IN THE SUPREME COURT OF MISSOURI

ULYSSES G. WHITE (Deceased), PATRICIA WHITE, Appellant, v. CONAGRA FOODS PACKAGED FOODS, LLC, and OLD REPUBLIC INSURANCE COMPANY, Respondents.	)	Case No. SC96041

Appeal From the Missouri Labor and Industrial Relations Commission
Injury No. 12-048291

SUBSTITUTE BRIEF OF RESPONDENTS

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JURISDICTIONAL STATEMENT

Pursuant to Missouri Rule of Civil Procedure 83.04, Respondents ConAgra Foods Packaged Foods, LLC (hereinafter referred to as "Employer" or "ConAgra") and Old Republic Insurance Company (hereinafter referred to as "Insurance Carrier") filed their Application for Transfer to the Missouri Supreme Court on November 15, 2016. This Court granted such Application by Order entered on December 20, 2016. This is an appeal from the January 21, 2016 Final Award Denying Compensation of the Labor and Industrial Relations Commission which affirmed the award and decision of the administrative law judge dated June 1, 2015. Appellate review is warranted under RSMo. 287.495.1, because what is being appealed is "the final award of the commission."

STATEMENT OF FACTS

Because Appellant's statement of facts is incomplete, Employer submits the following additional summary of pertinent records and testimony that was before the Division of Workers Compensation.

A. Pre-existing cardiovascular conditions of Employee

The autopsy report dated July 2, 2012 noted that Employee White suffered from cardiomegaley, severe coronary artery disease, pericardial adhesions with fibrous plaques on the epicardium, and emphysema. (Tr., p.181 – Hearing Exhibit 1-G; Respondent's Appendix A16). Cause of death was "a cardiac arrhythmia resulting from severe coronary artery disease." (Id.). Specifically, there was an 80 per cent focal calcific atherosclerosis of the left anterior descending coronary artery, a 60 per cent occlusion in

the right coronary artery, and a 75 per cent obstruction of the circumflex with atheromatous material. The heart weighed 480 grams. (Tr., p.183; A18).

The foregoing post-death findings were not inconsistent with Employee's medical history. Mr. White, born in January 1944, was diagnosed with hypertension and prescribed medication on August 24, 2006. (Tr., pp.176-178 - Hearing Exhibit 1-D).

It was noted on October 8, 2009 that Employee had a history of hypercholesterolemia. He was also diagnosed with cardiac dysrhythmias which were on the date of examination stable. (Tr., pp.324-327 – Hearing Exhibit 2-J). A resting EKG taken on October 21, 2009 disclosed an abnormal ventricular rate consistent with sinus tachycardia to the right bundle. His functional capacity on two stress tests performed in October 2009 demonstrated "poor functional capacity" as he was not able to walk even five minutes. (Tr., p.328 – Hearing Exhibit 2-K; p.308 – Hearing Exhibit 2-B).

On March 10, 2011, Employee again was diagnosed with hypertension and other specified cardiac dysrhythmias. (Tr., pp.330-332 – Hearing Exhibit 2-M). The same diagnoses were recorded following routine examination on January 12, 2012. (Tr., pp.333-335 – Hearing Exhibit 2-N and 2-O). In April 2012, less than three months before his fatal heart attack, Employee's blood pressure was not well controlled even with medication, with a recording of 194/90 mm Hg. (Tr., pp.308-309 – Hearing Exhibit 2-B; p.647 – Hearing Exhibit 8). Employee's wife confirms that her husband had just recently been prescribed a new high blood pressure medication shortly before his death. (Tr., p.399 – Hearing Exhibit 3).

B. Circumstances on Date of Employee's Death

Following his work shift on Friday, June 29, 2012, Employee returned home. Employee's wife testified at her deposition that Employee appeared normal that evening. He mentioned no health complaints and commented about the heat that day, which Mrs. White estimated at 96 degrees. (Tr., pp.391-392 – Hearing Exhibit 3). At trial, Mrs. White changed her testimony, stating that her husband came home from work during his last work week "tired" and did not eat much. (Tr., p.18). She even testified that she asked her husband on the evening of June 29, 2012 not to go to work the next day because she believed it was too hot to work. (Tr., p.19).

The next morning, Employee arose from bed and left to commute to work where his shift commenced around 5:30 a.m. His wife did not see or speak to him that morning. (Tr., pp.15, 27-28; pp.393-394 – Hearing Exhibit 3). This Saturday shift on June 30, 2012 was part of Employee's regularly assigned six day per week work schedule. (Tr., p.15).

Abraham Sellers, maintenance supervisor at Employer's Marshall facility, was the direct supervisor of Employee on June 30, 2012. Employee principally worked in the machine/fabrication shop making parts for the production lines. Typically, Employee operated mills and lathes. (Tr., pp.491-492 – Hearing Exhibit 5). Sellers recalls first speaking to Employee on the morning of June 30, 2012 around 4:45 a.m. to 5 a.m. before Employee clocked in. They discussed a scheduled power outage at the plant. They also talked about the heat that day and Sellers asked Employee "to make sure they filled the coolers out there" and make sure he watched out for heat stress. Employee was wearing

his regular work clothes and steel toed boots. (Tr., pp.466,493-496,578 – Hearing Exhibit 5). It was not unusual for Sellers to discuss the possibility of heat stress with his subordinate employees. He did so regularly during the summer months. (Tr. p.498 – Hearing Exhibit 5).

Regarding specific tasks assigned to Employee that morning, Sellers asked him to confirm that the water treatment facility was working after the completion of the power outage. (Tr., pp.499-500 – Hearing Exhibit 5). Between sometime after 5 a.m. and approximately 9 a.m., Employee was likely working in the machine shop making parts, but Sellers does not know exactly what he was working on. The scheduled power outage occurred around 9 a.m. and around 9:30 a.m., Employee left the machine shop and walked to the water treatment area to make sure that it had gone back on-line. This work involved only pushing buttons without any physical exertion. This work would have taken Employee twenty to thirty minutes. Thereafter, Employee worked with co-employee Jose Sanchez to bore holes in some plates and Plexiglas. This work occurred before lunch. (Tr., pp.500-502,513,516-518,527 – Hearing Exhibit 5).

