact 6 that the Commission was comparing Decedent's work conditions, particularly as they relate to heat, to anything other than that experienced by the general public. In other words, the Commission did not require Claimant to prove that the heat Decedent was exposed to on April 4, 2009 was greater than he normally encountered in his regular job duties. Instead, the Commission found that his working conditions, particularly as related to heat, simply were not excessive. The Commission found that Decedent's work area was open and cooled by swamp fans and other fans, noted that the outside temperatures (which Ms. Bryson testified affect temperatures inside the bakery) ranged from 41 degrees to 68 degrees on April 4, 2009. (Commission Decision, R. 16-17, 25-26). The Commission also properly relied on the fact that, after considering all of the evidence, Dr. Woodard "would not state to a reasonable degree of medical certainty that heat was a contributing factor to the [Decedent's] death." (Commission Decision, R. 19-20).

Second, even if Claimant had persuaded Dr. Woodard to state to a reasonable degree of medical certainty that excessive heat in fact caused Decedent's heart attack, which she did not, that statement would have had no probative value. Although Claimant's counsel suggested to Dr. Woodard in his deposition that the area where Decedent worked was 88 degrees on the day he had his heart attack, this there is no evidence in this record to support that assertion. "[I]t is well settled that the probative

value of expert testimony, based upon hypothetical factors, stands or falls on the existence or nonexistence of the facts upon which it is predicated." Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 449, 154 S.E.2d 845, 851 (1967); Radcliffe v. Southern Aviation Sch., 209 S.C. 411, 424, 40 S.E.2d 626, 632 (1946) (rejecting medical testimony based on unproven facts). Here, Decedent was a roll oven operator. (R. 443, line 22-23) (R. 368, line 18 – 369, line 9) (R. 358-359). The temperature taken on May 1, 2012 in the roll oven area as 86 degrees, not 88 degrees, as Claimant's counsel repeatedly suggested to Dr. Woodard. (R. 365). Furthermore, undisputed testimony in the record establishes that the outside temperature affects the temperature inside the bakery, (R. 451, lines 9-20), and the outside temperature on May 1, 2012 was approximately 20 degrees warmer than it was on April 4, 2009. (R. 366-367) (R. 363-364). There was uncontroverted testimony that where Decedent worked was an open, well-ventilated area with an overhead swamp cooler and with fans blowing cooled water throughout the room, as well as additional personal fans in the area. (R. 370, lines 16-25) (R. 378, lines 8-19) (R. 446, line 7 – 447, line 19) (*see also* R. 243-397 (photos of bakery work area)). The evidence in this record simply does not indicate excessive or extreme heat but, instead, supports the Commission's conclusion that, "Decedent's working conditions were not excessive, and the temperature of the work area was less than 90 degrees." (Commission Decision, R. 26).

The heat-induced heart attack cases relied on by Claimant are readily distinguishable from the case at hand. For example, in Madison v. International Paper Co., 165 N.C. 144, 598 S.E.2d 196 (N.C. Ct. App. 2004), the North Carolina Court of Appeals pointed out that the evidence in the case before it, "clearly shows Madison was

exposed to extreme heat, including radiant temperatures around ninety degrees Fahrenheit for a period of an hour to an hour and a half and heat in excess of 200 degrees Fahrenheit inside the dryer when the doors were open, which according to the medical expert testimony was a significant contributing factor in his fatal heart attack." 165 N.C. at 154, 598 S.E.2d at 202. In addition, although the claimant suffered from serious, pre-existing heart disease, the court also pointed out that the claimant's work conditions were "in violation of safety regulations and would represent unsafe and extreme conditions for anyone." Id., 598 S.E.2d at 202. Thus, in Madison, the heat was far more extreme than has been proven in the case before this Court, there was expert medical testimony that the heat was a significant contributing factor to the heart attack, and the work conditions violated safety standards.

In Byrd v. Stonega Coke & Coal Co., 182 Va. 212, 28 S.E.2d 725 (Va. 1944), the claimant was exposed to extreme heat working around ovens that were 2400 to 2500 degrees, during late July on a day that witnesses testified was "one of the hottest days of the summer." 182 Va. at 215, 28 S.E.2d at 726-27. In fact, the employer in Byrd conceded "the "extra-hazardous conditions under which the employee worked," and only contested causation. 182 Va. at 217, 28 S.E.2d at 727. No such extreme heat has been proven here.

