Case No. SC96041

IN THE SUPREME COURT OF MISSOURI

ULYSSES G. WHITE (DECEASED), PATRICIA WHITE,

Appellant,

v.

CONAGRA PACKAGED FOODS, LLC,

Respondent.

SUBSTITUTE REPLY BRIEF OF APPELLANT PATRICIA WHITE, DEPENDENT OF ULYSSES G. WHITE

Appeal from the
Missouri Labor & Industrial Relations Commission
Injury No. 12-048291

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I. While Respondent admits there was an "accident," its mischaracterization of what the accident was demonstrates its fundamental misunderstanding of the Workers' Compensation Acts' post-2005 definitional structure.

Respondent admits that Mr. White suffered an "accident" on June 30, 2012. *See* Resp. Br. at 14. But in its next breath, Respondent describes that accident as being Mr. White's collapse at work. *Id.* Unfortunately, this is even further from the mark than the Commission's conclusion that the "Employee's death at work was an 'unexpected traumatic event.'" *See* L.F. at 16 (Appx. 4). Neither the physical collapse, nor Mr. White's death was the accident here. Rather, Mr. White's death was the disability arising from the injury and the collapse is best characterized as a symptom of the injury (Mr. White's fibrillation). *Cf. See Leake v. City of Fulton*, 316 S.W.3d 528, 531 (Mo. Ct. App. W.D. 2010) (explaining how the work in that case caused ischemia (the accident), which caused fibrillation (the injury), that led to death (the disability)).

Respondent attempts to make its point that Appellant's suggested construction of the statute would render every "heart attack" that happened at work compensable with an example of an attorney under stress at oral argument collapsing and dying. *See* Resp. Br. 18-19. Respondent then argues that the collapse is the accident. *Id.* But Respondent glosses over the critical question, indicative of its suggested over-simplification of the appropriate analysis: What caused the attorney to collapse?

Throughout its brief, Respondent would seem to lump every possible cardiovascular condition into the catch-all term "heart attack." *See, e.g.,* Resp. Br. at 15, 17–19, 21–22, 25, 30. But there are a variety of cardiovascular events that can cause injury such as a stroke, a heart attack, or ischemia. *See* Mo. Rev. Stat. § 287.020.3(4) (delineating "cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident, or myocardial infarction" as separate things). To determine whether hypothetical attorney might have a case, we would need to know what cardiovascular condition he suffered and what were the causes of that condition.

Here the medical evidence is unanimous in this case that Mr. White did not suffer a heart attack in the classic sense (*i.e.*, the rupture of an arterial plaque causing a blood clot). *See* Tr. at 132 (Dep. of Dr. Schuman 90:17–24) (App. at 134) (describing the classic heart attack). Rather, Mr. White's fatal fibrillation was caused by ischemia. *See* Tr. at 87 (Dep. of Dr. Schuman 45:18–46:13) (App. at 89–90). Ischemia is a supply/demand imbalance where the heart demands more blood than it can be supplied. *See* Tr. at 132 (Dep. of Dr. Schuman 45:6–8) (App. at 87).[1] This is important

[1] There is no dispute that Mr. White's ischemia caused his ultimately fatal dysrhythmia. *See* Tr. at 87–88 (Dep. of Dr. Schuman at 45–46) (App. 89–90); Tr. at 1238–39 (Dep. of Dr. Farrar at 28–29) (App. 160–61).

because we have to fit what happened to Mr. White into the Workers' Compensation Act's statutory framework.

"Workers' compensation law is entirely a creature of statute…." *Hayes v. Show Me Believers, Inc.*, 192 S.W.3d 706, 707 (Mo. banc 2006). As such, the primary rule for interpreting the Workers' Compensation Act is to give effect to the plain language of the statute. *See Parktown Imps., Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. 2009). Under the post-2005 Workers' Compensation Act, an accident is "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift." *Young v. Boone Elec Coop.*, 462 S.W.3d 783, 792 (Mo. Ct. App. W.D. 2015) (citing Mo. Rev. Stat. § 287.120.1). Therefore, and as described in Appellant's opening brief, Mr. White's death was not the accident, it was the disability arising from his injury. *See Leake*, 316 S.W.3d at 530-31 (explaining that physical strain coupled with stress and working in a hot environment combined to increase demand on the cardiovascular system, *i.e.,* the unusual strain, that led to ischemia). Rather, ischemia was the accident in this case, just like it was in the *Leake* case. *See Leake*, 316 S.W.3d at 530–31. Indeed Respondent seems to acknowledge this

fact, and the "accident, injury, disability" classifications later in its brief when it asks "did the ischemia lead to fibrillations and then death…?"[2]

Identification of the accident is a critical step in the post-2005 analysis of a workers' compensation claim because the definition of "injury" is dependent on the "accident." *See* Mo. Rev. Stat. § 287.020.3(1) ("An injury by accident is compensable only if the **accident** was the prevailing factor in causing both the resulting medical condition and disability." [Emphasis added]). The definition does not ask whether the **work** was the prevailing factor causing the accident. The relationship of the work to the injury is dealt with in Mo. Rev. Stat. § 287.020.3(2) without reference to the prevailing factor standard. Under strict construction, the Court should not engraft the words "prevailing factor" to parts of the definition where the legislature did not include it. *See Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 518 (Mo. Ct. App. W.D. 2011); *see also* Mo. Rev. Stat. §287.800 (setting out the requirement of strict construction of the Workers' Compensation Act).