Mr. Sanchez, a maintenance employee, confirmed that he was in the presence of Employee approximately one hour before his collapse at approximately 11:45 a.m. Specifically, Sanchez went to the fabrication shop where he found Employee working on the lathe making some new plastic. Sanchez asked Employee for assistance to drill holes in a piece of metal and Plexiglas. Sanchez and Employee proceeded to do this work together. Sanchez estimates that this joint work took between fifteen and twenty minutes. During that work period, Employee stated no complaints about his health or the heat.

(Tr., pp.598-602 – Hearing Exhibit 7).

Charles Vandiver, a welder, worked in the machine shop during the morning of June 30, 2012. (Tr., pp.561-563 – Hearing Exhibit 6). Vandiver recalls nothing unusual about Employee's job tasks that morning. "[H]e was running the lathe making parts." Vandiver confirmed that Employee was assigned to walk to the waste water plant to make sure that it came back in operation after the planned power outage. Employee left the fabrication shop around 9:30 a.m. to undertake this assignment. When he returned to the fabrication shop, Employee did not appear to be under any stress or have any health issues. (Tr., pp.571-572). From approximately 10 a.m. to 11 a.m. Employee resumed working in the fabrication shop. At 11 a.m., Vandiver and Employee ate their lunch while sitting down in the fabrication shop. The lunch break ended at approximately 11:30 a.m. (Tr., pp. 572-574). Employee did not appear in any distress at the conclusion of the lunch break. Following the lunch break, Vandiver left the fabrication shop so that he could input his work time for that day in the computer system. As he left the shop, he observed Employee still sitting down on the stool where he had eaten his lunch with a pedestal fan blowing air on him. Employee was drinking coffee. (Tr., pp. 574-575,577). Fifteen or twenty minutes after leaving the fabrication shop, Vandiver returned, after receiving a medical assistance alert, and found Employee on the floor behind the lathe. (Tr., pp.575-576). In sum, "there was nothing out of the ordinary. It was a basic, normal work day for us. Just that it was Saturday." It was a little bit hotter than normal. (Tr., p.585).

Pedro Estrada, mechanic, worked the morning shift starting at 5 a.m. on June 30,

2012. He recalls seeing Employee for approximately ten minutes in the meeting shop. Employee appeared fine and normal. Thereafter, Estrada believes that Employee left to go to his regular workplace in the fabrication shop. (Tr., pp. 451-455,463 – Hearing Exhibit 4). Estrada spoke to Employee again between 6:30 a.m. and 7 a.m. for approximately five minutes while Employee was working on the lathe. Estrada described the temperature throughout the fabrication shop as being "just hot." At that time, Employee made no complaints about his health and Estrada observed nothing that would suggest that Employee was not feeling well. It was Estrada who first found Employee collapsed on the floor of the fabrication shop. This occurred around 11:45 a.m. (Tr., pp.463-464,467-468). Other than finding Employee collapsed, Estrada recalls nothing unusual occurring at the plant on June 30, 2012. In particular, he does not remember if it was hotter that day than prior days. (Tr., pp.471-472).

Employee's regular work area was the machine shop (also known as the fabrication shop). The shop has a window on the east side which was left open during the morning of June 30, 2012. This window is located directly behind the lathe that employee ran. Such lathe does not generate a lot of heat while in operation. The fabrication shop also has a roller garage door on the north side which was also open that morning. The shop also contained a vent on the south wall and another vent in the ceiling, along with several pedestal fans. Employee had his own circular fan in his work area. All of these cooling and ventilation devices were operational on the date in question. Finally, there was a front door to the machine/fabrication shop that was open on that morning. (Tr., pp.460-461,466,503-510,519,567-569,575-577,583,604,607).

With the doors and window open, and with the cooling/ventilation devices working, the estimated temperature in the machine/fabrication shop on June 30, 2012 was approximately five to eight degrees cooler than the outside ambient temperature. (Tr., pp.520,564-565,577-578).

C. Medical Causation

Board-certified cardiologist Michael W. Farrar, M.D. was retained by Employer to review Employee's medical records as well as the depositions of eyewitnesses. (Tr., pp.1215,1217-1219 – Hearing Exhibit B; A26, A28-A30). In his expert report dated June 28, 2014, Dr. Farrar identified Employee's pre-existing and relevant medical conditions to include "hypertension which recently had not been well controlled," and abnormal electrocardiogram in October 2009 showing a right bundle branch block, and dyslipidemia. He had also shown poor functional capacity on stress tests performed in October 2009. (Tr., pp.863, - Hearing Exhibit A; pp.1223-1227,1229; A115, A34-A38,A40). On autopsy, Employee's heart was "significantly enlarged, as well as [there being] evidence of significant coronary artery disease." (Tr., pp.1232-1234,1236-1238; A43-A45,A47-A49). This included focal calcific 80% narrowing of the left anterior descending coronary artery, a 60% narrowing of the right coronary artery, and a 75% narrowing of the circumflex coronary artery. The posterior wall of the left ventricle and the ventricular septum were both thickened. The autopsy report "shows us without question that he did have severe coronary artery disease and that he did have significant left ventricular hypertrophy." (Tr., pp.863,1292, 1295-1296; A115, A103, A106-A107).

It was Dr. Farrar's expert medical causation opinion that Employee "almost

certainly" died from ventricular fibrillation "due to a combination of severe coronary artery disease and hypertensive heart disease with consequent left ventricular hypertrophy. Myocardial ischemia secondary to the above would have resulted in the arrhythmias." (Id.; See also Tr., pp.1239-1241,1297; A50-A52, A108). The findings in the autopsy were consistent with traditional risk factors – hypertension, dyslipidemia, history of smoking, lack of regular exercise, poor functional capacity on stress testing, cardiac enlargement, and left ventricular hypertrophy. (Id.) Dr. Farrar believed it likely that Employee was acclimated to the heat typical in his work area during the summer months. He noted that no other employee in the plant suffered a heat-related illness on the date of Employee's death. (Tr., p. 1249; A60). "In summary, Mr. White died of sudden cardiac death related to the prevailing causes of underlying severe coronary artery disease and hypertensive heart disease, caused by traditional risk factors. The heat was neither a likely or necessary significant contributing factor in his death and certainly was not the prevailing factor in his death. The fact that his death occurred at work was simply coincidental." (Tr.,pp. 863-864,1241-1242,1248,1299; A115-A116,A52-A53,A59,A110). Employee had a condition that predisposed him to sudden cardiac death, "and so the fact that he died in a hot environment is really no different than if he died in an environment with a normal temperature or a cold temperature…" (Tr., p.1242; A53).