In Dillingham, the claimant "was required to wear a radiation suit when inside the reactor building which covered his entire body and caused him to sweat heavily. All openings in the suit were sealed with tape. Both medical experts implicated the wearing of the suit, and plaintiff's consequent inability to dissipate heat, as a cause of the cardiac arrest." 320 N.C. at 503-04, 358 S.E.2d at 382. Furthermore, in Dillingham, there was

"uncontradicted evidence ... that other employees at the plant had suffered heat-related illnesses leading to emergency room treatment." 320 N.C. at 504, 358 S.E.2d at 382. In contrast, Decedent was not required to wear any special or sealed clothing and there is no evidence in the record of other employees suffering from any heat-related illnesses.

Floyd v. W.O. Greene Plumbing & Heating Co., 255 S.C. 352, 179 S.E.2d 28 (1971), does not dictate a different outcome. Floyd dealt with the principle that, where an employee is found, deceased, at his place of work but where there is no "evidence of what caused the death, most courts will indulge a presumption or inference that the death arose out of the employment." 255 S.C. at 354, 179 S.E.2d at 29. That principle does not apply here where the cause of death, a heart attack "due to atherosclerotic coronary artery disease," (R. 355), is known. In addition, in Floyd, the claimant was working outside on a 103-104 degree day but was not perspiring, which is a recognized sign of heat stroke. The Court upheld the Commission's award of benefits because, of the possible causes of death stated in the medical testimony, one "was a heat stroke which, if the cause of death, would constitute an accidental injury within the meaning of the Workmen's Compensation Act." 255 S.C. at 356, 179 S.E.2d at 30.

Although Claimant is correct that Dr. Woodard testified that, assuming "in the usual humidity that we would experience in Anderson, South Carolina, [the 88 degrees near the ovens] would be a hot temperature[4] and it would put [Decedent] at high risk to start hemoconcentrating," which "would be a contributing factor to why he – the underlying heart condition presented as a myocardial infarction and death on that day," (R. 105, lines 4-24), Dr. Woodard made it clear that his conclusion was based on a

[4] As noted above, Decedent was a roll oven operator and the temperature in front of that oven was 86 degrees, not 88 degrees, on May 1, 2012. Given the outside temperatures on April 4, 2009, it can only be concluded that it was cooler than 86 degrees where Decedent was working that day.

combination of heat and humidity, (R. 103, line 25 – 104, line 13) (R. 106, lines 16-18), both of which are unknown. Furthermore, even if Claimant had produced outside humidity readings for April 4, 2009, which she did not, Dr. Woodard stated that he did not know "if a factory's more humid or less humid" than outside air would be. (R. 105, lines 11-12). Thus, any conclusion reached by Dr. Woodard regarding heat was necessarily dependent on the combination of excessive heat and humidity in the bakery where Decedent was working on April 4, 2009, neither of which were proven.

Furthermore, Dr. Woodard agreed that he could not state, to a reasonable degree of medical certainty that the proximate cause of Decedent's heart attack was exposure to excessive heat on the day of his death. Instead, he clarified that he had "never said or suggested it **was** the proximate cause. I've stated that **if** there was a heat stress, that it **could** be a contributing factor, but the causative factor was the underlying atherosclerosis, hardening of the arteries, and thereby reduction in blood flow to the heart and ischemia." (R. 110, lines 8-19) (emphasis added) (*see also* R. 111, lines 14-21 (explaining that heat stress **could** be a contributing factor)) (R. 114, lines 7-13 (clarifying that his opinion was not that exposure to excessive heat on April 4, 2009 caused Decedent's heart attack)). Dr. Woodard further agreed that, based on the autopsy he performed, Decedent's heart attack was not caused by exposure to excessive heat. (R. 110, lines 20-23).