For instance in *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012), the accident was the employee's slip and fall at work. *Id.* at 510. The claim in *Johme* was ultimately uncompensable because there was insufficient proof that that the risk source for the injury "resulted from a hazard or risk to which the employee would not

[2] The balance of the question presented by Respondent has been truncated because, as described in Section II, *infra*, it misstates the test under Mo. Rev. Stat. § 287.020.

have be equally exposed in 'normal employment life.'" *Id.* at 511. Critically, the Court did not apply the "prevailing factor" standard because, like here, whether an accident had occurred was not at issue. *Id.* at 509, n.6. Rather, the decision turned on the application of the definition of "injury" in section 287.020.3(2). *Id.* at 511–12. This is the key distinction that Mrs. White was not afforded in the Commission's decision. Rather, her entire claim was evaluated under the prevailing factor as though that was the burden of proof for a workers' compensation claim. *See* L.F. at 18 (Comm'n Decision at 3) (Appx. 6).

In deciding *Johme*, the court made reference to its earlier decision in *Miller. See Johme*, 366 S.W.3d at 510-11 (explaining *Miller v. Mo. Highway & Transp. Comm'n,* 287 S.W.3d 671, 673 (Mo. 2009)). The Court explained that the proper focus was not on what the employee was doing when he was injured, rather it was on the risk source for the injury. *Johme*, 366 S.W.3d at 511. Throughout this Court's discussion, there is no reference to the prevailing factor test. *See Johme*, 366 S.W.3d at 510–511. Unfortunately, the Commission applied the prevailing factor standard throughout its decision and outside its strictly limited applicability of Mo. Rev. Stat. § 287.020.3(2). This misapplication of the law is reversible error. *See Treasurer of Missouri-Custodian of the Second Injury Fund v. Witte*, 414 S.W.3d 455, 460 (Mo. 2013) (explaining that issues of statutory interpretation are questions of law and reviewed de novo). This Court, like the Court of Appeals below, should reverse and remand this case to the

Commission for further consideration under the proper application of the definitional rubric set out in Mo. Rev. Stat. § 287.020.

II. Respondent conflates the prevailing factor standard for causation with the burden of proof.

Respondent argues that "Claimant does not contest that the "prevailing factor" burden of proof rested with her or that the expert medical testimony was conflicting." *See* Resp. Br. at 20. Respondent is only partially correct. Claimant does not contest that the medical evidence is unanimous in relevant part that ischemia caused Mr. White's dysrhythmia. *See* n.1, *supra*. But claimant does contest that she faced the prevailing factor test as either a burden of proof or a that the prevailing factor standard applied to the question of the relationship between Mr. White's work and his injury.

To be sure, the standard of proof in a workers' compensation case, as in all civil cases, is "more likely true than not." *See* Mo. Rev. Stat. § 287.808; *Miller*, 287 S.W.3d at 672; M.A.I. 3.01. Indeed the headnote to section 287.808 is "Burden of Proof" and the plain language of the section speaks to the burdens of proving the different elements of a case. *Id.* On the other hand, the "prevailing factor" test is a causation standard not unlike the "contributing factor" test utilized in evaluating a workers' compensation retaliation or Missouri Human Rights Act case. *See Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371, 384 (Mo. 2014) (holding that the correct causation for workers' compensation retaliation was "contributing factor" standard rather than

"exclusive factor"). And while the "prevailing factor" is a higher standard for linking the causality of two events, it does not change the burden of proof.

Respondent then tries to reduce the entire injury analysis into one question. *See* Resp. Br. at 21. But Mo. Rev. Stat. § 287.020.3(1) cannot be reduced down to a simple question that Respondent can submit to be entirely evaluated under the prevailing factor standard. Rather, Mo. Rev. Stat. § 287.020.3(1) asks three separate questions and the prevailing factor test only applies to one of them:

1. Is it more likely than not that the injury arose out of employment?
2. Is it more likely than not that the injury arose in the course of employment? and
3. Is it more likely than not that the accident was the prevailing factor causing both the resulting medical condition and disability?

