Case No. SC96041

IN THE SUPREME COURT OF MISSOURI

ULYSSES G. WHITE (DECEASED), PATRICIA WHITE,

Appellant,

v.

CONAGRA PACKAGED FOODS, LLC,

Respondent.

SUBSTITUTE 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. JURISDICTIONAL STATEMENT

This appeal involves the construction and application of the Missouri Workers Compensation, and does not involve the validity of a treaty or statute of the United States, a statute or provision of the constitution of the State of Missouri, the construction of the revenue laws of the State of Missouri, title to any state office, or a case involving the death penalty. As such, this matter is not within the exclusive appellate jurisdiction of this Court. *See* Mo. Const. Art. V, § 3. Rather, this case is before the Court pursuant to the Court's Order of December 20, 2016 transferring this case from the Missouri Court of Appeals, Western District and is subject to retransfer to that court if it is determined that Respondent's Application for Transfer was improvidently granted. *See* Mo. Sup. Ct. R. 83.09.

II. STATEMENT OF FACTS

This workers' compensation case is an appeal from the decision of the Labor & Industrial Relations Commission (the "Commission"). The ultimate issue in this case is whether Ulysses George "Toad" White suffered on accident—in particular, cardiac ischemia—in the course of and arising out of his work for ConAgra which in turn caused a medical condition—specifically, fibrillation—that led his death.

A. George White was found dead at his work station at approximately 11:45 a.m. on Saturday, June 30, 2012.

George White worked at ConAgra for 24 years. *See* Tr. at 15:1–2 (App. at 23). He was a hard-working man who did his work without complaint. *See* Tr. at 601–02 (Dep. of Jose Sanchez 9:24–10:7) (App. at 203–04); Tr. at 525 (Dep. of Abraham Sellers 39:12–17) (App. at 191). For at least the last several years, Mr. White had worked as a machinist in ConAgra's machine shed where he used a lathe and other tools to fabricate metal parts. *See* Tr. at 492–93 (Dep. of Abraham Sellers 6:17–7:2) (App. at 188). The machine shed at ConAgra is a separate building in the middle of the ConAgra facility's parking lot and, in the summer time, is the hottest part of the ConAgra plant. *See* Tr. at 531 (Dep. of Abraham Sellers 45:3–5) (App. at 196). Unlike the rest of the ConAgra plant, this building is not air-conditioned. *See* Tr. at 527-29 (Dep. of Abraham Sellers 41:24–43:4). (App. at 193–95). In addition to the lathe used by Mr. White, there was also a welding station in the machine shed that put out a great deal of heat. *See* Tr. at 583 (Dep. of Charles Vandiver 27:3–19) (App. at 201).

While at work, Mr. White wore a long-sleeved uniform and hard hat. *See* Tr. at 467 (Dep. of Pedro Estrada 22:5) (App. at 186); Tr. at 578 (Dep. of Charles Vandiver 22:7–18) (App. at 198); Tr. at 427–28 (Dep. of Patricia White 45:7–46:3) (App. at 183–84). His usual shift required him to arrive at the plant at 5:00 a.m. each morning and work until at least 3:00 p.m. *See* Tr. at 15:10–14 (App. at 23). Mr. White typically worked six or seven days per week. *See* Tr. at 524–25 (Dep. of Abraham Sellers 38:16–39:22) (App. at 190-91). The day of Mr. White's death—Saturday, June 30th—was the sixth day in a row that Mr. White had worked. *See* Tr. at 524–25 (Dep. of Abraham Sellers 38:16–39:22) (App. at 190–91). And June 30, 2012 was not a "regular course of business" day at ConAgra. Rather, the plant was closed for maintenance work and, as a result, Mr. White was in high demand. *See* Tr. at 526–27 (Dep. of Abraham Sellers 40:11–41:6) (App. at 192–93); Tr. at 582 (Dep. of Charles Vandiver 26:11–23) (App. at 200). That summer had been hotter than was typically experienced at the ConAgra plant. *See* Tr. at 581–82 (Dep. of Charles Vandiver 25:19–26:10) (App. at 199–200). For example, Mrs. White explained that the heat of that summer had warped the metal frame of the door on her home and that other area homes were suffering foundation cracks and windows that would not shut. *See* Tr. at 19 (App. at 27). Indeed, before Mr. White started work on the day he died, ConAgra's plant manager, Abraham Sellers specifically cautioned all of the ConAgra workers to be aware of the heat and to watch out for each other because of the increased risk of heat-related injury that day. See Tr. at 529 (Dep. of Abraham Sellers 43:9–43:20) (App. at 195).

In addition, the weather during days and weeks leading up June 30, 2012 had been significantly hotter than normal. *See* Tr. at 16-20, 32; Tr. at 581–82 (Dep. of Charles Vandiver 25:19–26:10) (App. at 199–200). The high temperature on June 30, 2012 was 100 degrees Fahrenheit. *See* Rec. at 13; Tr. at 16–17 (App. at 24–25). By some reports, it was 110 degrees inside the building where Mr. White worked—a fact accepted by Defendants' expert, Dr. Farrar. *See* Tr. at 204 (Dep. of Dr. Farrar 11:18–23) (App. at 159); *see also* Tr. at 308 ("The temperature was apparently about 110 degrees inside the building.") (App. at 164). A number of local businesses had closed as a result of the hot weather. *See* Tr. at 17–18 (App. at 25–26).

In addition to the heat, Mr. White was also under added stress due to a painful foot injury. *See* Tr. at 13:1–15 (App. at 21). Mr. White had previously suffered a foot injury that had kept him from working and that was still healing. *See* Tr. at 13 (Appx. 21), 129–30 (Dep. of Dr. Stephen Schuman 87:10–88:15); *see also* Tr. at 803 (Exhibit 11, Medical Records from Columbia Orthopaedic Group). As a result of this injury, Mr. White wore a brace while working. *See* Tr. at 13 (Appx. 21).

Mrs. White had asked her husband not to go to work on that Saturday, June 30, 2012 because of how the heat that week seemed to be wearing him down and the forecast for that Saturday was continued high heat. *See* Tr. at 19:1–8 (App. at 27). Mrs. White described that her husband had come home tired every evening that week and did not eat much. *See* Tr. at 18 (App. at 26). Prior to the summer of 2012, Mr. White

had been able to consistently work both at ConAgra and around the house outside in the weather without limitation. *See* Tr. at 20 (App. at 28).

When Mrs. White was asked during her deposition about how her husband was feeling the night before he died, she relayed what Mr. White had said at dinner about the heat:

> Q. I'm asking you did he give you any indication of how he was feeling physically on June 29th, 2012?
>
> A. He said – I don't know how you want me to answer that.
>
> Q. However you want.
>
> A. Well, what – he was fine as far as he said it was a hot son-of-a-bitch that day. It was 96 degrees at 11:00. That was his comment.

See Tr. at 393 (Dep. of Patricia White 11:3–11) (App. at 181).

B. Mr. White's work environment on June 30, 2012 caused the cardiac ischemia that lead to his heart going into fibrillation and his eventual death.

