· Reversed
Chair, Ballance
Concurring:
Bolch
Bunn - Heard case, retired prior to decision

NO. COA00-277

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2001

JULIUS SPENCER WALL (deceased),
Employee,
Plaintiff;

v.

APPLING-BOREN COMPANY, INC.,
Employer,

SELF/RISCORP OF N.C.,
Carrier,
Defendants.

North Carolina
Industrial Commission
I.C. Docket No. 644273

Appeal by defendant-employer from opinion and award entered 5 January 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 January 2001.

At all relevant times, Julius Spencer Wall (decedent) was employed as a foreman for defendant Appling-Boren Company, Inc. Defendant was in the business of constructing gas lines. As part of his duties, Mr. Wall operated a backhoe and trenchers, did some welding, and sometimes drove a truck which pulled heavy equipment from one job site to another. Other employees loaded the heavy equipment or hitched the trailers on which the equipment was transported to the truck driven by Mr. Wall.

When Mr. Wall arrived at his camper late on the evening of 19 June 1996, he did not have a trailer attached to his truck. Between 6:30 a.m. and 7:00 a.m. the next morning, however, decedent arrived at a job site near Townsville, South Carolina, with a trailer already attached to the back of his truck. No witnesses

were offered by either party as to the circumstances under which the trailer was attached to the truck. At the Townsville job site, a Ford tractor was driven onto the trailer and secured; the tractor was then transported to a job site being supervised by Ricky Thomas. At the Thomas job site, decedent complained of indigestion and was given a Zantac by Ricky Thomas. About 8:30 a.m. on 20 June 1996, decedent and his crew left the Thomas job site to drive to another nearby job site. Decedent was still pulling the Ford tractor on the trailer. When decedent arrived at the job site, he instructed the other employees to unload the tractor. After briefly speaking to his son at the job site, decedent placed his head on the truck and then fell over with an apparent heart attack. Decedent was transported to a local hospital and pronounced dead. The death certificate indicated that Mr. Wall died of cardiac arrest and probable acute myocardial infarction. The Industrial Commission concluded that Mr. Wall's death was compensable and awarded benefits to his children. Defendant-employer appealed.

Biggs & Biggs, L.L.P., by JoAnn C. Biggs, for plaintiff appellee.

Alala Mullen Holland & Cooper, P.A., by H. Randolph Sumner and Jesse V. Bone, Jr., for defendant appellants.

HORTON, Judge.

Where an employee is carrying out his job in the usual way and suffers a heart attack, the death is not considered accidental and is not compensable. If the heart attack results, however, from unusual or extraordinary exertion caused by the employment duties,

then it is accidental and is compensable. *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 403-04, 82 S.E.2d 410, 414-15 (1954). Here, the Commission framed the "dispositive question" as "whether decedent's known cause of death (heart attack) was caused by conditions of his employment and whether his death was due to an accident." The Commission further found, pursuant to the decision of our Supreme Court in *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988), that because "[d]ecedent's death occurred within the time and space limits of his employment . . . claimant is entitled to a presumption that the death was the result of an accident and arose out of the employment. Defendant has the burden of rebutting this presumption."

Our review of an opinion and award of the Industrial Commission is limited to two issues. We must first determine whether there is any competent evidence in the record which supports the findings of fact made by the Commission. We must then determine whether those findings of fact justify the Commission's conclusions of law. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 765, 487 S.E.2d 746, 750-51 (1997); *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986).

The Commission made the following pertinent findings of fact:

> 3. On June 20, 1996 defendant had at least three work sites, one where Ricky Thomas was foreman, a second site near Townville, South Carolina, where decedent was foreman, and a third site where decedent was also foreman. Work at the second site was being finished up with a Ford cleanup tractor and work at the other two sites was underway.

4. On the morning of June 20, 1996 the Ford cleanup tractor needed to be transported from the second site to the third. Aubrey Long arrived first at the second job site to meet decedent for the purpose of picking up the Ford tractor and moving it to another site. A trailer was needed in order to move the tractor, but there was no trailer at the second job site where the tractor was located. When decedent arrived at the second job site to pick up the Ford tractor between 6:30 and 7:00 A.M., he had a trailer already hitched to the back of his truck. Decedent had gotten the trailer from the Ricky Thomas job site prior to his arrival at the second job site to pick up the Ford tractor.