Although Claimant's counsel persuaded Dr. Woodard to agree that the combination of factors, including assumed (but not established) temperatures inside the bakery and a physically demanding job, contributed to Decedent's demise, that statement falls far short of an expert opinion stated to a reasonable degree of medical certainty that

excessive heat in fact aggravated his heart condition. Dr. Woodard only stated that "**if** [Decedent] was exposed to excessive heat on 4/4/09;, it **could** be a contributing factor because he would sweat, he would hemoconcentrate, his viscosity would go up." (R. 114, line 21-24) (emphasis added). In fact, Dr. Woodard's statement that, if Decedent had had a job in an air conditioned office, "he probably wouldn't have died," is no more than speculation which cannot serve as the basis for an award under the Act. *E.g.*, Crosby v. Wal-Mart Store, Inc., 330 S.C. 489, 496, 499 S.E.2d 253, 257 (Ct. App. 1998) (holding that the "burden is on the claimant to prove such facts as well render the injury compensable, and such an award must not be based on surmise, conjecture or speculation"); Lorick, 245 S.C. at 526, 141 S.E.2d at 668 (expert medical testimony must show employment "'most probably' contributed to and precipitated the coronary occlusion"). In addition, medical testimony merely stating that certain conditions **can** lead to heart attack or cause of death is insufficient to prove compensability. Bridges v. Housing Auth., 278 S.C. 342, 345, 295 S.E.2d 872, 874 (1982) (explaining that medical testimony indicating "that the malady in question 'possibly' or 'could have' or 'might have' resulted from the injury" is insufficient).

Dr. Woodard readily agreed that he had not been presented with any evidence of what the temperature had been in the bakery on the day of Decedent's heart attack, (R. 108, lines 5-9), and acknowledged that he had not been presented with sufficient evidence to conclude that Decedent was exposed to excessive heat on April 4, 2009. (R. 114, lines 14-19) (R. 115, lines 3-5). In fact, he agreed that his comments regarding heat exposure were "conjecture" because he did not know what the temperature was inside the bakery on the day that Decedent had his heart attack. (R. 116, lines 8-11). Dr. Woodard

testified that, "obviously, at least in my looking at those pictures, it looks like this bakery's pretty open. And he's working at night and it's – actually, if I was going turkey hunting that day, I'd want my long johns because you'd be a little chilly sitting in the woods." (R. 116, lines 17-25). Although Dr. Woodard's turkey hunting reference clearly related to outside temperatures, Ms. Bryson's uncontroverted testimony was that outside temperatures affected temperatures inside the bakery. (R. 451, lines 9-20). Outside temperatures were approximately 20 degrees cooler on April 4, 2009 than they were on May 1, 2012.

As a result, this Court should reject Claimant's arguments and uphold the Commission's Decision that Claimant did not prove excessive or extreme heat caused Decedent's heart attack on April 4, 2009.

II. The Commission correctly found that Dr. Woodard did not state, to a reasonable degree of medical certainty, that heat and other conditions of employment inside the bakery were contributing factors to Decedent's heart attack which is not compensable.

As noted above, Claimant did not prove that Decedent was exposed to excessive heat on April 4, 2009, a fact Dr. Woodard acknowledged. And while Dr. Woodard agreed that the physical demands of Decedent's job aggravated or contributed to his heart attack, the conditions of Decedent's job on April 4, 2009 were not proven to be unusually or extraordinarily strenuous in any way. On both fronts, Claimant has failed to prove her claim.

A. The Commission properly found that Dr. Woodard did not state to a reasonable degree of medical certainty that heat was a contributing factor in Decedent's death.

Claimant argues that the Commission erred in finding that Dr. Woodard did not state to a reasonable degree of medical certainty that heat was a contributing factor in

Decedent's death. At most, Dr. Woodard stated that heat could aggravate or contribute to a heart attack, but he repeatedly acknowledged that he was not provided with evidence that Decedent was exposed to excessive or extreme heat on April 4, 2009.