In support of her claim for death benefits under the Workers Compensation Act ("the Act"), Mrs. White presented the deposition testimony and reports of Dr. Stephen Schuman. *See* Tr. 43–170 (App. at 45–155). Dr. Schuman is a board-certified cardiologist whose opinions have been accepted by the Commission and the Courts in Missouri workers' compensation cases. *See* Tr. at 166; *see also, e.g., Leake v. City of Fulton*, 2009 MOWCLR LEXIS 176 (Mo. Lab. & Ind. Rel. Comm'n Nov. 13, 2009)

affirmed at 316 S.W.3d 528 (Mo. Ct. App. W.D. 2010); *Aldridge v. So. Mo. Gas Co.*, 131 S.W.3d 876 (Mo. Ct. App. S.D. 2004); *see also Ceniceros v. Ellis, Evard, Inc.*, 2005 MOWCLR LEXIS 39 (Mo. Lab. & Ind. Rel. Apr. 13, 2005) (crediting Dr. Schuman testimony on behalf of the employer/insurer to deny compensation). In preparing his opinions, Dr. Schuman read all of the relevant medical records as well as the deposition of Patricia White and Pedro Estrada. *See* Tr. at 168 (Exhibit 1.b).

Before discussing Dr. Schuman's medical opinion, some vocabulary is required. "Ischemia" is the lack of adequate blood flow to the heart. *See* Tr. at 87, 136 (Dep. of Dr. Stephen Schuman 45:6–17; 64:14–15) (App. at 89, 108). That is, the supply-demand equilibrium of the heart is out of balance. *See* Tr. at 87 (Dep. of Dr. Stephen Schuman 45:6–17) (App. at 89). Severe ischemia can cause cardiac arrest. *See* Tr. at 87–88 (Dep. of Dr. Stephen Schuman 45:18–46:13) (App. at 89). When the heart suffers severe ischemia it will first fibrillate. *See* Tr. at 88 (Dep. of Dr. Stephen Schuman 46:14–23) (App. at 90). Fibrillation is the "very rapid irregular contractions of the muscle fibers of the heart resulting in a lack of synchronism between heartbeat and pulse." *See* //www.merriam-webster.com/dictionary/fibrillation (dictionary definition) (last accessed January 30, 2017). If the fibrillation does not stop, it will result in "flat line" cardiac arrest. *See* Tr. at 88 (Dep. of Dr. Stephen Schuman 46:14–23) (App. at 90). Dr. Schuman opined that this is what happened to Mr. White. *See* Tr. at 136–38 (Depo. of Stephen Schuman 94:20–96:2) (App. at 138).

Dr. Schuman further opined that Mr. White's work activities combined with the unusually hot work environment, his uniform of long-sleeves and hard-hat, and the pain from his still-healing foot injury that he suffered at work to cause his increased heart to demand more blood than could be supplied. *See* Tr. at 61–62; 136–37 (Dep. of Stephen Schuman 19:8–20:2; 94:21–95:25) (App. at 63–64, 138–39). That is, Mr. White's work activities on June 30, 2012 caused Mr. White's ischemia, cardiac arrest and death. *See* Tr. at 64–65; 87–89 (Dep. of Stephen Schuman 22:21–23:20; 45:18–47:7) (App. at 89-91). Indeed, while he ultimately reached a different conclusion, ConAgra's expert, Dr. Farrar, agreed that both pain and being hot can cause stress. *See* Tr. at 254 (Dep. of Dr. Michael Farrar at 61:7–10) (App. at 163). And stress can be a trigger for a cardiac event. *See* Tr. at 254 (Dep. of Dr. Michael Farrar at 61:11–13) (App. at 163).

C. Before he died, George White was an active and relatively healthy man.

George White had been married to and lived with his wife, Patricia "Pat" White, from 1993 until he died. *See* Tr. at 7, 391 (App. at 15, 180). Both of Mr. White's parents lived a full life and neither died of heart disease. *See* Tr. at 8:8–11 (App. at 16); *see, e.g.,* Tr. at 652 ("No significant familial diseases," noted on each visit with Missouri Valley Physicians) (App. at 171). When not at work, Mr. White performed the maintenance work to take care of his rural home and large yard. *See* Tr. at 9–10 (App. at 17–18). Mr. White did the mowing both using a riding lawnmower and push mower

during the summer months. *See* Tr. at 9–10 (App. at 17–18). As a hobby, Mr. White performed mechanical work on his "dune buggy" outdoors during the summer months. *See* Tr. 9-11:5; 14:1-15 (App. at 17–18). He was able to do all of this without ill effects from the heat. *See* Tr. 9-11:5; 14:1-15 (App. at 17–18).

Mr. White was a non-smoker having completely quit 10–12 years prior to his death. *See* Tr. at 8:23–9:10 (App. at 16–17). Both Dr. Schuman and Dr. Farrar testified that his status as a prior smoker did not put him at significant risk for a heart attack. *See* Tr. 130–31 (Dep. of Stephen Schuman 88:16–89:10 ("So a current smoker is at significant risk, but a former smoker is not.") (App. at 132–33); Tr. at 253 (Dep. of Dr. Michael Farrar 60:4–18 (explaining that 10-12 years of non-smoking was long enough to have a significant decrease in Mr. White's risk of a cardiac event) (App. at 162). Mr. White had, at one time, been on cholesterol medicine but his family doctor had taken him off the medicine when it was no longer needed. *See* Tr. at 12:1–12; 333–34 (App. at 169–70). Mr. White was careful about his diet and consciously did not overeat. *See* Tr. at 11:13–25 (App. at 19).

Prior to his death, Mr. White was regularly examined by his physician. On August 30, 2006, Mr. White underwent a carotid Doppler ultrasound which ruled out any bruit (murmur) in his carotid arteries. *See* Tr. at 51 (Dep of Dr. Steven Schuman 9:12–20) (App. at 53). On October 9, 2009, Mr. White underwent a 24-hour Holter monitor exam which showed Mr. White had some minor heart arrhythmias that Dr. Schuman did not find significant. *See* Tr. at 51–52 (App. at 53–54). On October 15,

2009, Mr. White underwent a treadmill stress test; which showed only minor potential irregularities. *See* Tr. at 53 (App. at 55). On October 21, 2012, Mr. White underwent a nuclear stress test which is more accurate, sensitive, and specific. *See* Tr. at 53–54 (App. at 55–56). The nuclear stress test was negative, showing that Mr. White had no perfusion defects, no low motion abnormalities, no ischemia, no prior infarction, and that he had normal pumping with an ejection fraction of 70%. *Id.*

Mr. White was 5'8" and weighed 193 pounds when he died. *See* Tr. 182 (Exhibit 1.g at p.2) (App. at 157). An autopsy revealed that Mr. White had an 80% occlusion of the left anterior descending artery and a 60% occlusion of the right coronary artery. *See* Tr. 183 (Exhibit 1.g at p.3) (App. at 157). An 80% blockage is "moderately severe." *See* Tr. at 58 (Dep. of Dr. Schuman 16:3-5) (App. at 60); *See* Tr. 183 (Exhibit 1.g at p.3) (App. at 157). Autopsy further revealed that Mr. White's heart had no scarring indicating that he had never had a previous heart attack. *See* Tr. 183 (Exhibit 1.g at p.3) (App. at 157); Tr. at 57 (Dep. of Dr. Schuman 15:13–19) (App. at 59).