Claimant's retained medical expert, Dr. Stephen Schuman, reached a different medical causation opinion. Following review of medical records, including the autopsy report, Dr. Schuman issued a report dated December 23, 2013. He described the autopsy results as showing three vessel coronary artery disease "of moderate severity from 60-

80% stenosis." Dr. Schuman acknowledged Employee's cardiac risk factors, including former smoking, hypertension, and hyperlipidemia. Death occurred because of primary cardiac arrest. (Tr., pp.170, 174 – Hearing Exhibit 1-C; pp.57-59,86 – Hearing Exhibit 1). Dr. Schuman theorized that Employee's foot injury would have made him uncomfortable and required him to make more effort in moving around while wearing a brace. Employee worked in a hot environment and did physical work of moderate intensity. (Tr., pp.61-62,174). Dr. Schuman opined that "the work activities of 06-30-12 were the substantial cause of Mr. White's death." (Tr., pp.63-64,175). By letter dated February 10, 2014, Dr. Schuman summarily modified his causation opinion, writing that Employee's work activities of June 30, 2012 "were the prevailing factor causing Mr. White's cardiac arrest and death." (Tr., pp.64-65, 145; p.180 – Hearing Exhibit 1-F).

Dr. Schuman acknowledged that the blockages in Employee's coronary arteries resulted in ischemia - that is, reduced blood flow to the heart. (Tr., pp.89-91). Dr. Schuman also conceded that he did not know what specific work Employee was performing on the morning of his death, but he believed that there was "nothing unusual" about Employee's job assignments that day. He assumed that Employee spent his work day operating the lathe. "I have to assume that whatever he did was enough to cause a cardiac arrest." (Tr., pp.100-102,142-143, 145-146). He also stated his understanding that the ventilation system in the fabrication shop was not good. However, Dr. Schuman does not know what the room temperature was nor did he assume any specific temperature inside the shop. (Tr., p.103). Dr. Schuman did not know whether or when Employee took his lunch break on June 30, 2012. (Tr., p.117). Finally, Dr. Schuman

agreed that persons with severe coronary disease could have a fatal cardiac arrest without exertion, but he characterized Employee's coronary disease as "moderate." (Tr., pp.143-144).

D. Decisions Of The Division Of Workers Compensation

By Award dated June 1, 2015, the administrative law judge reviewed the lay and expert testimony and the autopsy report, cited to the applicable definitions of "accident" and "injury," and found that Claimant had failed to sustain her burden of proof that the Employee sustained an accident or occupational disease. Both expert doctors agreed that the mechanism of death was lack of blood flow to the heart which caused ventricular fibrillation. They both agreed that the coronary arteries could not supply adequate blood to the heart. The two doctors differed on whether the temperature was a factor leading to Employee's death. Dr. Schuman agreed that there was nothing unusual or different about Employee's work on the date of death, "only that the heart needed more blood than the artery could supply." The autopsy report identified cardiac arrhythmia caused by severe coronary artery disease as the cause of death. (R.O.A., pp.7-14; A9-A15).

In a Final Award Denying Compensation entered on January 21, 2016, (R.O.A., pp.16-28; A3-A15), the Labor and Industrial Relations Commission affirmed the decision of the administrative law judge with a Supplemental Opinion. The majority opinion of the Commission first reviewed the finding of the ALJ relating to "accident." The Commission cited to the definition of "accident" set out at RSMo. 287.020.2 and then concluded that Employee had sustained an "accident" because the incident of June 30, 2012 occurred at work and was an "unexplained traumatic event." The Commission then

noted that both parties had asked the administrative law judge to determine whether "work was the prevailing factor in causing the alleged accident or occupational disease....We take it that by invoking the 'prevailing factor' test, the parties intended to dispute the issue of medical causation." (R.O.A., p.16; A3). The Commission then cited to 287.020.3(1) and to 287.020.3(4). It acknowledged that Claimant's medical expert, Dr. Schuman, had testified that employee's work activities on June 30, 2012 were the prevailing factor causing his death based on the hot weather and on the conditions in the machine shop where employee worked, putting more stress on his heart than otherwise might have been. While such general theory of medical causation was not "inherently incredible," the Commission found that Claimant had not satisfied her burden of proof because Dr. Schuman did not possess "the necessary factual foundation to support his theory." Specifically, Dr. Schuman was not specific in his testimony as to the exertions that Employee undertook on the date in question, had to "guess" what Employee was physically doing that morning, had incorrectly made assumptions about what work Employee actually performed that morning and was not aware of the actual temperature within the machine shop where Employee was working. "Because we find Dr. Schuman insufficiently informed as to the relevant facts underlying his own theory of medical causation, we deem his testimony on the subject to be ultimately unpersuasive. Because the cardiac pathology leading up to and causing employee's death is, in our estimation, beyond the realm of lay understanding, we find that the failure to present persuasive expert testimony on the issue of medical causation prevents us from rendering an award in claimant's favor...We find that claimant has failed to meet her burden of proof with

respect to the issue of medical causation. We conclude that employee's work activity of June 30, 2012, was not the prevailing factor causing his heart attack and death." (R.O.A., p.18; A5). Claimant timely appealed the Commission Final Award Denying Compensation to the Missouri Court of Appeals, Western District.

ARGUMENT

I. Standard Of Review

On appeal of a decision from the Labor and Industrial Relations Commission, an appellate court shall review only questions of law and may modify, reverse, remand for rehearing or set aside the award only if it concludes that the Commission acted in excess of its jurisdiction, that the award was procured by fraud, that the facts found by the Commission do not support the award, or that there was not sufficient competent evidence in the record to warrant the making of the award. RSMo. 287.495.1. In the absence of fraud, the Commission's findings of fact are conclusive and binding. Id. The appellate court is not bound by the Commission's interpretation and application of the law. Treasurer of the State of Missouri v. Cook, 323 S.W.3d 105, 108 (Mo.App.W.D. 2010). While the appellate court defers to the Commission on issues of fact, it reviews questions of law *de novo*. Moreland v. Eagle Pilcher Technologies, LLC, 362 S.W.3d 491, 503 (Mo.App.S.D. 2012).