Every citation highlighted by Claimant concerning Dr. Woodard's testimony regarding excessive heat was either qualified by Dr. Woodard or based on assumptions that she failed to prove. The testimony at R. 105, line 25 – 106, line 24 requires Dr. Woodard to assume the temperature where Decedent was working was not only 88 degrees but also humid, neither of which was proven to be true for April 4, 2009. The testimony at R. 112, line 23 – 113, line 19 combines the assumption that the area where Decedent was working was 88 degrees on April 4, 2009, which has not been proven, with the fact "that he works a very heavy job or heavy job with heavy pushing ..." (R. 112, line 24 – 113, line 5). Thus, Dr. Woodard's statement was based on the combination of heat and physical activity. The former was not proven and the latter was found not to have been unusual or extraordinary, a factual finding Claimant has not challenged. In addition, all Dr. Woodard suggested was that, if Decedent "had had a job in an air conditioned office on that same day, he **probably** wouldn't have died." (R. 113, lines 17-19) (emphasis added). As noted above, this is conjecture and, as such, cannot support an award. *E.g.*, Crosby, 330 S.C. at 496, 499 S.E.2d at 257; Bridges, 278 S.C. at 345, 295 S.E.2d at 874. Finally, the testimony at R. 115, line 9 – 116, line 4 again asks Dr. Woodard to assume the area where Decedent was working on April 4, 2009 was 88 degrees, and combines the heat with "doing all the lifting and pushing that he was required to do." Dr. Woodard's conclusion is as much about the physical labor, which was not unusual or exceptional, as it is about the temperature, which was not proven.

Claimant's assertion that Dr. Woodard "went further and stated that the temperatures outside the plant were not a contributing factor to Mr. Kelley's death," (App. Br. p. 22), is plainly inaccurate. Dr. Woodard testified that, based on all of the temperature data he had been provided, both inside and outside of the bakery, he could not conclude with reasonable medical certainty that heat was a contributing factor in Decedent's death. (R. 86, line 20 – 89, line 23).

Dr. Woodard simply would not state to a reasonable degree of medical certainty that excessive or extreme heat aggravated or contributed to Decedent's heart attack. This is precisely because Claimant failed to prove Decedent was exposed to excessive or extreme heat on April 4, 2009, which Dr. Woodard recognized several times. (R. 108, lines 5-9) (R. 114, lines 14-19) (R. 115, lines 3-5). In fact, he agreed that his comments regarding heat exposure were "conjecture" because he did not know what the temperature was inside the bakery on the day that Decedent had his heart attack. (R. 116, lines 8-11).

Claimant's assertion that Dr. Woodard's testimony at R. 88, line 15 – 89, line 23 referred only to outside temperatures is mistaken. Counsel for Respondents first went over the temperature readings taken inside the bakery on May 1, 2012 (88 for the bread oven area and 86 for the roll oven area) (R. 86, line 20 – 87, line 13) and then compared the outside temperatures on that date with the date that Decedent experienced his heart attack. (R. 87, line 14 – 89, line 1). It was on the basis of this entire discussion of temperatures both inside and outside of the bakery that Dr. Woodard stated he could not "state to a reasonable degree of medical certainty that heat was a contributing factor to Mr. Kelley's death." (R. 89, lines 18-23).

In Holley, the Commission found that the claimant "suffered a heart attack as a result of a pre-existing coronary condition which was aggravated and accelerated by climbing in excessive heat in the place of employment." 301 S.C. at 523, 392 S.E.2d at 807. Although this Court's decision in Holley, "carves out an exception to the traditional heart attack rule," it did not apply a lesser burden of proof in cases alleging aggravation of a pre-existing heart condition. Although there is plenty of testimony that excessive or extreme heat can aggravate or contribute to a heart attack, there is absolutely no evidence that Decedent was exposed to excessive or extreme heat. Without this evidence, the Commission properly concluded that "there is no evidence in the record that [Decedent's] heart condition was aggravated by his work environment or job requirements." (Commission Decision, R. 22-23). As Dr. Woodard hand-wrote, "Roger Kelley's death was caused by atherosclerotic coronary artery disease." (R. 37).

This Court should confirm that the Commission properly concluded that, "Dr. Woodard would not state to a reasonable degree of medical certainty that heat was a contributing factor to the Claimant's death." (Commission Decision, R. 19-20). This Court also should uphold the Commission's finding that there is no evidence that Decedent's work conditions, including heat, aggravated or contributed to Decedent's fatal heart attack.

B. The Commission properly found that there is no evidence in the record that Decedent's heart disease was aggravated by other conditions of his employment that would render it compensable.

The fact that the normal physical demands of Decedent's job may have aggravated his underlying heart condition does not render this claim compensable. Claimant repeats and appears to confuse the test for heart attacks in general. Her

arguments appear to be related solely to the "causation" prong of the test for whether a heart attack is compensable, totally ignoring the requirement that a claimant prove an unexpected strain or overexertion. In fact, the quote she lifts out of Brown strategically omits this part of the test, which is highlighted here: "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.** [*citation omitted*] This is true even though there is a pre-existing pathology that may have been a contributing factor." 286 S.C. at 330, 333 S.E.2d at 355 (emphasis added).