D. Procedural history

On March 25, 2015, an evidentiary hearing was held in this case before the Honorable Administrative Law Judge Hannelore D. Fischer ("the ALJ"). *See* Rec. at 10. On June 1, 2015, the ALJ issued her award denying compensation. *Id.* On June 19, 2015, Ms. White filed her Application for Review to the Commission. *See* Rec. at 15.

On January 21, 2016, the Commission entered its Final Award Denying Compensation modifying the original Award of the ALJ. *See* Rec. at 16 (App. at 4). The

award was a split decision with Commissioner Curtis E. Chick, Jr. dissenting. *See* Rec. at 19 (App. at 7).

As an initial matter, the majority of the Commission did find Mr. White's "death at work was an 'unexpected traumatic event.'" *See* Rec. at 16 (App. at 4). So according to the Commission, Mr. White suffered an accident under the Act. *See* Rec. at 16 (App. at 4). But then the Commission went on to analyze "the issue of medical causation" applying Mo. Rev. Stat. §§ 287.020.3(1) and 287.020.3(4) which both set forth prevailing factor tests. *See* Rec. at 16–17 (App. at 4–5).

The Commission noted that Dr. Schuman's general theory of medical causation was not inherently incredible. *See* Rec. at 17 (App. at 5). But nonetheless held that Ms. White failed to carry her burden of proof. *See* Rec. at 18 (App. at 6). In so holding, the Commission specifically declined to consider the fact that Mr. White had been working consecutive 12-hour days. *See* Rec. at 17, n.1 (App. at 5). The Commission also noted that Dr. Schuman did not know exactly what work activities Mr. White was doing for the entire morning of his death. *See* Rec. at 17 (App. at 5). And Dr. Schuman did not know the exact, numeric temperature. *See* Rec. at 18 (App. at 6). Based on these perceived deficiencies in the evidence, the majority held that "Dr. Schuman [was] insufficiently informed" and denied death benefits to Ms. White. *See* Rec. at 18 (App. at 6).

In a detailed dissent, Commissioner Chick explained that it was "overwhelmingly clear to [him] that employee's work caused him to suffer the fatal

heart attack on June 30, 2012." *See* Rec. at 19 (App. at 7). The dissent began by noting that the evidence was uncontested that it was "*extremely* hot" on the day in question. *Id.* The dissent then noted the heat-related safety warning given by Abraham Sellers on June 30, 2012 stating "[e]specially given Mr. Seller's testimony, I find the majority minimization of Dr. Schuman's understanding as merely "it was hot" to be an oversimplified and, frankly, an unfair reading of the evidence." *Id.* The dissent further noted that Dr. Schuman provided persuasive testimony about how the work environment led Mr. White's heart to suffer from an increased demand for blood, stating:

> Dr. Schuman indicated employee's mere presence in the machine shop on June 30, 2012, combined with the effects of wearing his long-sleeved uniform, hard hat, and foot brace, put an increased demand on employee's heart. Dr. Schuman very persuasively explained that we as human beings dissipate about 25% of our body heat through our heads, and that the employer's work rule requiring employee to wear a hard hat automatically subjected employee to a much greater risk of overheating than the average individual, regardless of how strenuous his work was.

Id.

Accordingly, the dissent found that "the *exact* temperature in the machine shop or employee's *exact* movements in operating the lathe are simply not relevant to Dr.

Schuman's theory of medical causation." *Id.* The dissent noted that any indefiniteness in an expert opinion can be combined with lay testimony to provide a sufficient foundation to support causation. *See* Rec. at 19–20 (App. at 8). And Dr. Schuman "was not impeached with respect to his opinions or their factual foundation at any time during" cross-examination. *See* Rec. at 20 (App. at 8). As a result, the dissent noted its agreement with the "Commission majority's (implied) finding that Dr. Schuman's theory is more credible" than Dr. Farrar's who the dissent considered to have been impeached. *See* Rec. at 20 (App. at 8).

The dissent then turned to a factual comparison between this case and *Leake v. City of Fulton*, 316 S.W.3d 528 (Mo. Ct. App. W.D. 2010). *See* Rec. at 20 (App. at 8). Noting that Dr. Schuman was the credited medical expert in *Leake*, the dissent found that Mr. White was, from a cardiovascular standpoint, much healthier than Mr. *Leake*. *See* Rec. at 20 (App. at 8). Indeed the dissenting Commissioner stated that he was convinced that if Alan Leake's fatal cardiac event was compensable despite his comparatively dire pre-existing cardiovascular problems, then so too should Ulysses White's case be compensable. *See* Rec. at 20 (App. at 8). In conclusion, the dissent argued that Ms. White had met her burden under Mo. Rev. Stat. § 287.020.3(2)(b) and the claim should have been found compensable. *See* Rec. at 21 (App. at 9).

On February 18, 2016, Ms. White filed her Notice of Appeal with the Missouri Court of Appeals, Western District. *See* Rec. at 29. On September 27, 2016, the Court of Appeals issued is unanimous decision reversing the Commission's award and

remanding the case to the Commission "for the limited purpose of determining whether [Mrs. White] sustained her burden to establish, by a preponderance of the evidence, that [Mr. White's] death came from a hazard or risk of employment, and if so, to calculate the compensation [Mrs. White] is entitled to receive." *See White v. ConAgra Packaged Foods, LLC,* 2016 Mo. App. LEXIS 956, *33 (Mo. Ct. App. W.D. Sept. 27, 2016) (internal footnotes omitted) (App. at 217).

On October 11, 2016, ConAgra filed its Application for Transfer to this Court with the Court of Appeals. That Application was denied on November 1, 2016. On November 15, 2016, ConAgra filed its Application for Transfer in this Court. On December 20, 2016, this Court granted that Application.

III. POINTS RELIED ON

Point I: **The Commission erred in finding that George White's widow failed to prove that Mr. White's death was covered by the Workers Compensation Act because the Commission misconstrued Mo. Rev. Stat. § 287.020 in that it improperly applied the "prevailing factor" burden of proof, rather than the "preponderance of the evidence" standard, to the question of whether Mr. White's accident arose out, and in the course, of his employment.**

Mo. Rev. Stat. § 287.020

Young v. Boone Elec. Coop., 462 S.W.3d 783 (Mo. Ct. App. W.D. 2015)

Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511 (Mo. Ct. App. W.D. 2011)

Malam v. Dep't of Corr., 492 S.W.3d 926 (Mo. banc June 28, 2016)

Point II: **The Commission erred in refusing to consider lay testimony that Mr. White had worked five consecutive 12-hour days prior to his death because the Commission may not arbitrarily ignore testimony that is within the realm of lay understanding in that there was expert testimony in the record establishing the impact physical stress has in causing ischemia.**

Lawrence v. Treasurer of Mo. – Custodian of the 2d Injury Fund, 470 S.W.3d 6 (Mo. Ct. App. W.D. 2015)

Johnson v. Duenweg Fire Dep't, 735 S.W.2d 364 (Mo. 1987)

IV. ARGUMENT

An employer under the Workers' Compensation Act "shall be liable, irrespective of negligence to furnish compensation under the provisions of [the Act] for personal injury . . . of the employee by accident . . . arising out of and in the course of the employee's employment." Mo. Rev. Stat. § 287.120.1. "Accident" and "injury" are both defined terms under the Act. *See* Mo. Rev. Stat. §§ 287.020.2 (defining "accident"), 287.020.3 (defining "injury"). As such, those defined terms must be strictly construed, with their meaning limited to the express terms of the statute. *See* Mo. Rev. Stat. § 287.800; *Peters v. Wady Indus.*, 498 S.W.3d 784, 792 n.6 (Mo. banc 2016). That is, under strict construction, the reviewing court "presumes nothing that is not expressed." *Avery Contr., LLC v. Niehous*, 492 S.W.3d 159, 163 (Mo. banc 2016), citing *Templemire v. W. & M Welding, Inc.*, 433 S.W.3d 371, 381 (Mo. banc 2014). That said, "strict" does not mean stingy. *See Young,* 462 S.W.3d at 792; *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 828 (Mo. Ct. App. S.D. 2009).