An appellate court must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award, i.e., whether the award is contrary to the overwhelming weight of the evidence. Whether the award is supported by competent and substantial evidence is judged by examining the evidence in

the context of the whole record. Hampton v. Big Boy Steel Erectors, 121 S.W.3d 220, 222-223 (Mo.banc 2003). The phrase "overwhelming weight of the evidence" connotes evidence that is more persuasive than that which is merely of greater weight or more convincing than the evidence which is offered in opposition to it. Royal v. Advantica Restaurant Group, Inc., 194 S.W.3d 371, 373 (Mo.App). W.D. 2006)(citing Higgins v. Quaker Oats Co., 183 S.W.3d 264, 279 (Mo.App. W.D. 2005)).

II. Response To Point Relied On I

A. The Commission did not err in its medical causation analysis and specifically did not err in applying the relevant statutes defining "accident" and "injury".

RSMo. 287.020.3(4)

Leake v. City of Fulton, 316 S.W.3d 528 (Mo.App. W.D. 2010)

Young v. Boone Electric Cooperative, 462 S.W.3d 783 (Mo.App. W.D. 2015)

Malam v. State of Missouri, Department of Corrections, 492 S.W. 3d 926 (Mo. banc. 2016)

Appellant's brief raises a straw man issue in its assertion about the elements of "accident" and the "prevailing factor" standard of proof. In the first place, the Commission plainly found that an "accident" had occurred on June 30, 2012. Specifically, the Commission's Final Award Denying Compensation accurately cited RSMo. 287.020.2 and then determined that an "accident" had occurred because there had been an "unexpected traumatic event." In making this finding, the Commission did not

purport to apply a "prevailing factor" standard. Claimant has cited to Young v. Boone Electric Cooperative, 462 S.W.3d 783 (Mo.App. W.D. 2015) relating to the statutory elements of an "accident" under RSMo. 287.020.2. Yet, there is no dispute before this Court as to whether an "accident" occurred. There was a finding below of an "unexpected traumatic event" that may have been tied to the unusual strain of working in a hot environment. This traumatic event was, by both expert physicians' opinions, a collapse due to insufficient blood flow through the heart. The traumatic event occurred at an identifiable time and place – sometime around 11:45 a.m. on June 30, 2012. There were objective symptoms of an injury in that Employee collapsed on the floor. Finally, there was a particular happening during a single work shift. See Young, 462 S.W.3d at 794.

Secondly, Employer does not contest the finding of "accident" and does not contend that a "prevailing factor" standard of proof applies to whether an "accident" occurs.

Instead, this case turns on the issue of whether the "accident" is compensable. The pertinent statutory provisions are, first, the last sentence of RSMo. 287.020.2 which provides that an injury "is not compensable because work was a triggering or precipitating factor." Secondly, an injury by accident is compensable "only if the accident was the prevailing factor in causing both the resulting medical condition and disability." RSMO. 287.020.3(1). Third, an injury "shall be deemed to arise out of and in the course of the employment only if…It is reasonably apparent upon consideration of all of the circumstances, that the accident is the prevailing factor in causing the injury." RSMO. 287.020.3(2)(a). Fourth, a cardiovascular disease or myocardial infarction

"suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition." RSMo. 287.020.3(4). The Workers Compensation Act goes on to define "prevailing factor" as "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." RSMo. 287.020.3(1). Reading these provisions together leads to a medical causation factual determination that is precisely what the Commission below undertook. The Commission had to determine whether the activities being performed by Employee on the morning of June 30, 2012 and the conditions under which his physical exertion occurred (specifically, working in an unair-conditioned building on a hot summer day) merely triggered or precipitated the heart attack or whether a non-work-related factor (in this case, pre-existing coronary artery blockages and enlarged heart) were the primary factor in causing "the resulting medical condition" (that is, the heart attack) and "disability" (that is, death). In other words, did work activities or working conditions constitute the prevailing factor in causing the injury (that is, the malfunctioning of the heart - arrhythmias) and, in particular, was work the prevailing factor in causing "the resulting medical condition" of cardiovascular disease/heart attack?

Claimant's position is that if one sustains a heart attack at work, that satisfies both the "accident" and compensability questions. However, the Act plainly distinguishes between the two. An "accident" occurs when there is a trauma or unusual strain at work. A compensable injury and, in particular, a compensable heart attack, occurs only when there is a finding of medical causation and the proper standard of medical causation is "prevailing factor."

That distinction was recognized, in the context of a cardiovascular disease case, in Leake v. City of Fulton, 316 S.W.3d 528 (Mo.App. W.D. 2010). In that case, the employee assisted at the scene of two motor vehicle collisions in bad weather conditions (hot, humid and raining) and then collapsed after climbing back into his work vehicle. He died at the scene. Employer retained a medical expert who, upon reviewing pertinent medical records, concluded that employee's death was primarily caused by underlying cardiovascular disease. Employee's retained medical expert testified that, in his opinion, unusual physical exertions on the date in question were the prevailing factor in causing arrhythmia and death. In reviewing a Commission award in favor of the employee, the appellate court cited to the specific language of RSMo. 287.020.3(4) relating to prevailing factor in a cardiovascular disease claim. It noted that the earlier "substantial factor" standard had been replaced in 2005 by the "prevailing factor" causation standard of proof. Moreover, "[w]here as here, both a pre-existing cardiovascular condition and a work-related activity contributed to cause an employee's injury or death, the question is which of the contributing factors was 'the primary factor, in relation to [the] other factor, causing…the resulting' injury or death." (Citation to RSMO. 287.020.3(1)). "The determination of whether a particular accident is the 'prevailing factor' in causing an employee's condition (in this case, death) is inherently a factual one…" 316 S.W.3d at 532.

