An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA03-1196

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

RONALD McLEAN, Guardian
ad Litem for MATTHEW KALI
ASKIRI GARVEY, minor child;
KALI ASKIRI GARVEY,
Deceased Employee,
Plaintiffs,

v.

North Carolina Industrial Commission
I.C. File No. 054769

COCA-COLA BOTTLING COMPANY
CONSOLIDATED,
Employer,

and

SELF-INSURED RSKCO,
Servicing Agent,
Defendant.

Appeal by defendants from opinion and award of the North Carolina Industrial Commission entered 13 June 2003. Heard in the Court of Appeals 19 May 2004.

Mitchell, Brewer, Richardson, Adams, Burns & Boughman, by Vickie L. Burge, for plaintiff-appellees.

Lewis & Roberts, P.L.L.C., by Christopher M. West and Jack S. Holmes, for defendant-appellants.

Bentham Garvey and Brigitte M. Garvey, Pro Se.

ELMORE, Judge.

Kali Askiri Garvey (decedent) was killed in a car accident which arose out of and was in the course of his employment with Coca-Cola Bottling Company Consolidated (Coca-Cola). After decedent passed away, a child was born to Santrise Jackson (Jackson), a Georgia resident, which she claimed was fathered by decedent. Jackson contacted decedent's mother, Brigitte Garvey (Ms. Garvey), to tell her that she was having decedent's baby and did not want to keep the baby. Keith Andrez Dawson (Dawson) was listed as the child's father on the birth certificate issued by the State of Georgia, allegedly to make sure the hospital bill was covered by insurance. Later, Jackson hired an attorney to have the birth certificate changed to name decedent as the father. Decedent never married nor had any other children. Decedent's parents, Mr. and Ms. Garvey, are now raising the child.

A petition was brought before the North Carolina Industrial Commission (the Commission) in the name of the minor child, claiming death benefits from decedent's work-related fatal accident. Deputy Commissioner George T. Glenn filed an opinion awarding benefits to the minor child. Defendants appealed to the Full Commission, which upheld the award, with a dissent. The opinion and award concluded as a matter of law that the child was decedent's biological posthumous child and was presumed to be dependent on the decedent. This conclusion was based on the Georgia court's order allowing Jackson's petition to change the child's birth certificate to reflect decedent as the father. From this opinion and award, defendant now appeals.

I.

The standard for appellate review of an opinion and award of the Industrial Commission is well settled. Review "is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980); *see also Shah*

v. Howard Johnson, 140 N.C. App. 58, 61, 535 S.E.2d 577, 580 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001).

In addition, "so long as there is some 'evidence of substance which directly or by reasonable inference tends to support the findings, this Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary.'" *Shah*, 140 N.C. App. at 61-62, 535 S.E.2d at 580, (*quoting Porterfield v. RPC Corp.*, 47 N.C. App. 140, 144, 266 S.E.2d 760, 762 (1980)). "[O]ur task on appeal is not to weigh the respective evidence but to assess the *competency* of the evidence in support of the Full Commission's conclusions." *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 486, 528 S.E.2d 397, 401 (2000).

Our Supreme Court has also reasoned:

> . . . that this Court is bound by the Commission's finding of fact when there is any evidence to support it. . . . But the principle must be applied with discrimination. A "fact found" upon supporting evidence may be posited as an evidentiary fact purporting to establish the existence of another, or other facts or factual situations necessary to the final result; or leading to a question of fact and law, or a conclusion of law upon which the decision or award is necessarily predicated. It is still the office of this Court to determine whether a reasonable inference may be drawn from the basic fact, or facts, found by the Commission tending to establish the other facts in sequence, or the conclusions predicated upon them. . . .

Evans v. Lumber Co., 232 N.C. 111, 116, 59 S.E.2d 612, 615-16 (1950).

II.

Defendants first argue on appeal that the Full Commission erred in concluding that the minor child was a dependent of the decedent. We agree.

The Commission concluded as a matter of law:

> 3. Given the finding made in the State of Georgia and the lack of contrary evidence presented, Matthew Kali Askiri Garvey is decedent's biological posthumous child and is presumed

> to be dependent upon decedent. U.S. Const. Art. IV §1, cl 1; N.C.G.S. §97-2(12); N.C.G.S. §97-39.