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." Mo. Rev. Stat. § 287.020.2. Broken down into its constituent parts, this definition has four elements:

(1) An unexpected traumatic event or an unusual strain;

(2) Identifiable by time and place of occurrence;

(3) Producing at the time objective symptoms of an injury; and

(4) Caused by a single event during a single work shift.

Id.; *see also Young v. Boone Elec. Coop.*, 462 S.W.3d 783, 794 (Mo. Ct. App. W.D. 2015) (en banc) (applying step-by-step analysis to section 287.020.2).

On the other hand, an "injury" must have "arisen out of and in the course of employment," which means that:

1. It is reasonably apparent that the accident is the prevailing factor causing the injury (upon considering all the circumstances); and
2. The injury must not come from a risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life; and
3. In the case of a cardiovascular incident (as occurred here), the accident is the prevailing factor in the resulting medical condition.

See Mo. Rev. Stat. § 287.020.3(2)(a-b); *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510 (Mo. banc 2012); *see also Young*, 462 S.W.3d at 788 (applying this definition).

Notably, the prevailing factor test is used only when the General Assembly is describing causation in the context of whether the accident caused the injury, medical condition and/or disability. *Id.* It does not appear in the sentence defining what an accident is. *See* Mo. Rev. Stat. § 287.020.2. Nor is it contained in the provision setting out the requirement that the "injury" arise out of and in the course of employment. *See* Mo. Rev. Stat. §§ 287.020.3(1-2). Rather, the generally applicable, and explicitly

stated, burden of proof applies throughout the Missouri Workers' Compensation Law where the "prevailing factor" test was not added in 2005. *See* Mo. Rev. Stat. § 287.808 ("[T]he party asserting [a] claim or defense must establish that such proposition is more likely to be true than not true."). of the Despite this, as explained in more detail below, the Commission applied the "prevailing factor" standard to the question of whether Mr. White's injury arose from his work. As such, it mixed separate concepts with separate burdens of proof and imposed a burden on the Claimant that is not required under the Act. This failure to properly apply the law resulted in prejudicial error to Ms. White. Therefore, the Court should reverse and remand this case back to the Commission for consideration under the correct legal standards.

A. Standard of review

Pursuant to Mo. Rev. Stat. § 287.495.1, this Court should reverse an award when (1) the Commission acted without or in excess of its authority, (2) the award was procured by fraud, (3) the facts found do not support the award, or (4) the record does not contain sufficient competent and substantial evidence to support the award. *See Johme*, 366 S.W.3d at 509; *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220, 223 (Mo. 2003). A review of an award from the Commission must include a determination of whether it was authorized by law and supported by competent and substantial evidence on the whole record. *See Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 629 (Mo. banc 2012) (citing Mo. Const. art. V, § 18). The Commission exceeds its authority when it misapplies the law. *See, e.g., Hinkle v. A.B. Dick Co.*, 435 S.W.3d 685,

688-89 (Mo. Ct. App. W.D. 2014) (reversing the Commission for failure to follow the Act's requirements for approving a settlement).

When examining the record, the Court determines whether considering the whole record, there is "sufficient competent and substantial evidence to support the award." *Malam v. Dep't of Corr.,* 492 S.W.3d 926, 928 (Mo. 2016). In doing so, the Court should look at the entire record, not just the evidence that supports the decision. *See Daly v. Powell Distrib., Inc.*, 328 S.W.3d 254, 258 (Mo. Ct. App. W.D. 2008). And the Court should defer to the Commission on issues involving the credibility of witnesses when such findings are made. *See Malam*, 492 S.W.3d at 929; *see also Lagud v. Kansas City Mo. Bd. Of Police Comm'rs*, 272 S.W.3d 285, 292 (Mo. Ct. App. W.D. 2008) ("unimpeached or undisputed evidence cannot be disregarded unless an administrative agency makes a specific finding that such evidence is incredible or unworthy of belief"). But "[t]his Court is not bound by the commission's interpretation and application of the law, and no deference is afforded to those determinations." *Greer v. Sysco Food Servs.*, 475 S.W.3d 655, 664 (Mo. banc 2015) (citing *Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 620 (Mo. banc 2012)).

B. POINT I: The Commission erred in finding that George White's widow failed to prove that Mr. White's death was covered by the Workers Compensation Act because the Commission misconstrued Mo. Rev. Stat. § 287.020 in that it improperly applied the "prevailing factor" burden of proof, rather than the "preponderance of the evidence" standard, to the question of whether Mr. White's accident arose out, and in the course, of his employment.

While it has been almost 12 years since the Legislature abrogated the former definition of accident and replaced it with the current version of Mo. Rev. Stat. § 287.020.2, the Western District of the Court of Appeals, sitting en banc was the first to court to perform a critical analysis of the "new" language of that subsection. *See Young*, 462 S.W.3d at 791-797 (explaining that it was the case of first impression on the interpretation of the term "accident" under the 2005 amendments to the workers' compensation law). While this Court has rendered three opinions interpreting the changes made in 2005 to the basic definitions in Mo. Rev. Stat. § 287.020, each of those opinions focused on § 287.020.3's revised definition of "injury" in cases where the issue of "accident" was not controversial. *See Malam*, 492 S.W.3d at 928-29 (assuming without analysis that an accident had occurred when an employee suffered a "hypertensive crisis" following an "adrenaline rush" because the "dispositive issue" in the case was whether the accident was the prevailing factor for the injury); *Johme*,

366 S.W.3d 509-10 (assuming that the employee's fall was an accident and that it satisfied § 287.030(2)(a) but failed under § 287.030(2)(b)'s requirement that the injury arise from a hazard or risk not unrelated to her employment); and *Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 673 (Mo. 2009) (assuming that the employee's knee "popping" while walking was, similarly, an accident and that it satisfied § 287.030(2)(a) but failed under § 287.030(2)(b)'s requirement that the injury arise from a hazard or risk not unrelated to her employment). But this Court has not yet issued an opinion on the correct interpretation of Mo. Rev. Stat. §287.020.2.

Indeed as the Court of Appeals explained in *Young*, the interpretation of the term "accident" under the 2005 amendments to the Act had not been thoroughly analyzed by any court in the then nearly 10 intervening years since the change to strict construction. *See Young*, 462 S.W.3d at 791. As it happens, the parties here did not have the benefit of the *Young* decision when this case was presented to the ALJ because it was handed down 20 days after the hearing. While certainly not binding on this Court, the *Young* decision demonstrates why mixing terms in the Act is not permitted under the strict construction regime imposed by the 2005 amendments. *Id.* at 792-94.