In the present case, the same basic circumstances and the same standard of medical causation applies. Employee suffered an "accident" because he collapsed at work due to inadequate blood flow through his heart. The issue before the Commission

was whether work (including physical exertion at work and the conditions under which the work was undertaken), or a non-work-related factor (that is, pre-existing cardiovascular disease) was the prevailing factor in causing Employee's arrhythmias and death. On that issue, the expert medical opinions were divided and this Court must defer to the Commission's factual finding as to medical causation if supported by substantial competent evidence.

The Commission below cited to the relevant medical causation statutory provisions (RSMo. 287.020.3(1) and RSMO. 287.020.3(4)). While it may not have used the precise statutory language for medical causation (that is, stating the issue as whether "work" was the prevailing factor in causing the alleged accident), that was because that is how both parties submitted the issue to the administrative law judge and that is the standard that both medical experts applied in their reports and sworn testimony. It is clear that the Commission was determining whether work factors or non-work-related factors primarily caused the "resulting medical condition" – that is, arrhythmia and death. The Commission specifically found Dr. Schuman's theory of medical causation "to be ultimately unpersuasive" as to "the cardiac pathology leading up to and causing employee's death." Accordingly, Claimant did not meet her burden under the prevailing factor test "on the issue of medical causation" which precludes an award of benefits. "We conclude that employee's work activity of June 30, 2012, was not the prevailing factor in causing his heart attack and death." (R.O.A., pp.16-18; A3-A5).

Although the Commission did not precisely state the issue as to whether the "accident" was the prevailing factor in causing the heart attack and death, the analysis

under the "prevailing factor" provisions is clearly in line with Leake and the post-2005 statutes. Employee suffered an "accident" at work, but the factual question here was whether the unexpected trauma or unusual strain (physical exertion in a hot environment) principally caused the arrhythmia and death or whether such trauma/strain was only a contributing factor and instead non-work-related factors (in particular, coronary artery obstructions and enlarged heart) were the more important/prevailing factor in the medical condition that became apparent on June 30, 2012 and the death that ensued.

Claimant's proposed construction of the various provisions in RSMo. 287.020 effectively eliminate the "prevailing factor" standard in cardiovascular or heart attack claims. Her reading of those statutes is extremely strained. If one suffers a cardiac event at work and if that cardiac event results in death, then there would be a compensable injury without regard to whether work activities caused the heart attack and death. This contention runs counter to the fact that the Legislature in 2005 adopted the "prevailing factor" test in substitution of a "substantial factor" test. "The employee's burden in establishing his injury is compensable is now higher than before the changes in the law." Leake, 316 S.W. 3d at 532. Claimant is proposing that the post-2005 causation burden should be construed as less than it was previously.

For example, an attorney at oral argument before this Court may be under stress relative to having to answer questions of the justices. The attorney might collapse and die during his presentation. While an "accident" would have occurred because of the traumatic event or unusual strain of collapsing while working, that is not enough under the post-2005 Act to establish a compensable injury. The attorney's widow would still

have to prove that the stress of the oral argument was the primary factor, as opposed to a diagnosed or undiagnosed coronary disease process, in causing the heart attack and death. To suggest otherwise would be to decrease the burden of proof on a claimant when, plainly, the amendment of the Act from "substantial factor" to "prevailing factor" was intended to heighten the burden of proof on an employee in establishing a compensable injury. Claimant wants this Court to essentially eliminate the "prevailing factor" heightened standard of proof. She also appears to want the Court to overrule Leake and, in particular, its holding regarding medical causation for a cardiovascular event that occurs at work.

It should also be emphasized that Claimant can hardly complain about how the medical causation issue was stated below given her stipulations and evidentiary submissions. At the final hearing, both parties concurred that issues for resolution by the fact finder included whether there was an accident, whether the accident arose out of and in the course of employment, and whether work was the prevailing factor in causing the accident. (Tr., pp.3-5). Employee then submitted the expert report of Dr. Schuman which opined that "Employee's work activities of June 30, 2012 were the prevailing factor causing Mr. White's cardiac arrest and death." (Tr., p.180). Therefore, Claimant requested that the fact finder apply the "prevailing factor" test to draw a causal connection between work activities and resulting medical condition/disability. Having received a fact finding on this issue adverse to her position based on the ALJ's and Commission's review of the expert medical opinions, Claimant now wants this Court to restate the issue to be determined. Claimant is simply disingenuous in accusing the

Commission of having misapplied the proper causation standard when that was the very standard that Claimant submitted to the ALJ. The bottom line is that while an "accident" is a traumatic event or unusual strain that occurs at work, the "prevailing factor" standard is correctly applied to determine which factors primarily caused the medical condition and disability that became apparent at work. The distinction is one of where the trauma occurred versus why it occurred.

Claimant does not contest that the "prevailing factor" burden of proof rested with her or that the expert medical testimony was conflicting. She does not assert, for example, that Dr. Farrar had failed to reach medical causation conclusions that were wholly different from that of Dr. Schuman. In particular, Dr. Farrar opined that the prevailing factors in causing Employee's death were the underlying coronary artery disease and underlying left ventricular hypertrophy. (Tr., p.1241; A52). These medical conditions that pre-existed June 30, 2012 were evidenced both by medical records dating back to October 2009 and to the autopsy report which showed a significantly enlarged heart and significant, multiple coronary artery occlusions. (Tr., p. 1232-1234, 1236-1238; A43-A45, A47-A49). Rather than arguing that Dr. Farrar's medical causation opinions as supported by the autopsy report are not substantial evidence relating to what were the primary factors causing the arrhythmias (resulting medical condition) and disability (death), Claimant contends that medical causation is somehow irrelevant because Employee suffered ischemia while at work. However, the proper question before the Commission was whether that ischemia (necessity for increased blood flow through the heart) principally resulted from work activities/work conditions or from non-work-related

factors such as heart disease. In other words, did the ischemia lead to fibrillations and then death because of unusual conditions in the machine shop on June 30, 2012 or as a natural consequence of the progression of coronary artery disease? This issue is governed by the "prevailing factor" standard as set out in RSMo. 287.020.3(1) and (4). Accordingly, there is no legal basis for a remand to the Commission for further factual findings.