5. The trailer that decedent was pulling with his truck on the morning of June 20, 1996 had a trailer hitch that had to be picked up off the ground and aligned with the ball on the rear of the truck in order to hitch. Usually the trailer hitch had to be moved back and forth to achieve alignment. The trailer had a pivot point and the tongue of the trailer had to be physically lifted in order to reach the pivot point. If lifted up too far, the weight of the trailer would shift all the way back and if not lifted far enough, the weight of the trailer would shift toward the ground. In order to hook the trailer, a person would have to bend down, pick up the trailer hitch with both hands and arms, stand, and maneuver the trailer in place for hitching. Some of the trailers defendant used had a jack which made hitching easier, but the jack was broken on the trailer decedent was pulling on June 20, 1996, requiring that the tongue of the trailer be physically picked up from the ground for hitching purposes. Although the exact weight of the trailer was not known by the witnesses who testified, the trailer was too heavy to be lifted ordinarily by one person, but it could be lifted by one person, when necessary.

6. Decedent and Aubrey Long drove the Ford tractor onto the trailer using ramps, secured the tractor onto the trailer and drove back to the Ricky Thomas job site. While at the Ricky Thomas job site, decedent complained

of indigestion and got a Zantac from Ricky Thomas. During this same period of time (around 8:30 A.M.), decedent talked to his brother, Jim Wall, by telephone and was expected to meet his brother shortly thereafter at Hardees. Decedent did not stop at Hardees, but went immediately to the third job site to deliver the tractor, instead.

7. Decedent and his crew left the Ricky Thomas site around 8:30 A.M. enroute to the third site which was about ten minutes away. Decedent rode alone in his truck which was pulling the trailer while the crew drove in another vehicle. When the decedent arrived, his son was on the telephone with his uncle, the decedent's brother. Decedent proceeded to get out of his truck and told the other workers to unload the tractor. After a brief exchange with his son, decedent turned around and placed his head on his truck and then fell over from an apparent heart attack.

. . . .

12. If decedent hitched the trailer to his truck without assistance, such an exertion would have been unusual and could have precipitated his heart attack. The circumstances bearing on the work-relatedness of his heart attack are therefore unknown.

13. The trailer which decedent pulled between the sites on the morning of June 20, 1996 was particularly difficult to hook up. It had no operational jack with a wheel on it and therefore one had to pick the tongue up off the ground with both hands and use both arms because of the weight to lift and place the trailer on the hitch. The trailer had to be maneuvered back or forth or from side to side in order to fit it on the ball of the hitch.

14. Decedent did not have the trailer hitched to his truck when he arrived at his brother's camper at 10 P.M. the night before he died, but he did have it hitched to his truck when he met Aubrey Long between 6:30 A.M. and 7:00 A.M. the next morning at the second worksite [sic] where the Ford tractor

> which needed transporting was located. No evidence was offered that any one else hitched the trailer to decedent's truck or assisted him in doing so. Based on all reasonable inferences from the evidence, the Full Commission therefore finds that decedent hitched the trailer to his truck without assistance on the morning of June 20, 1996.
>
> 15. Hitching the trailer to his truck without assistance would have required an unusual exertion due to the weight of the trailer and the fact that the jack was broken. Expert medical testimony has established that such an unusual exertion could have precipitated decedent's heart attack. Therefore, the Full Commission presumes that the unusual exertion required of decedent in lifting and hitching the trailer to his truck caused decedent's heart attack and death and was thus an accidental death.

Based on those findings, the Commission concluded as a matter of law:

> 2. [Wall's] unusual or extraordinary exertion or overexertion caused by his employment duties immediately preceding his fatal heart attack constituted an accident within the meaning of the Workers' Compensation Act. Gen. Stat. § 97-2(6). *Wall v. North Hills Properties, Inc.*, 125 N.C. App. 357, 481 S.E.2d 303 (1997).
>
> 3. As a result of unusual or extraordinary overexertion arising out of and in the course of his employment on June 20, 1996, Julius Spencer Wall (decedent) died from a heart attack. Decedent's death is therefore compensable. N.C. Gen. Stat. § 97-2(6). *Wall v. North Hills Properties, Inc.*, 125 N.C. App. 357, 481 S.E.2d 303 (1997).