In *Young*, the employee suffered two injuries, a knee injury and a shoulder injury. *Id.* at 787-88. Both were found to be compensable by the Commission. *Id*. at 786. The employer appealed effectively arguing that (a) the knee injury was not a

compensable *injury*, and (b) the shoulder injury was not caused by a compensable *accident*. *Id.* at 788, 791. The Court's analyses of both points are applicable to this case.

1. Prevailing factor does not apply to the question of "accident."

On October 2, 2009, after 22 years of working for the employer, Mr. Young was pulling himself up into the rear of a work truck just as he had done countless times before. *Id.* at 789-87, 794. The employer argued that the employee could not show an accident because Young was performing a routine procedure with "no evidence of any trauma or duress associated with him entering the truck." *Id.* at 794. According to the employer, there simply could not be an "unexpected traumatic event or unusual strain" because the employee was doing the same thing he always did at work. *Id.* Put another way, the employer urged that an external force was required to cause the specific event. *Id.* The Court rejected this argument, pithily explaining "repeated unusual strain does not make it usual; it merely makes it repeated." *Id.*

The Court conducted an in-depth review of the language and grammar of the statutory definition of "accident." *See Young*, 462 S.W.3d at 791-797. From this, the Court distilled the elements required to prove an "accident" under Mo. Rev. Stat. § 287.020.2 as requiring:

1. An unexpected traumatic event or unusual strain;
2. An identifiable time and place of occurrence;
3. Objective symptoms of an injury; and

4. Caused by a particular happening during a single work shift.

See Young, 462 S.W.3d at 794. Notably, "prevailing factor" is not a part of any of these elements. *Id.* Here, each of the above elements to prove accident is shown by undisputed evidence:

1. Mr. White's suffered ischemia where his circulatory system was unable to supply the amount of blood demanded by his heart (the unexpected traumatic event or unusual strain);
2. Mr. White was found collapsed at his work station at approximately 11:45 a.m. (an identifiable time and place of occurrence);
3. Mr. White died (objective symptoms of an injury); and
4. Mr. White's cardiac ischemia occurred on June 30, 2012 at work (a particular happening during a single work shift).

Rather than conducting this inquiry, the divided Commission simply found there was an "accident" because Mr. White had died at work. *See* Rec. at 16 (App. 4). Then the Commission superimposed the prevailing factor test over every remaining question in the case under the auspices of "medical causation." *See* Rec at 16–18 (App. 4–6). Because the Commission majority short-circuited the analysis, it did not adequately address the elements in the definition of accident and injury as stated in Mo. Rev. Stat. § 287.020. Reversal is mandated where the Commission fails to properly consider or address all of the issues raised in Mo. Rev. Stat. § 287.020. *See*

Van Winkle v. Lewellens Prof'l Cleaning, Inc., 258 S.W.3d 889, 898 (Mo. Ct. App. W.D. 2008).

A proper application of the statutory definition of "accident" would have allowed for the proper application of the definition of "injury." Undertaking the analysis in its required steps is critical to the appropriate application of the Act under strict construction. *See* Mo. Rev. Stat. § 287.800; *see also Mantia v. Mo. DOT*, 2016 Mo. App. LEXIS 597, *8-9 (Mo. Ct. App. E.D. June 14, 2016) (providing an example of how the change to strict construction has changed the way court's are to analyze and apply the Act – sometimes to an employer's benefit, sometimes to a claimant's). Instead, the Commission was not able to go through the various factors contained in the applicable definitions because it found that death was the accident, rather than the resulting disability. Such a finding is akin to finding that a fractured femur bone was the accident if a hypothetical painter fell off a tall ladder and broke his leg. But under the Act, in that situation, the painter's fall was the accident. The broken leg is the injury.

Notably, requiring the Commission to engage in the statutorily-proscribed analysis is not tantamount to finding that the "prevailing factor standard . . . is satisfied in a cardiac case simply by an employee suffering a fatal heart attack at work" as argued by ConAgra in its Application for Transfer. Resp. App. for Trans. at 1. While a strict application of the Workers' Compensation Law's definition may allow Mrs. White to prove compensability in this case, it is hyperbole to assert that every

heart attack at work would be compensable under a strict application of the definitions found in section 287.020.

Rather than applying the prevailing factor test to the entire case, the Commission should have applied the general burden of proof—whether a proposition is more likely to be true than not true—to decide whether Mr. White's working conditions (the work-related hazard) led to his cardiac ischemia (the accident). *See* Mo. Rev. Stat. § 287.808; *see Leake*, 316 S.W.3d at 530 (describing the supply-demand imbalance in the heart, *i.e.* the cardia ischemia, as the accident at issue). Then, the question should have turned to whether Mr. White's cardiac ischemia (the accident) was the prevailing factor causing the fibrillation and cardiac arrest (the medical condition) which, in turn, led to Mr. White's death (the disability). *See Leake*, 316 S.W.3d at 531 (explaining that the fibrillation was the medical condition while death was the disability). Here, it is undisputed that the ischemia suffered by Mr. White on June 30, 2012 caused his fibrillation and eventual death. *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). Accordingly, the Commission's failure to abide by the correct standard is not only in error, it is prejudicially so.

Notably, this is not the first time that the Commission has imputed the prevailing factor test into what it lumps together as "medical causation." *See, e.g., Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 518 (Mo. Ct. App. W.D. 2011) (reversing Commission decision denying medical benefits where the Commission

utilized a "prevailing factor" rationale on the question of "medical causation" of the need for treatment); *see also Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 634-35 (Mo. banc 2012) (endorsing *Tillotson's* restriction of the prevailing factor test to the portions of § 287.020 in which it appears). As in *Tillotson*, the Commission's confusion of the standards had the practical effect of an erroneously heightened burden of proof being applied. *See Tillotson,* 347 S.W.3d at 518. Therefore, this case should be reversed and remanded to the Commission for further proceedings under the correct standard.

2. George White's ischemia did not come from a risk unrelated to the employment to which he was equally exposed outside of and unrelated to the employment in normal nonemployment life.

As pointed out by the dissenting Commissioner, the issue of whether Mr. White's death arose out of and in the course of his employment, so as to satisfy Mo. Rev. Stat. §287.020.3(2), boils down to the simple question of whether Mr. White would have faced the conditions that led to his death on June 30, 2012 had he not been at work. *See* Rec. at 21 (App. 9). The fact that this is the core question in the case reveals the overstatement inherent in ConAgra's description of the Court of Appeals' holding. *See* Resp. App. for Trans. at 2. But more to the point, the reason that § 287.020.3(2)'s definition of "arise out of and in the course of employment" is the key question was also demonstrated by *Young*. *See Young*, 462 S.W.3d at 788-90.

On January 4, 2008, Mr. Young was walking at a job site to retrieve materials when he stepped on a "frozen dirt clod." *Young*, 462 S.W.3d at 786. When he did so, his left knee "buckled and popped" and Mr. Young fell to the ground. *Id.* at 786-87. As a result of this incident, Mr. Young suffered a sprained knee. *Id.* at 787. The employer appealed arguing that "Young failed to prove that the accident arose out of his employment." *Id.* at 788.