In paragraph 2 of her Point Relied On I, Claimant argues that she is entitled to an award of compensation as a matter of law under the standard set out in RSMo. 287.020.3(2)(b) related to hazards or risks in the employment. This position is not well-taken for several reasons. First, there was no reason for the Commission to even consider that element of an injury arising out of and in the course of employment when it had found, based upon substantial evidence, that the accident was not the prevailing factor in causing the injury, resulting medical condition, and death. See RSMo. 287.020.3(2)(a). Similarly, such additional inquiry was not necessary because of the Commission's finding that the cardiovascular disease or heart attack was not an injury because the accident was not the prevailing factor in causing the resulting medical condition. See RSMo. 287.020.3(4).

Secondly, even if a separate analysis under RSMo. 287.020.3(2)(b) is held necessary by this Court, it would not be the Court's role to make such a factual finding in the first place. Specifically, there is substantial evidence in the record from which a fact finder could decide that the risk or hazard of Employee suffering a cardiac event was as great off the job than during employment activities. This includes the autopsy report

showing cardiac artery blockages and an enlarged heart, as well as the expert opinions of Dr. Farrar who concluded that it was coincidental that the cardiac event occurred at work. Moreover, the chronology of events on the morning of June 30, 2012, including but not limited to the facts that Employee collapsed after a 30 minute lunch break during which he was performing no work activities and that he expressed no health concerns to co-employees anytime that morning, would support a finding that the heart attack was a sudden occurrence having little or nothing to do with work conditions or work activities. On this matter, Claimant is simply asking this Court to resolve a disputed issue of medical causation which is for the Commission to decide.

On this matter, Claimant's citation to Young, 462 S.W.3d at 788-799, is inapposite. There, the factual question under RSMo. 287.020.3(2)(b) was whether tripping over a "frozen dirt clod" at work was the kind of hazard that the Claimant would have experienced outside of work. There was no question there of non-work-related health risks unlike the present case. Here, the disputed issue of fact, as stated in the conflicting expert medical opinions, was whether Employee suffered a cardiac event because of work conditions or rather because of underlying risk factors outside of the work place, in particular, pre-existing cardiovascular disease which reduced blood flow through the heart. In any event, while it is not contested that Employee was working in an unair-conditioned metal building on a summer morning, it simply is not the case that there were no other non-work-related risks or factors unrelated to the work environment. This Court cannot make a factual finding as to work-relatedness of "injury" and of whether working conditions caused arrhythmias and death. The evidence is disputed.

Of course, it should be emphasized that neither of the medical experts applied the test set out at RSMo. 287.020.3(2)(b) and that the parties did not submit this as one of the issues for resolution.

As previously argued above, Leake does not support Claimant's position here. The Leake court affirmed a finding of medical causation in favor of a heart attack victim, and the Commission in the present case applied the very same medical causation standard to reach a finding against Employee. In both instances, appellate court review is limited to the substantial competent evidence standard. Similarly, in Aldridge v. Southern Missouri Gas Co., 131 S.W.3d 876 (Mo.App.S.D. 2004), the court affirmed a Commission Award, under the lesser medical causation standard that existed prior to 2005, based on there being sufficient evidence to support the Commission's finding that claimant's heart attack was work-related. The court there did not reverse a causation finding of the Commission, as is urged by Claimant here. In Jensen–Price v. Encompass Medical Group, 2016 WL 4440490 (Mo.App. W.D. August 23, 2016), the court addressed whether an employee is deemed to still be working when she is waiting to get off an office elevator to go home while she is carrying a laptop computer. Again, the issue was not whether work or non-work-related factors were the primary factor in causing injury.

Nor do recent decisions of this Court support Claimant's assertion that the Commission applied the incorrect standard for determining medical causation. Malam v. State of Missouri, Department of Corrections, 492 S.W. 3d 926 (Mo. banc. 2016), raised an entirely different issue – that is, whether a prison guard's takedown of an inmate

caused a hypertensive crisis. The Commission had discounted the expert medical opinion of the employee's physician on the grounds that such expert had not used the specific language of "prevailing factor." The Supreme Court reversed solely because it held that the employee's expert had actually given a prevailing factor causation opinion. The Court there did not excuse an employee from having to come forward with prevailing factor expert medical causation opinions. Indeed, it required such testimony and held that employee had submitted it. In the present case, there were conflicting expert medical opinions as to whether work activities/conditions or non-work-related factors such as pre-existing cardiac disease caused the arrhythmias and death of Employee that occurred at work. Substantial competent evidence supports the finding of the Commission on this issue of fact.

B. The Commission As Fact Finder Is Entitled to Discount Expert Medical Opinions Which Are Not Premised On Full Knowledge Of Workplace Conditions And Activities.

Bock v. City of Columbia, 274 S.W.3d 555 (Mo.App. W.D. 2008)

Mueller v. Bauer, 54 S.W.3d 652 (Mo.App. E.D. 2001)

Cook v. Missouri Highway and Transportation Commission, 500 S.W.3d 917 (Mo.App. S.D. 2016)

Employer also requested transfer of this appeal because the Court of Appeals' Opinion (that has now been vacated) improperly criticized the credibility findings of the Commission. Specifically, at pages 21-22 of such Opinion, the Court of Appeals

suggested that the Commission lacked a factual basis for finding "ultimately unpersuasive" Dr. Schuman's opinion that work activities and conditions were the prevailing factor in causing the arrhythmias and death. However, appellate courts do not sit to make their own credibility determinations and the undisputed fact is that the autopsy report determined that the cause of death was severe coronary artery disease, including occlusions of three coronary arteries and an enlarged heart. It is also the case that Dr. Schuman did not have a full understanding of work activities and conditions on the morning in question and of the ambient temperature in the fabrication shop with all ventilation systems fully operating. Furthermore, Dr. Farrar was clear in his expert opinion that risk factors unrelated to the employment were the primary factors in causing the heart attack. In short, the Commission did not substitute "personal opinion on medical causation." Instead, it determined that based on all of the evidence, including the expert medical opinions of Dr. Farrar, that Claimant had not satisfied her burden of proof. The Commission made a credibility determination concerning the omissions and misunderstandings of Dr. Schuman, and it was not appropriate for the Court of Appeals to overturn those credibility findings.