North Carolina provides full faith and credit to a paternity determination made by another state only if such a determination is made: "(1) [i]n accordance with the laws of that state, and (2) [b]y any means that is recognized in that state as establishing paternity[.]" N.C. Gen. Stat. §110-132.1 (2003). Accordingly, we must examine the law of Georgia to determine whether amendment of a birth certificate via a name change petition is a "means that is recognized in that state as establishing paternity[.]" *Id.*

It appears that Georgia allows paternity to be resolved, in some instances, through amendment of a birth certificate. *Doe v. Roe*, 235 Ga. 318, 319, 219 S.E.2d 700, 701 (1975) (stating that a name change petition "would be the proper legal vehicle for the resolution of this dispute [between two putative fathers regarding paternity], serving a petition on both purported fathers, making both of them parties to the proceedings. The trial judge would then have to resolve the dispute.") However, it appears that such a procedure, set forth as part of the Georgia domestic relations laws, Ga. Code Ann. §19-12-1 *et. seq*, cannot be used to establish paternity following the putative father's death. *Rodriguez v. Nunez*, 252 Ga. App. 56, 60, 555 S.E.2d 514, 518 (2001) (action to determine paternity, provided for within the title "Domestic Relations," does not apply when "the putative father is not alive, and [the case] includes no issues of child support, adoption, custody, or visitation.") In addition, although Ga. Code Ann. §19-7-46.1(a) provides that the appearance of the name of the father on the birth certificate constitutes *prima facie* evidence of paternity, this is true only if the name was "entered with his written consent[.]"

In the present case, which includes no issues of child support, adoption, custody, or visitation, the Georgia order was entered after the death of decedent, the putative father. Nor did decedent give his written consent to inclusion of his name on the birth certificate. Therefore, the

Georgia order, even if it purports to determine paternity, is not, on these facts, a means recognized by the state of Georgia as establishing paternity. *Rodriguez*, 252 Ga. App. at 60, 555 S.E.2d at 518. Accordingly, the Georgia order is not entitled to full faith and credit in North Carolina on the issue of paternity, pursuant to N.C. Gen. Stat. §110-132.1.

Because the Commission based its opinion and award on its belief that the Georgia order was binding, we conclude that the Commission acted under a misapprehension of the law in awarding benefits to the minor child as a presumed dependent of decedent. When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard. *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003). In the case *Tucker v. City of Clinton*, 120 N.C. App. 776, 463 S.E.2d 806 (1995), this Court, after concluding that the Commission erred in relying upon a clerk of court's posthumous determination of paternity, "recognize[d] that evidence can exist independent of the clerk's Order which might suffice to pass the *Carpenter [v. Tony E. Contractors*, 53 N.C. App. 715, 281 S.E.2d 783 (1981)] test" and remanded the matter to the Commission for rehearing. *Tucker*, 120 N.C. App. at 783, 463 S.E.2d at 811.

Based on *Tucker* and *Holley*, and noting that defendants also contend the Commission erred in failing to determine whether or not decedent acknowledged the child as his son, we conclude that remand for rehearing on the issues of paternity and acknowledgment is the proper disposition in the present case. Regarding acknowledgment, we conclude that to the extent defendants seek to impose a requirement under the Workers' Compensation Act of proof of acknowledgment separate from paternity, such a construction may render the Act unconstitutional under *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 31 L. Ed. 2d 768 (1972) (restrictions placed on recovery rights of illegitimate children under workers'

compensation statute must bear rational relationship to statute's objective). Plaintiffs, however, have not raised this constitutional issue, and it is therefore not before us. Nevertheless, a remand for rehearing may eliminate any concern about *Weber*. Remand would give the Commission an opportunity to further explore the evidence regarding DNA testing which the record indicates was presented at the hearing. If the Commission ultimately concludes that the evidence establishes paternity, then the question of acknowledgment need not be reached. Even if the Commission determines that decedent is not the child's biological father, the child would qualify for death benefits if plaintiffs can show that decedent acknowledged the child through his actions or conduct.

This case is reversed and remanded to the Industrial Commission for rehearing consistent with this opinion.

Reversed and remanded.

Judges BRYANT and GEER concur.

Report per Rule 30(e).