While the law on aggravation of a pre-existing condition allows that the mere existence of a pre-existing condition does not preclude compensation in certain circumstances, Brown, 286 S.C. at 330, 333 S.E.2d at 355, Claimant has failed to prove that either "unexpected strain or overexertion in the performance of the duties of his employment or by unusual and extraordinary conditions" aggravated Decedent's heart condition and caused, proximately or otherwise, his heart attack. It cannot be disputed that, "[w]hether a claimant's condition was accelerated or aggravated by an accidental injury is a factual matter for the Commission, and its finding of fact based on conflicting evidence may not be set aside." Owings, 315 S.C. at 299-300, 433 S.E.2d 869 at 871. In addition, the same burden for proving the legal and causal standards in heart attack cases in general applies to claims that work conditions aggravated an underlying heart condition. *See* Ricker v. Village Management Corp., 231 S.C. 47, 55, 97 S.E.2d 83, 87 (1957) (applying the "unusual exertion or strain rule to which this Court has consistently

adhered," in upholding Commission determination that claimant's work conditions aggravated his heart condition by subjecting him to "considerable strain"). The same standard applies to a claim that work conditions **aggravated** a heart condition as apply to a claim that work conditions **caused** a heart attack. If this were not so, claimants with pre-existing heart conditions could by-pass the traditional heart attack rule simply by arguing their work "aggravated" their underlying condition. The test quoted by Claimant from Mullinax v. Winn-Dixie Stores, Inc., that "[a] condition is compensable **unless it is due solely to the natural progression** of a pre-existing condition," 318 S.C. 431, 437, 458 S.E.2d 76, 80 (Ct. App. 1995) (emphasis added), cannot be the sole test in heart attack cases. Such an approach would make it easier for a claimant with a pre-existing heart condition to recover benefits (because he would not have to prove an unusual strain or exertion) than it would be for a claimant with no pre-existing health problems (who would have to prove an unusual strain or exertion), which would be an unjust and absurd result that the Legislature clearly could not have intended. Furthermore, dropping the requirement that the claimant prove either unusual strain or overexertion, or excessive or extreme work conditions aggravated an underlying heart condition would convert the Act in those cases, "into the protection furnished by a life insurance policy where an employee dies while in the performance of his work." Price v. B.F. Shaw Co., 224 S.C. 89, 100, 77 S.E.2d 491, 496 (1953).

Other states apply the same rule to whether work conditions aggravate a pre-existing heart condition as they do to whether work conditions cause a heart attack. *See, e.g.*, Denver v. Industrial Comm'n of Colorado, 195 Colo. 431, 579 P.2d 80 (Colo. 1978) (where the claimant suffered from pre-existing arteriosclerosis, requiring evidence that

the heart attack "was the result of extraordinary or unusual overexertion in the course of his employment"); Hampton v. Owens-Illinois Glass Co., 140 S.2d 868, 1962 Fla. LEXIS 2871 (Fla. 1962) (requiring the claimant to prove that his pre-existing heart condition was aggravated by "unusual emotional and physical exertions beyond the requirements of his ordinary employment"); United States Steel Corp. v. Dykes, 238 Ind. 599, 154 N.E.2d 111 (Ind. 1958) (in order to prove aggravation of underlying coronary disease, a claimant must provide evidence of an "increase in the work load or of ... extra exertion"); State Indus. Ins. Syst. v. Foster, 110 Nev. 521, 874 P.2d 766 (Nev. 1994) (limiting recovery to "instances where 'exceptional and extraordinary physical exertion demanded by the employment' aggravates a preexisting heart disorder and causes death"); Nelson v. North Dakota Workmen's Comp. Bur., 316 N.W.2d 790, 1982 N.D. LEXIS 211 (N.D. 1982) (requiring proof of unusual physical or emotional stress to prove heart attack compensable where the claimant suffered from underlying hypertension and had a long history of smoking).

In fact, the Indiana Supreme Court summarized the pertinent inquiry succinctly:

> The causal question here is: Was the inability of decedent's heart to meet the demands, i.e., the "coronary insufficiency," caused by a change, i.e., an increase in the work load beyond the heart's ability to function, or by a decrease in the heart's ability to meet an unchanged demand. The "cause" is that which has changed, not that which remains constant.