Here, the Commission's very formulation of its holding, "that employee's work activity of June 30, 2012 was not the prevailing factor causing his heart attack and death" reveals that the commission was applying the prevailing factor test to its overall evaluation of the relationship between the work and the injury. *See* L.F. at 18 (Comm'n Decision) (Appx. 6). That is legal error and this Court, like the Court of Appeals before it, should reverse the Commission's decision and remand this matter for reconsideration under the correct legal framework.

III. The Commission did not make credibility findings to which the Court must defer.

Respondent next mischaracterizes the Court of Appeals' opinion as having "improperly criticized the credibility findings of the Commission." *See* Resp. Br. at 24. But Credibility goes to the question of whether the testimony of a witness is to be believed. *See, e.g., Taylor v. State*, 262 S.W.3d 231, 245 (Mo. 2008) (explaining that a criminal defendant's proffered evidence that a witness was not to be believed went to the question of credibility). The Court of Appeals could not have been discussing the credibility findings of the Commission because the Commission did not make any such findings contrary to Claimant. The only credibility findings the majority of the Commission made were to state that Dr. Schuman's testimony was not inherently incredible. *See* L.F. at 17 (Comm'n Decision) (Appx. 5). Indeed the dissenting opinion observed that the majority impliedly found Dr. Schuman's theory more credible than that of Dr. Farrar. But in any event, just because testimony may be ultimately found unpersuasive to the fact finder does not make create a credibility determination entitled to the high deference that Respondent seeks. As such, the Court should not accept Respondent's invitation to affirm the Commission's erroneously-reached conclusion in the guise of deferring to the Commission's non-existent credibility determinations.

IV. Rather than address Appellant's second point relied on, Respondent attempts to re-argue the case as though this was a *de novo* review.

Respondent argues that the Court should simply assume that the Commission reviewed all the evidence and then summarized the most pertinent evidence. *See* Resp. Br. at 32. Respondent offers this broad presumption without authority. *Id.* But beyond that, we know that the Commission specifically refused to consider the cumulative strain that Mr. White suffered from working consecutive, long days in the hot weather because the majority of the Commission explicitly said that they did. *See* L.F. at 17, n.1 (Comm'n Decision) (Appx. 5). Mrs. White's lay testimony regarding her husband's appearance and description of his work that work on the night before he died go squarely to the cumulative effect of that week's work. Accordingly, it can reasonably be inferred from the Commission's failure to describe Mrs. White's observation that it also refused to consider those observations.

Instead of addressing the Commissions exclusion of Mrs. White's testimony head-on, Respondent argues that the lay testimony of the other ConAgra employees was just as relevant, if not more so that Mrs. White's. *See* Resp. Br. at 32. This argument is made after spending three pages reciting all of the evidence it believes supports its case. *See* Resp. Br. at 28–30. But Appellant is not arguing that this case should be reversed because the award was not supported by competent evidence. That would require a different standard of review. *See Hornbeck v. Spectra Painting, Inc.,* 370 S.W.3d 624, 629 (Mo. banc 2012) (citing Mo. Const. art. V, § 18 and noting it

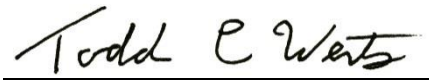
is not the role of this Court to evaluate the evidence). Appellant is certainly not asking this Court to re-weigh the evidence as a fact finder. Rather Appellant urges reversal due to the Commission's mistake of law.

V. Conclusion

As described above and in Appellant's opening brief, this case should be reversed and remanded because the Commission misapplied the law. *See Witte*, 414 S.W.3d at 460. Specifically, the Commission misapplied the law when it failed to strictly apply the definition of "injury" from Mo. Rev. Stat. § 287.020.3 and instead applied the prevailing factor standard throughout its analysis of the facts. When the Commission did that, it effectively denied Mrs. White her "fair day in court." As the Court of Appeals did before, this Court should remand this case to the Commission for reconsideration of the limited question of whether Mr. White's injury "did not come from a hazard or risk unrelated to employment pursuant to section 287.020.3(2)(b)." *See White v. ConAgra Packaged Foods, LLC*, 2016 Mo. App. LEXIS 956, *36 (Mo. Ct. App. W.D. Sept. 27, 2016).

Respectfully submitted,

LEAR WERTS LLP



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CERTIFICATION

Pursuant to Mo. R. Civ. Proc. 84.06(c), I hereby certify that this Appellant's Substitute Reply Brief complies with Mo. R. Civ. Proc. 55.03 and with the requirements and limitations set forth in Rule 84.06(b) and the Local Rules of the Court. This brief contains 2,943 words according to the Microsoft Word system used to prepare the brief.

Todd C. Werts

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above brief was filed in PDF format with the Missouri Court Electronica Filing System on this 14th day of March, 2017.

Todd C. Werts