In its analysis, however, the Court explained that the issue of "arising out of employment" is actually a question of "injury," not accident. *Id.*; Mo. Rev. Stat. § 287.020.3(2)(b)). In deciding this question, the Court considered two recent decisions from the Supreme Court of Missouri. *Young*, 462 S.W.3d at 789. (discussing *Miller v. Missouri Highway & Transportation*, 287 S.W.3d 671 (Mo. banc 2009) and *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. banc 2012)). The *Young* court distinguished both *Miller* and *Johme* on the basis that, unlike in *Young*, there was no risk particular to the work environment in those cases with which to tie the injuries. *See Young*, 462 S.W.3d at 789. The Court summarized this distinction as follows:

> "Together, *Miller* and *Johme* stand for the proposition that an unexplained injury is not compensable merely because the injury occurred at work." *Dorris v. Stoddard Cnty.*, 436 S.W.3d 586, 592 (Mo. App. S.D. 2014). "[W]e consider whether [the claimant] was injured *because* he was at work as opposed to becoming injured merely *while* he was at work." *Pope[v. Gateway to W. Harley Davidson]*, 404 S.W.3d [315,] 320[(Mo. Ct. App. E.D. 2012)]. Thus, because we find that Young was injured because he was at work, Boone Electric's reliance on *Miller* and *Johme* is misplaced.

Id.

The *Young* court then went on to explain its rationale for why Young was injured *because he was at work* by citing to *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. Ct. App. E.D. 2012). In *Duever*, the employee was injured when he slipped on a piece of ice on a parking lot while walking back inside after performing a safety demonstration on the parking lot. *Id.*at 865. The *Duever* court also distinguished *Miller* and *Johme* because the employee was on the icy parking lot "as a function of his employment." *Id.* at 867-88. As a result, Mr. Duever was exposed to the risk of slipping on the ice because of his employment. *Id.* Applying the *Duever* rationale to the claimant in *Young*, the Court held that Young's risk from which his injury arose was related to his employment because the unsafe condition – the frozen dirt clod –

a was on the ground at Young's work site, a place he was required to be because of work. *See Young*, 462 S.W.3d at 790.

Next, the Court addressed the employer's argument that Young's injury did not arise from employment because Young was "'equally exposed to clods of dirt' in his nonemployment life." *Id.* This argument was rejected because the risk was not slipping in general, rather it was slipping at the employee's particular work location. *Id.*; *see also Lincoln Univ. v. Narens*, 2016 Mo. App. LEXIS 345, *10-11 (Mo. Ct. App. E.D. April 12, 2016) (explaining that *Miller* and *Johme* require the identification of "risk source" of the claimant's injury and then a comparison of that risk source to the claimant's normal nonemployment life); *Wright v. Treasurer of Mo.*, 2015 Mo. App. LEXIS 1159, * 15-16 (Mo. Ct. App. E.D. Nov. 10, 2015) (affirming compensation where employee was injured when a chair collapsed because the "risk source" for the employee's injury was the particular chair in which he sat at work, not the risk that any chair might possibly collapse).

Importantly, proof that an injury came from a hazard or risk of employment is not subject to the prevailing factor test by the plain language of the statute. *See* Mo. Rev. Stat. § 287.020.3(2)(a) and (b). As noted by the Court of Appeals in its opinion in this case:

> The pre-2005 version of the Missouri Workers' Compensation Act, section 287.020.2, RSMo 2004, provided that "[a]n injury is compensable if it is clearly work related. An injury is clearly work

> related if work was a substantial factor in the cause of the resulting medical condition or disability." Under this version of the Act, it was a claimant's burden to establish that work was a substantial factor in causing the resulting medical condition or disability. However, the General Assembly amended this compensability test in 2005, and now requires a claimant to establish that the ***accident*** (not work) was the prevailing factor in causing the resulting medical condition and disability. Section 287.020.3(1). The assessment of whether the injury was related to work activities is now separately determined pursuant to section 287.020.3(2)(a) and (b). Though section 287.020.3(2)(a) also includes a prevailing factor test, it requires only that the accident is the prevailing factor causing the injury. Section 287.020.3(2)(b) is the only prong of the course of employment test that refers to work activities. It requires that an injury not come from a hazard or risk unrelated to work, but is not subject to the prevailing factor test for its proof.

White v. ConAgra, 2016 Mo. App. LEXIS 956, *30 n.9 (Mo. Ct. App. W.D. Sept. 27, 2016).

Just as Mr. Young's work required him to walk across that particular work site that caused him to step on that particular clod of frozen dirt, Mr. White's work required him to be in ConAgra's un-air conditioned metal building, on a particularly hot summer day, while nursing a painful foot injury, after working a long week, while wearing a work uniform of long sleeves and hard hat. Each of these conditions is "not

unrelated to his work," increased the demand for blood from his heart and created the risk that Mr. White would suffer ischemia. Therefore, for all the same reasons as Mr. Young's slip on the dirt clod was work-related, so too was Mr. White's cardiac ischemia. And just as Mr. Young's slip on the dirt clod caused him to suffer a knee sprain, so too did Mr. White's ischemia cause him to suffer fibrillation and eventually death.

Accordingly, under the proper analysis, the undisputed evidence in this case demonstrates an "injury" under the Act. Therefore, the Commission's award is not only in error but was prejudicially so. It must therefore be reversed and the case remanded for further limited consideration of whether Mr. White's fibrillation and eventual death came from a hazard or risk of employment.

3. *Young's* analysis is consistent with a long line of cardiac injury cases.

While the *Young* opinion was a case of first impression as to the proper interpretation of "accident" under the Act, its rationale is consistent with a long line of compensable cardiac injury cases. Indeed the leading case regarding whether work is the prevailing factor causing cardiac ischemia and eventual death is *Leake v. City of Fulton*, 316 S.W.3d 528 (Mo. Ct. App. W.D. 2010) *affirming* 2009 MOWCLR LEXIS 176 (Mo. Lab. & Ind. Rel. Comm'n Nov. 13, 2009).

In *Leake*, the employee was a fire fighter who was performing rescue work on a hot and humid day in April, 2006. *See Leake*, 316 S.W.3d at 529. The claimant's

expert, Dr. Steven Schuman—the same doctor that has testified on claimant's behalf here—explained that Mr. Leake's work and environmental stress combined with the heat to cause Mr. Leake's heart to demand more blood than the cardiovascular system could provide, the very definition of cardiac ischemia. *Id.* at 530–31. Specifically, Dr. Schuman explained that "if the demand had not been there, in the form of the physical exertion, emotional stress, and environmental factors, the electrical event would not have occurred…." *Id.* at 531. The *Leake* court explained its three-step analysis as follows:

> For an award of benefits to be appropriate, the 2005 amendments require that the workplace "accident" [step 1] was the "prevailing factor" or primary factor in causing the injury [step 2] and the disability [step 3] (in this case, the ventricular fibrillation that caused Leake's death).

Id. Because Mr. Leake satisfied all three steps in this analysis, his case was compensable. *Id.* at 533.

In the instant case, and similar to *Leake*, Dr. Schuman opined that Mr. White's work in the heat on June 30, 2012 caused his ischemia. Dr. Schuman based this opinion on the fact that Mr. White was working in a metal building without air conditioning, performing work that required strain on Mr. White's upper body while wearing long sleeves and a hard hat, and Mr. White was working on his still-healing, and painful, broken foot.