Claimant has never suggested that the Commission erred in holding that the cause of a heart arrhythmia and resulting death is something that is beyond lay understanding and, therefore, must be the subject of expert opinions/testimony. See, e.g., Bock v. City of Columbia, 274 S.W.3d 555, 561 (Mo.App. W.D. 2008) (An injury maybe of such a nature that expert opinion is essential to show that it was caused by the accident to which it is ascribed); and Mueller v. Bauer, 54 S.W.3d 652, 658 (Mo.App. E.D. 2001) (Expert

witness testimony about cause of death cannot be premised on speculative testimony). The Commission having found unpersuasive the medical causation theory of Dr. Schuman, there was nothing else to support Claimant's medical theory. Accordingly, Claimant failed to meet her burden of proof and it was thus unnecessary for the Commission to expressly mention the expert medical causation opinions of Dr. Farrar. Employer believes that the Commission adequately explained its rationale for its factual findings and summarized the particular reasons why it discounted Dr. Schuman's expert opinions.

Finally, Claimant's brief does not object to the admissibility or probative value of Dr. Farrar's expert medical causation opinions. Claimant essentially ignores Dr. Farrar's report and testimony, somehow urging this Court to take on the role of fact finder by adopting the opinions of her medical expert. It simply is not the function of appellate courts to choose between two opposing expert opinions. See Cook v. Missouri Highway and Transportation Commission, 500 S.W.3d 917, 923 (Mo.App. S.D. 2016) (Conflicting medical theories present a creditability determination for the Commission to make; therefore, the Commission's decision as to which of the various medical experts to believe is binding on the appellate court).

III. Response To Point Relied On II

A. Substantial competent evidence, including but not limited to medical expert opinions, supported the Commission's medical causation findings.

Leake v. City of Fulton, 316 S.W.3d 528 (Mo.App.W.D. 2010)

Staab v. Laclede Gas Co., 691 S.W.2d 343 (Mo.App.E.D. 1985)

Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624 (Mo. banc 2012)

This Court must review the Commission's Final Award Denying Compensation to determine whether there was not "sufficient competent evidence in the record to warrant the making of the award." RSMo. 287.495.1(4). The determination of whether a particular accident is the "prevailing factor" causing an employee's condition (in this case, death) "is inherently a factual one...we see no reason not to defer to the Commission's factual finding in this case." Leake v. City of Fulton, 316 S.W.3d 528, 533 (Mo.App.W.D. 2010). A reviewing court considers whether the Commission "could have reasonably made its findings, and reached its results, upon consideration of the evidence before it." Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624, 629 (Mo. banc 2012). The reviewing court defers to the Commission's factual findings, recognizes that it is the Commission's function to determine the creditability of witnesses, and does not substitute its judgment on the evidence. Id. Specifically, "[w]hether to accept conflicting medical opinions is a fact issue for the Commission, and this Court defers to the Commission's decisions relating to the creditability of witnesses and the weight given to testimony." Id. at 632.

In Leake, "[t]wo different expert opinions served as evidence" regarding what was the prevailing factor in causing the employee's death at work. This court properly deferred to the Commission's acceptance of the claimant's medical expert regarding causation – that the events and conditions of the firefighter's rescues on the date of death,

taken together, were the prevailing factor leading to the death. In the present case, there are also two conflicting expert opinions as to medical causation and the Commission (as well as the administrative law judge) did not credit the expert opinion of Claimant's retained physician but instead credited the medical causation opinion of the Employer's retained medical expert to the effect that work conditions were not the prevailing factor in causing Employee's death. Under the applicable standard of review, that finding of fact and credibility determination cannot be reversed on appeal to this court.

Substantial competent evidence supported the medical causation findings of the Commission. First, Dr. Farrar reviewed the pertinent medical records from both before and after Employee's death and opined that Employee's ventricular fibrillation resulted from a combination of severe coronary artery disease and hypertensive heart disease with consequent left ventricular hypertrophy. (Tr., pp.863,1239-1241,1297; A115, A50-A52, A108). He further opined, that it was likely that Employee was acclimated to the heat typical to his work area during the summer months. Finally, Dr. Farrar opined that the prevailing causes of the sudden cardiac death were the severe preexisting cardiovascular disease process, which in turn resulted from traditional non-work related risk factors. "The heat was neither a likely or necessary significant contributing factor in his death and was certainly not the prevailing factor in his death. The fact that his death occurred at work was simply coincidental." (Tr., pp.863-864; A115-A116).

Second, Dr. Farrar's medical causation opinions were supported by the July 2, 2012 autopsy report which noted that Employee was suffering from cardiomegaley (enlarged heart), severe coronary artery disease with substantial occlusions in three of the

coronary arteries, and that the cause of death was "a cardiac arrhythmia resulting from severe coronary heart disease." (Tr., pp.181-183; A16-A18).

Third, prior to his death, Employee had been diagnosed with hypertension, hyperlipidemia, cardiac dysrhythmias, and abnormal ventricular rate consistent with sinus tachycardia to the right bundle. Functional capacity on two stress tests performed in October 2009 was poor. Dr. Schuman acknowledged that the autopsy disclosed cardiovascular disease including coronary artery blockages, but described these conditions as "moderate." (Tr., pp.143-144). As fact finder, the Commission was not compelled to accept Dr. Schuman's discounting of the cardiovascular disease, in particular when Dr. Farrar and the author of the autopsy report characterized such condition as "severe."

Fourth, there was nothing unusual about Employee's work activities on the date in question. He performed operation of the lathe, left the fabrication shop briefly to check on the waste water treatment plant, punched or drilled some holes in materials submitted to him by a co-employee, and had a 30 minute lunch break sitting down which ended approximately 15 minutes before his collapse. There simply was no evidence of unusual exertion or strain undertaken by Employee on the day of his sudden cardiac death.