Dykes, 238 Ind. at 608, 154 N.E.2d at 116. In essence, was the heart too weak to accommodate the normal work conditions, or were work conditions unusually strenuous or physically demanding such that they overwhelmed the heart? Compensation is awarded only in the latter circumstance, which Claimant did not prove here.

Dr. Woodard was willing to state to a reasonable degree of medical certainty that the physical work Decedent performed aggravated and contributed to his heart attack. (R. 71, line 18 – 72, line 6) (R. 73, lines 2-8). This undoubtedly is the basis for his statement that Decedent's "job at Kroger Bakery aggravated his underlying symptoms and ultimately contributed to his death on April 4, 2009." (R. 37). However, as noted above, the Commission's Findings of Fact that there was "no evidence that Decedent was required to perform tasks out of the normal for his job description," and "no evidence that any of this equipment malfunctioned on that day," (Commission Decision, R. 26), are supported by substantial evidence and have not been challenged on appeal by Claimant. The evidence overwhelmingly establishes that Decedent's work conditions – the amount and kind and duration of his work – were not unexpected or unusually strenuous. There was nothing unusual about his workload, his hours or the pace or stress of his job on April 4, 2009.

In the end, Dr. Woodard explained that "the physical work load, lifting, repetitive lifting of things that would be heavy, and would call that exercise, would aggravate the ischemia to [Decedent's] heart," and noted that, "the cause of his heart attack was his atherosclerosis." (R. 112, lines 6-11). In order to demonstrate that Decedent's employment aggravated his pre-existing heart condition, Claimant had to prove either 1) unusual strain or overexertion in the physical demands of Decedent's job, or 2) excessive or extreme heat. She proved neither.

Thus, this Court should affirm the Commission's finding that Decedent's heart attack is not compensable.

III. Claimant's argument regarding repetitive trauma injury is neither preserved for appeal nor supported by substantial evidence.

Claimant argues that the Commission applied an incorrect legal standard to her purported repetitive trauma claim. (App. Br. pp. 16 n.1, 19). However, this issue is not properly preserved or raised on appeal and should not even be considered.

First, her argument regarding repetitive trauma injury under section 42-1-172 is not preserved because Claimant never fully presented it to the Single Commissioner and did not raise it at all in her appeal to the Full Commission. Claimant's Form 52 alleges only an injury by accident and does not reference either repetitive trauma injuries or S.C. Code Ann. § 42-1-172 in any way. (R. 30). Although her Form 58 Pre-Hearing Brief filed with the Single Commissioner includes a passing reference to Section 42-1-172 in a long list of statutory sections allegedly pertinent to her claim, (R. 33), Claimant presented no arguments or evidence to the Single Commissioner regarding any alleged repetitive trauma injury. "It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon" by the lower tribunal to be preserved for appellate review. Pratt v. Morris Roofing, Inc., 353 S.C. 339, 352, 577 S.E.2d 475, 481-82 (Ct. App. 2003).

In her appeal of the Single Commissioner Decision, she failed to raise any argument regarding either repetitive trauma injuries or Section 42-1-172. (Cl. Form 30). Creech, 320 S.C. at 564, 467 S.E.2d at 117 (explaining that "only issues within the application for review are preserved for the full commission"); Green v. City of Columbia, 311 S.C. 78, 80, 427 S.E.2d 685, 687 (Ct. App. 1993) (holding that, "[d]ue process requires that litigants receive notice of the issues to be met on trial, hearing or appeal. *[citation omitted]* Only issues within the application for review under S.C. Code

Ann. § 42-17-50 (1976) are preserved for appeal to the commission"). Because she failed to raise this argument in any meaningful way before the Single Commissioner, and failed to raise it in her appeal to the Appellate Panel, her argument regarding repetitive trauma injury should be dismissed.

Second, because Claimant did not list repetitive trauma injury under S.C. Code Ann. § 42-1-172 in her Statement of the Issues on Appeal, they are not properly raised on appeal. Burris v. Propst Lumber & Logging, Inc., 396 S.C. 85, 94, 719 S.E.2d 695, 700 (Ct. App. 2011) (issue not preserved for review because appellant did not specifically raise the point in its Statement of Issues on Appeal); Langehans v. Smith, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001) (holding that, "[i]n order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal. See Rule 208(b)(1)(B), SCACR"). Therefore, this Court should not even consider her argument regarding repetitive trauma injury.