As in *Leake*, Dr. Schuman testified that Mr. White's ischemia and eventual fibrillation occurred because of Mr. White's risks arising from his work environment on June 30, 2012. But also like in *Leake*, the employer's doctor blamed the heart attack on the claimant's pre-existing risk factors. *See Leake*, 316 S.W.3d at 532. A comparison between Mr. Leake's medical history and Mr. White's is illuminating. In particular, Mr. Leake had significantly more non-work related risk factors for a heart attack than did Mr. White.

- In *Leake* the claimant was 5'8" and weighed approximately 220 pounds. *See Leake*, 2009 MOWCLR 176 at *6. In contrast, Mr. White was 5'8" and weighed 193 pounds, 27 pounds less than Mr. Leake. *See* Tr. 182 (Exhibit 1.g at p.2) (App. at 157).
- Mr. Leake had a 95% occlusion of the left anterior descending artery. *See Leake*, 2009 MOWCLR 176 at *6. Mr. White's was 80% occluded. *See* Tr. 183 (Exhibit 1.g at p.3) (App. at 157).
- Mr. Leake had a 95% occlusion of the right coronary artery. *See Leake*, 2009 MOWCLR 176 at *6. Mr. White's was 60% occluded. *See* Tr. 183 (Exhibit 1.g at p.3) (App. at 157).
- Mr. Leake suffered a "significant heart attack" prior to his work-related death. *See Leake*, 2009 MOWCLR 176 at *6, 11. Mr. White's heart had no scarring indicating he had never had a prior heart attack. *See* Tr. 183 (Exhibit 1.g at p.3) (App. at 157); Tr. at 57 (Dep. of Dr. Schuman 15:13–19) (App. at 59).

- Mr. Leake was a two-pack a day smoker. *See Leake*, 2009 MOWCLR 176 at *11. Mr. White quit smoking 10-12 years before his death. *See* Tr. at 8:23–9:10 (App. at 16-17). Even Dr. Farrar agreed that was long enough to have a significant decrease in Mr. White's risk of a cardiac event. *See* Tr. at 253 (Dep. of Dr. Michael Farrar 60:4–18 (App. at 162).
- Both Mr. Leake and Mr. White were active outdoors and neither had any difficulty performing regular tasks around the house including yard work and home maintenance. *See Leake*, 2009 MOWCLR 176 at *7; Tr. at 9–10 (App. at 17-18).
- Both Mr. Leake and Mr. White had a history of elevated cholesterol. *See Leake*, 2009 MOWCLR 176 at *11; Tr. at 12:1–12; 333–34 (App. at 20, 169–70).
- Mr. Leake never received treatment for high cholesterol. *See Leake*, 2009 MOWCLR 176 at *7. On the other hand, Mr. White had been monitoring his cholesterol with his doctor and had been on medication until his doctor ordered him to discontinue the medication because it was no longer needed. *See* Tr. at 12:1–12; 333–34 (App. at 20, 169–70).

In sum, the claimant in *Leake* had significantly worse pre-existing, and therefore non-work related, risk factors than Mr. White in almost every category.

While the work performed by the claimant in *Leake* may have been more physically demanding than what Mr. White was doing on June 30, 2012, conditions like those encountered by Mr. White have almost uniformly been found by the Court

of Appeals and the Commission to be "an unusual strain" that can give rise to an "accident" under the Missouri Workers' Compensation Law.

In *Aldridge v. S. Mo. Gas Co.*, 131 S.W.3d 876 (Mo. Ct. App. S.D. 2004), the claimant was a 63 year old man who suffered a heart attack while performing manual labor "on a hot and humid, southern Missouri day in August." *See id.* at 878, 881. Even though *Aldridge* is an "old law" case that applies the "substantial factor" test, it is still relevant to the question of when working in the heat can cause a compensable strain. The key in *Aldridge*, that is also present here, is that the deceased worker suffered a cardiac event, at work, while performing his work, on a hot day. Unlike the instant case, there is nothing in the *Aldrige* record about it even being an unusually warm summer. *Id.* at 878–79. Rather, the Court of Appeals in *Aldridge* acknowledges that a workman, even an older workman, performing his regular vocation, in the hot summer is exposed to the sort of unusual risk that can give rise to a compensable injury. *Id.* at 880–81. This principle has consistently been applied by the Commission since.

In *Avery v. Botkin Lumber Co.,* 2008 MOWCLR LEXIS 97 (Mo. Lab. & Ind. Rel. Comm'n June 24, 2008), the deceased employee worked on the production line of a sawmill. *Id.* at *8–9. Like the metal building where Mr. White died, the sawmill in *Avery* had no air conditioning and was ventilated by open doors and fans. *Id.* As such, "it [was] always twenty degrees hotter than it [was] outside." *Id.* at *8. The Commission affirmed the ALJ's finding that physical work in such a hot environment

caused the compensable injury. *See also Hieronymus v. McCown Gordon Const.*, 2003 MOWCLR LEXIS 194 (Mo. Lab. & Ind. Rel. Comm'n Nov. 17, 2003) (finding that a 58 year old man who worked in high heat for two weeks during the summer and who died of a heart attack had a compensable heat-related injury).

Finally, in *Simmons v. B.T. Office Products*, 2006 MOWCLR LEXIS 224 (Mo. Lab. & Ind. Rel. Comm'n Oct. 10, 2006), the employee worked in a warehouse performing physical labor. *Id.* at *7–8. During the first four days of the week that Mr. Simmons was injured, he had worked 50–55 hours and the temperature was above 90 degrees each day. *Id.* at *9. Under these facts, the Commission affirmed the ALJ's determination that the work environment caused a compensable injury.[1]

Here, Mr. White had worked his regular full shift for the five days preceding his death; at least 50 hours in the heat. *See* Tr. at 524–25 (Dep. of Abraham Sellers 38:16–39:22) (App. at 190-91). And he had reported to Mrs. White that it had been 96 degrees at 11:00 a.m. the day before he died. *See* Tr. at 393 (Dep. of Patricia White 11:3–11) (App. at 181). Indeed the high temperature on June 30, 2012 was 100 degree Fahrenheit. *See* Rec. at 13; Tr. at 16–17 (App. at 24-25). In short, Mr. White was exposed to a similar work environment as the claimants in *Aldridge, Avery, Hieronymus*, and *Simmons*. Accordingly, the Commission should find that Mr. White's

[1] The award was ultimately in the employer's favor because the injury did not result in disability. *See Simmons*, 2006 MOWCLR LEXIS 224 at *33.

work environment—working in the heat while in pain—was an unusual strain that caused his cardiac arrest.

C. POINT II: The Commission erred in refusing to consider lay testimony that Mr. White had worked five consecutive 12-hour days prior to his death because the Commission may not arbitrarily ignore testimony that is within the realm of lay understanding in that there was expert testimony in the record establishing the impact physical stress has in causing ischemia.

The Commission's failure to properly apply the definitions of the Act also led it to refuse to consider the effect working consecutive 12-hours days in hot weather had on Mr. White or even how Mrs. White's observations of that effect might be probative to the case. *See* Rec. at 17, n.1 (App. 5). Rather, this important evidence was relegated to a footnote in the majority opinion and entirely disregarded because Dr. Schuman spoke in terms of an accident. *Id.* But as this Court has recently observed, "[T]he words a medical expert uses . . . are often important, not so much in and of themselves, but as a reflection of what impression such witness wishes to impart." *Malam*, 492 S.W.3d at 929 (reversing Commission for taking an overly literal approach to applying an expert's opinion to the facts and law of a workers' compensation case).