Defendant argues that the Commission erred in inferring from the evidence that the decedent hitched the trailer to his truck on the morning of his death. We agree with defendant.

While there is evidence that the trailer was not hitched to

the decedent's truck late on the evening of 19 June 1996 but was hitched to the truck in the early morning of the next day, there is no direct evidence at all that decedent hitched the trailer to the truck. Further, decedent's son testified that, during the time he worked on the crew with his father, he never observed his father hooking or unhooking trailers.

Another member of decedent's crew, Aubrey Long, testified that during the five months prior to decedent's death, the most strenuous work he had seen decedent do was running the backhoe or trencher. Further, Mr. Long testified that he never saw decedent move any of the equipment by himself. Long stated that "[i]f we had to move anything, it was - everybody - there was other people helping you do it, load it up for him, and then he'd just drive the truck." Normally, two persons participated in moving equipment. Scott Wall, decedent's son, testified that some of the trailers had a jack on them and he supposed a person could hook that trailer up to a truck. However, on the particular trailer in question, the jack was not operative and a person would have to pick up the trailer himself. Scott Wall further stated that he "wouldn't pick [the trailer] up by [him]self," but he could if he had to. Although plaintiff is entitled to every reasonable inference from the evidence, we cannot say that a finder of fact could reasonably infer from this evidence that decedent attached the trailer to his truck by himself on the morning of his death.

Further, even if it is reasonable to infer that the decedent hooked up the trailer to his truck on 20 June 1996, the evidence

does not support a finding that decedent's heart attack was caused by any such exertion. When taken to the hospital on the day in question, decedent told the emergency room doctor that he had chest pains when he got up that morning. Further, there is evidence decedent had numerous risk factors for a heart attack. There was evidence that decedent was an alcoholic, that he smoked, that he was overweight, and that he suffered from depression and grief.

During his deposition, Dr. Howard M. Leslie was asked on direct examination a lengthy hypothetical question which assumed that the decedent actually hitched up the steel trailer to his truck without assistance. Plaintiff's counsel then asked this question:

> The question is: Could or might the exertion of hitching up the steel trailer to the truck have been a precipitating factor of the myocardial infarction?
>
> MR. SUMNER: Just for the record, I'm going to object. You may answer the question.
>
> A. Okay. Theoretically, it's possible.
>
> [MS. BIGGS:] So it could or might have?
>
> A. It could.
>
> MR. SUMNER: Objection.
>
> [MS. BIGGS:] If the person was having symptoms of a myocardial infarction and then exerted himself as the way I described in the hypothetical, could or might that level of exertion have precipitated a cardiac arrest?
>
> MR. SUMNER: Objection. You may answer.
>
> A. It's hard to say. I mean, a small heart attack can cause you to have cardiac

> arrest or a big one can make you not have it. It's just -- I mean, you can't say. It's possible.
>
> [MS. BIGGS:] But if a person has a myocardial infarction and then he exerts himself, can the exertion exacerbate that myocardial infarction?
>
> A. I guess it's possible, yes.

On cross-examination by defendant's counsel, the doctor was asked if he had an opinion as to what caused decedent's heart attack. The doctor replied that his opinion was "probably [decedent's] other risk factors led to the problems, more certainly than the activity."

Although a medical expert may give opinion evidence about the causal relationship between an accident and an injury, the opinion must be based on "reasonable probabilities according to scientific knowledge and experience," and not be "merely speculative and mere[ly] possib[le] . . . ." *Lockwood v. McCaskill*, 262 N.C. 663, 669, 138 S.E.2d 541, 546 (1964). It seems apparent from the excerpt set out above that the opinions of Dr. Leslie, while given in good faith, were little more than speculation and were possibilities rather than medical probabilities.

Finally, the Commission relies on the Supreme Court's holding in *Pickrell* to find and conclude that decedent's death was presumptively the result of an accident and arose out of his employment; further, that the defendant did not rebut the presumption which arose from the circumstances of this death. Again, we disagree.