Fifth, there were substantial credibility issues relating to Dr. Schuman's medical causation opinions. This physician first applied a substantial factor test, but then without explanation several months later applied a primary factor analysis. He assumed that from 6:00 a.m. to 11:45 a.m. on June 30, 2012 Employee was working continuously at the lathe machine. Co-employee testimony established otherwise. Employee left the

fabrication shop for 20-30 minutes to check on the waste water treatment plant; thereafter, he spent substantial time punching holes in materials with the assistance of a co-worker; and he had a substantial lunch break immediately before he collapsed. Dr. Schuman premised his causation opinion principally on the heat inside the fabrication shop. However, he acknowledged that he did not know the temperature inside that structure and he testified wrongly that the building was not well ventilated. In fact, there were open doors, open windows, exhaust fans and pedestal fans which reduced the temperature inside by 5 to 8 degrees from the ambient temperature outside. It is not contested that the fabrication shop was hot, but no eyewitness described the heat as unusual or exceptional in the building that morning.

Dr. Schuman's analysis is rather results-oriented - that is, because Employee collapsed with sudden heart death at 11:45 a.m., therefore the heat must have been excessive and must have caused the heart attack. Obviously, chronology is not causation.

The Commission noted several of these credibility issues with Dr. Schuman's opinions and testimony. It characterized Dr. Schuman's medical causation opinions as based on guesswork or speculation. It deemed his testimony to be "unpersuasive." Because medical causation as to a heart attack is not within the common understanding of lay people, and because the Commission found Dr. Schuman's testimony not credible, the Commission reasonably found that Claimant had not met her burden of proof that the "accident" of June 30, 2012 was the prevailing factor causing Employee's death. See RSMo. 287.020.3(4).

Appellant does not assert that expert medical testimony as to causation was

unnecessary. Instead, her argument is essentially that Dr. Schuman's expert opinions are more credible than those of Dr. Farrar. Such contention goes beyond the scope of this court's review. That the Commission adopted Dr. Schuman's causation opinion under the entirely different set of facts at issue in Leake is not dispositive or even relevant to the prevailing factor findings of the Commission under the different set of circumstances at issue in the present proceeding.

That the Commission did not discuss at length the shifts worked by Employee prior to date of death is of no significance. In the first place, Dr. Schuman's causation opinions were that the work activities of June 30, 2012 were the substantial or prevailing factor in causing Employee's death. Claimant's own expert did not rely on work activities or the length of work shifts occurring prior to June 30, 2012. Moreover, when asked at her deposition about her husband's condition on the evening of June 29, 2012, she testified that he appeared normal and simply made a comment about the heat. Only at trial did she embellish her account by testifying that her husband had lost his appetite, and appeared fatigued, and that she had asked him not to work the next day. In short, Mrs. White's own testimony about the effects on her husband of his work during the days preceding his death was different if not contradictory.

It should also be emphasized that none of Employee's testifying co-workers observed Employee to be ill or stressed on the date of his sudden cardiac death nor did they receive any complaints from Employee about the heat before his collapse at around 11:45 a.m. on June 30, 2012. Nothing unusual or unexpected occurred in the fabrication shop before such collapse. The other employees working there suffered no heat related

illness or medical condition. What distinguished Employee that day was his underlying coronary disease processes as disclosed in the autopsy report.

Neither the administrative law judge nor the Commission ignored lay testimony. It must be assumed that they reviewed all of the evidence, and in their written awards they summarized what they believe to be the most pertinent evidence relating to medical causation. The Commission expressed sympathy for Mrs. White, but simply did not adopt Dr. Schuman's causation analysis that heat and/or stress at work was the prevailing factor in causing Employee's death. Even if Mrs. White's trial testimony regarding what she observed on the evening of June 29, 2012 was credited, that would not require or even suggest a different medical causation finding. The lay testimony of co-employees, who were eyewitnesses to Employee's condition in the hours immediately before his collapse, is just as (if not more) relevant. Claimant did not observe her husband after he arose from bed early that morning.

Appellant cites to cases in which a medical causation finding of the Commission in favor of a heart attack victim has been affirmed by an appellate court under the substantial competent evidence standard of review. See, e.g., Johnson v. City of Duenweg Fire Department, 735 S.W.2d 364 (Mo.banc.1987). By the same token, Missouri appellate courts have affirmed medical causation findings against employees suffering heart attacks at work under the same substantial competent evidence standard of review. See Staab v. Laclede Gas Co., 691 S.W.2d 343 (Mo.App.E.D. 1985) (Employee's fatal heart attack at work was not shown to have been brought on by activity or other external causes as opposed to a spontaneous event in the life of his coronary artery disease).

CONCLUSION

The Final Award Denying Compensation entered by the Labor and Industrial Relations Commission should be affirmed. The Commission properly applied the "prevailing factor" statutory test to determine whether the "accident" was the cause of Employee's resulting medical condition and disability. Specifically, this meant evaluating potential contributing factors to the sudden cardiac death, including pre-existing severe cardiovascular diseases and work conditions on the date of death, in determining which were the prevailing or primary factors. The Commission properly placed the burden of proof as to medical causation on Claimant.

As to the merits of the Commission's findings, the expert medical causation testimony was conflicting, but Dr. Farrar's conclusions were amply supported by the autopsy report and by the lay testimony of co-employees. Under the substantial competent evidence standard of review, resolution of conflicts between testifying medical experts is for the Commission to resolve, and this Court does not sit to reverse the reasonable credibility findings made by the Commission regarding Dr. Schuman's reports and testimony.

The resolution of the medical causation issue in favor of the Employer renders all other issues moot. Accordingly, Appellant's request for a remand to the Commission for further proceedings should be denied.

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CERTIFICATE PURSUANT TO RULE 84.06(c)

Respondents ConAgra Foods Packaged Foods, LLC and Old Republic Insurance Company, by and through their attorney Douglas M. Greenwald, certify to the Court that the foregoing Substitute Brief of Respondents complies with the limitations contained in Missouri Rule of Civil Procedure 84.06(c); that the number of the words in the brief is 9,107; that all defenses, contentions and arguments contained in the Substitute Brief of Respondents are not presented for improper purpose and are warranted by existing law; and that all allegations and factual contentions in the Substitute Brief of Respondents have evidentiary support (all as required by Missouri Rule of Civil Procedure Rule 55.03).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 20, 2017, a copy of this Substitute Brief of Respondents was electronically filed using the Missouri Court Electronic filing system, which will serve copies on all parties and counsel of record, including the following:

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