"[W]here the record is wholly silent concerning the Commission's weighing of credibility, the Commission may not arbitrarily disregard or ignore competent,

substantial, and undisputed evidence of witnesses." *Cardwell v. Treasurer of Missouri*, 249 S.W.3d 902, 907-08 (Mo. Ct. App. E.D. 2008). Here, the Commission, at least impliedly, found Dr. Schuman's testimony to be credible. *See* Rec. at 17 (App. 5) ("While Dr. Schuman's general theory of medical causation is not, in our view, inherently incredible ...."); *id.* at 20 (App. 8) ("I agree with the Commission majority's (implied) finding that Dr. Schuman's theory is more credible ...") (Commn'r Chick, dissenting). And there is absolutely no evidence that impeached the testimony of Mrs. White. *See generally* Tr. at 22–33 (App. 30–41) (defense counsel's cross-examination of Mrs. White). *Cf. Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 636 (Mo. Ct. App. E.D. 2007) ("The Commission may not disregard and ignore competent, substantial and undisputed evidence of witnesses who are not shown by the record to have been impeached.").

In *Lawrence v. Treasurer of Mo. – Custodian of the 2d Injury Fund,* 470 S.W.3d 6 (Mo. Ct. App. W.D. 2015) this Court reversed the decision of the Commission denying permanent total disability benefits from the Second Injury Fund. *Id.* at 11-12. The evidence in *Lawrence* showed that the claimant needed to lie down periodically during the day. *Id.* at 15. The Commission in *Lawrence* refused to consider the employee's need to lie down because the proffered medical expert "did not identify any such restriction in his report or his deposition." *Id.* As occurred here, the Commission indicated it would require expert testimony on the question of whether

the employee needed to lie down. *Id.* But the *Lawrence* court specifically rejected this notion, stating:

> To the extent that the Commission suggests there must be medical expert testimony to establish that Lawrence has a need to lie down during the day, we disagree. As stated, Lawrence explicitly testified regarding his need to lie down during the day due to his back spasms, and the Commission specifically found that testimony to be credible. "The testimony of the claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and *extent* of the disability[.]"

Id. at 15, n.9 (quoting *ABB Power T & D Co. v. Kempker,* 236 S.W.3d 43, 51 (Mo. Ct. App. W.D. 2007)). Accordingly, just as the lay testimony was probative in *Lawrence*, so too are Mrs. White's observations about Mr. White the night before he died.

In *Sage v. Talbot Inds.*, 427 S.W.3d 906 (Mo. Ct. App. S.D. 2014), the Court of Appeals affirmed an award of permanent total disability benefits. *Id.* at 913. There, the medical opinion about the disabilities suffered by the employee was supported by the testimony of lay witnesses. *Id.* Specifically, the claimant testified about his condition and third-party lay witnesses testified about their own observations of the claimant. *Id.* This testimony supported the expert medical evidence about the claimant's disabilities. *Id.* The Court noted that lay testimony, within the realm of lay understanding, "can constitute substantial evidence of the nature, **cause** and extent

of the disability, especially when taken in connection with, or when supported by, some medical evidence." *Id.* at 12 (citing *Grauberger v. Atlas Van Lines, Inc.*, 419 S.W.3d 795, 801 (Mo. Ct. App. S.D. 2013)) (emphasis added).

The observation that someone is tired and physically stressed after working in the heat is within the realm of lay understanding. *See Johnson v. Duenweg Fire Dep't*, 735 S.W.2d 364, 367 (Mo. 1987) *overruled on other grounds Hampton v. Big Boy Steel*, 121 S.W.2d 2203, 224 (Mo. 2003). In *Johnson*, this Court reversed the decision of the Commission denying compensation to the widow of an employee who died as a result of a work-related heart attack. *Id.* at 365. There, the employee died at home after working as a firefighter at a very hot scene. *Id.* The employee's doctor could not give a definitive opinion about when the heart attack occurred. *Id.* at 366. The court reversed because the *lay testimony* revealed that the employee had to rest immediately after working in the high heat, that is, he was tired. *Id.* at 368. This testimony was admissible and relevant to supporting the medical evidence to prove causation under the standard applicable at that time. *Id.* While the Act has been amended a number of times since the *Johnson* opinion, nothing about those amendments impact whether a lay witness' observations of a tired worker are within the realm of lay understanding.

Here, there was testimony from both doctors about how stress on the body increases the heart's demand for blood. *See* Tr. at 64–65; 87–89 (Dep. of Stephen Schuman 22:21–23:20; 45:18–47:7) (App. at 89-91). Dr. Farrar agreed that pain can

cause stress and stress can be a trigger for a cardiac event. *See* Tr. at 254 (Dep. of Dr. Michael Farrar at 61:7–13) (App. at 163). Mrs. White testified about her own observations of Mr. White the night before he died. *See* Tr. at 393 (Dep. of Patricia White 11:3–11) (App. at 181). Mrs. White explained how Mr. White reported it being hotter than normal. *Id.* She observed that he was more tired and strained than normal. *See* Tr. at 18 (App. at 26). Indeed, Mrs. White asked her husband not to work on Saturday because of the hot working conditions and the strain she could see it was having on him. *See* Tr. at 19:1–8 (App. at 27). Mr. White may not have had an accident at work until June 30, 2012 but Mrs. White's unimpeached testimony is relevant to showing that working in the hot environment at ConAgra put a strain on Mr. White related to his employment. Accordingly, the Commission should have considered Mr. White's work schedule the days before his death and this case should be remanded to the Commission for reconsideration, giving due regard to all the evidence, under the correct analysis.

V. CONCLUSION

This Court defers to the finder of fact when deference is due. But this Court also requires that judgements issued in lower proceedings apply the laws of our State. In a workers compensation case, the claim must be analyzed under the plain language of the Act. *See* Mo. Rev. Stat. § 287.800. Applying the Act's explicit burden of proof as stated at Mo. Rev. Stat. §287.808, compensability under the Act as amended in 2005 requires a step-by-step analysis of whether there was an "accident" and, if so, whether there was an "injury." *See* Mo. Rev. Stat. §§ 287.020.2 and 020.3; *Young*, 462 S.W.3d at 771-79. If the answer to both of these questions is "yes," then section 287.020 has been satisfied. The question then becomes whether section 287.120.1 has been satisfied. *See Tillotson*, 347 S.W.3d at 517. If that section is satisfied, then the only thing remaining is it to determine the amount of benefits payable. *Id.* The Commission majority did not undertake this analysis. Rather, it utilized a short-hand approach that erroneously skipped critical steps in the statutorily-proscribed analysis. Accordingly, Mrs. White was effectively denied her day in court and the Commission majority's award denying compensation should be reversed with instructions for further proceedings consistent with Missouri law.

Respectfully submitted,

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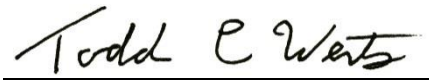

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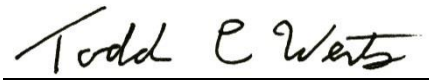
CERTIFICATION

Pursuant to Mo. R. Civ. Proc. 84.06(c), I hereby certify that this Appellant's 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 11,691 words according to the Microsoft Word system used to prepare the brief.



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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 31st day of January, 2017.

Todd C. Werts