In *Pickrell*, a bare majority of our Supreme Court held that plaintiff could rely on a presumption of compensability where there was undisputed evidence that plaintiff's husband died while acting within the course and scope of his employment, and no evidence indicating that plaintiff's husband died "other than by accident." *Pickrell*, 322 N.C. at 371, 368 S.E.2d at 587. Thus, the *Pickrell* presumption of compensability relieved the plaintiff in that case of the necessity of proving that the death of her husband resulted from an accidental injury and proving that it arose out of his employment. The authorities relied on by the *Pickrell* Court, however, seem to agree that the presumption applies "'in the absence of any evidence of what caused the death . . . .'" *Id.* at 367, 368 S.E.2d at 584 (quoting 1 Larson, *The Law of Workmen's Compensation* § 10.32 (1985)).

Defendant argues that the Full Commission erred in applying the *Pickrell* presumption to the facts surrounding Mr. Wall's death. Since defendant assigned error to the Full Commission's conclusion of law, which applied the *Pickrell* presumption to this case, it has properly preserved this point for argument on appeal. Compare *Bason v. Kraft Food Service, Inc.*, ___ N.C. App. ___, ___, 535 S.E.2d 606, 610 n.1 (2000) (Where defendants did not cross-assign error to the Full Commission's conclusion of law regarding application of the *Pickrell* presumption, they could not argue on appeal that the presumption was improperly applied below.).

However, the *Pickrell* Court recognized that the presumption of compensability is rebuttable:

> "In the absence of evidence to the contrary, the presumption or inference will be indulged in that injury or death arose out of the employment where the employee is found injured at the place where his duty may have required him to be, or where the employee is found dead under circumstances indicating that death took place within the time and space limits of the employment. . . . *Such presumptions are rebuttable and they disappear on the introduction of evidence to the contrary.*"

Id. at 367, 368 S.E.2d at 584 (quoting 100 C.J.S. *Workmen's Compensation* § 513 (1958)(emphasis added)). "Once this presumption is established, the defendant has the burden of producing credible evidence that the death was not accidental or did not arise out of employment." *Bason*, ___ N.C. App. at ___, 535 S.E.2d at 609. Here, the defendant-employer offered evidence which presented an alternate explanation for decedent's heart attack, and -- even assuming that it applies -- the *Pickrell* presumption disappears.

We find support for our holding in our recent *Bason* decision. In *Bason*, the decedent was a delivery driver who transported goods to locations on his assigned route. On occasion, he served as a substitute driver and drove another driver's route. *Id.* at ___, 535 S.E.2d at 606. During one of these substitute drives, decedent suffered a fatal cardiac arrhythmia, caused by severe hardening of the arteries. *Id.* at ___, 535 S.E.2d at 607. A doctor offered expert medical testimony and concluded that "'people who are not exerting themselves could suddenly die of an arrhythmia as well as people who are exerting themselves.'" *Id.* at ___, 535 S.E.2d at 608. The Full Commission found that decedent's substitute driving was a normal activity with no unusual exertion. Additionally, the

Full Commission concluded that

> [w]here circumstances bearing on work-relatedness are unknown and where the death occurs within the course of employment, plaintiff should be able to rely on a presumption that death was work-related and therefore compensable, whether the medical reason for death is known or unknown. . . . This presumption of compensability then requires the defendant to come forward with some evidence that the death occurred as a result of a non-compensable cause. Otherwise, the plaintiff prevails. *In the presence of sufficient competent evidence that the death was not compensable, the presumption is successfully rebutted.*

Id. at ___, 535 S.E.2d at 608 (citation omitted) (emphasis added). After reviewing the evidence, the Full Commission found that decedent's death resulted from severe heart disease and was not caused by his work activities. The Commission then concluded that the employer successfully rebutted the *Pickrell* presumption, and this Court affirmed the Full Commission's opinion and award. *Id.* at , 535 S.E.2d at 609.

Here, the evidence is simply insufficient to support the Commission's findings that decedent hitched the trailer to his truck unassisted, and it does not support a finding that any such "overexertion" caused his heart attack. We hold that the presumption created by the *Pickrell* decision was successfully rebutted by the defendant.

The decision of the Industrial Commission is reversed.

Reversed.

Judges GREENE and TYSON concur.

Report per Rule 30(e).