Even if this Court considers this argument, which Respondents assert is not preserved, it is unclear if or how Section 42-1-172 would apply in heart attack cases. Although there are no cases in South Carolina discussing heart attacks as the result of repetitive trauma injury, the same standard would have to apply to heart attack claims under Section 42-1-172 as apply generally. The claimant would have to prove unusual or extraordinary work conditions, or exposure to excessive/extreme temperatures. Otherwise, claimants could completely circumvent the traditional heart attack rule simply by bringing their claim under Section 42-1-172. Such a result would overrule the holdings in an entire line of cases including Black, Kearse, Brown, Sims, Pellum, DeBruhl, Jones and Holley, among others.

Here, Claimant failed to adduce medical evidence stating to a reasonable degree of medical certainty that there is any causal relationship between unusual or extraordinary work conditions or exposure to excessive/extreme temperatures and any alleged repetitive trauma injury. *See* Michau v. Georgetown Cnty, 396 S.C. 589, 594, 723 S.E.2d 805, 807 (2012) (only medical evidence that is stated to a reasonable degree of medical certainty is admissible to prove repetitive injury claims under section 42-1-172). Therefore, even if this issue had been properly preserved for appeal, which it was not, the only conclusion the Commission could have reached would be that she failed to meet her burden of proof under Section 42-1-172.

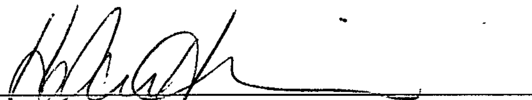
This Court should hold that Claimant failed to preserve her argument under Section 42-1-172 and reject the same. Even if it is considered, this argument would fail for the same lack of proof that dooms her other arguments.

CONCLUSION

For all the reasons stated herein, this Court should uphold the Commission Decision in its entirety and dismiss Claimant's appeal.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC



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October 22, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Commissioner T. Scott Beck
Commissioner Melody James
Commissioner Andrea C. Roche

W.C.C. File No. 0922072

Roger Dale Kelley, Employee, ... Appellant,

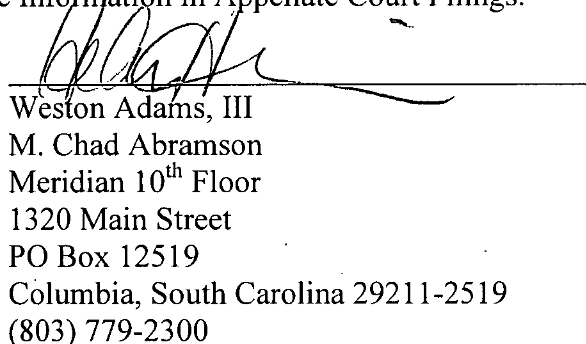
v.

The Kroger Company, Employer, and
The Kroger Co. c/o Sedgwick CMS, Carrier. .... Respondents.

PROOF OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondents The Kroger Company and The Kroger Co. c/o Sedgwick CMS complies with Rule 211(b), SCACR. The undersigned further certifies that the Final Brief Final Brief of Respondents The Kroger Company and The Kroger Co. c/o Sedgwick CMS complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

October 22, 2013



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In The Court of Appeals

APPEAL FROM THE
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Commissioner T. Scott Beck
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Lynn Kelley, as Personal
Representative of the Estate of
Roger Dale Kelley, Employee, ...Appellant,

v.

The Kroger Company, Employer, and
The Kroger Co. c/o Sedgwick CMS, Carrier...Respondents.

PROOF OF SERVICE

I certify that on the 22nd day of October 2013, I served the **Respondents' Final Brief** on Lynn Kelley, as Personal Representative of the Estate of Roger Dale Kelley, by depositing a copy of it in the United States Mail, postage prepaid, addressed to her attorney of record:

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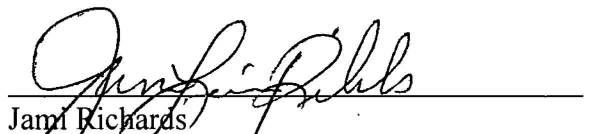

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