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NO. COA10-128

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

PATRICE FAULCON, Widow of
BRINKLEY FAULCON, (DECEASED)
Employee, and BRANDTRICK
FAULCON,

Employee,
Plaintiffs-Appellees,

v.

N.C. Industrial Commission
I.C. No. 766857

NORTH CAROLINA ADMINISTRATIVE
OFFICE OF THE COURTS,

Employer,

and

KEY RISK MANAGEMENT SERVICES,

Third-Party Administrator,
Defendants-Appellants,

Appeal by defendants from opinion and award of the Full Commission of the North Carolina Industrial Commission entered 21 October 2009 by Commissioner Dianne C. Sellers. Heard in the Court of Appeals 10 June 2010.

Joseph H. Forbes, Jr., for plaintiffs-appellees.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Marc X. Sneed, for defendants-appellants.

JACKSON, Judge.

The North Carolina Administrative Office of the Courts ("defendant") appeals from an opinion and award entered by the North Carolina Industrial Commission ("the Full Commission") awarding workers' compensation benefits for the death of Brinkley Faulcon ("Faulcon") to his widow, Patrice Moncell Jones Faulcon, and son, Brandtrick Autrell Jackson Faulcon (collectively, "plaintiffs"). For the reasons set forth below, we affirm.

Defendant employed Faulcon as an Assistant District Attorney for the First Judicial District of North Carolina. On 2 May 2006 at approximately 4:30 p.m., Faulcon was returning from Chowan County Superior Court in Edenton, North Carolina when he was involved in a one car accident. Faulcon was traveling on US 17 North bypass when his vehicle ran off the roadway to the right, continued north on the shoulder, ran into a fence, then a ditch, and then a small wooden bridge before coming to a stop. Trooper J. Kevin Jones found Faulcon dead at the scene.

On 9 May 2007, plaintiffs filed a Form 18 Notice of Accident with the Industrial Commission. On 8 June 2007, defendant filed a Form 61 Denial of Workers' Compensation Claim. On 26 October 2007, plaintiffs filed a Form 33 Request for Hearing. On 27 November 2007, defendant filed a Form 33R Response alleging that Faulcon's death did not occur in the course and scope of his employment and did not arise from his employment. On 31 July 2008, the dispute came before Deputy Commissioner John B. Deluca ("Deputy Commissioner Deluca"). On 1 August 2008, Deputy Commissioner

Deluca entered a Post-Hearing Order granting an extension to complete depositions.

At the time of his death, Faulcon was fifty-two years old and had a prior history of heart condition. In a deposition taken on 16 December 2008, Dr. Lindsey L. White ("Dr. White") testified that Faulcon first came to Dr. White's practice in 1997 because of an abnormal EKG. Faulcon was diagnosed with cardiomyopathy, diabetes, high blood pressure, and was overweight. Dr. White testified that while Faulcon's health conditions improved some over time, Faulcon still had cardiomyopathy at the time of his death. Faulcon's autopsy stated the cause of death was sudden cardiac death due to dilated cardiomyopathy. Dr. White testified that sudden cardiac death meant that Faulcon had a "sick" heart, and, at the time of the wreck, something triggered arrhythmia, or an irregular heartbeat, which made Faulcon pass out and die. Dr. White further testified that while sudden cardiac death was more than likely the cause of death, "[o]ne cannot be 100 percent sure . . . that . . . something odd and untoward didn't happen." Dr. White testified that a variety of things could have triggered the irregular heartbeat, such as Faulcon's sleep apnea, or a wasp, but no one could know for sure. When asked whether Faulcon experienced the arrhythmic episode before or after he left the road, Dr. White again stated that no one can say for certain. On 9 April 2009, Deputy Commissioner Deluca entered an opinion and award in favor of defendant. Plaintiff filed notice of appeal that same day. On 21 October 2009, the Full Commission entered an opinion and award

reversing the opinion and award of Deputy Commissioner Deluca. Defendant appeals.

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). Findings of fact supported by competent evidence are conclusive on appeal, even if there is evidence that would support a finding to the contrary. *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985) (citing *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E.2d 458 (1981)). "[T]he [F]ull Commission is the sole judge of the weight and credibility of the evidence." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998)). This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Id.* at 115, 530 S.E.2d at 552 (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission's conclusions of law are subject to *de novo* review." *Hobbs v. Clean Control Corp.*, 154 N.C. App. 433, 435, 571 S.E.2d 860, 862 (2002) (citing *Grantham v. R.G. Barry*

Corp., 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998)).

In defendant's first two arguments, it contends that the Full Commission erred in applying a presumption of compensability when an employee's "death occurs within the course of employment," even though the "circumstances bearing on work-relatedness are unknown" as set forth in *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 370, 368 S.E.2d 582, 586 (1988), to both the "by accident" and the "arising out of" elements of compensability. We disagree.

"To establish 'compensability' under the North Carolina Workers' Compensation Act . . . a 'claimant must prove three elements: (1) [t]hat the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury was sustained in the course of employment.'" *Clark*, 360 N.C. at 43, 619 S.E.2d at 492 (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). A heart attack is not compensable if it occurs while the decedent "is carrying on his normal work routine, performing his customary duties in the usual way," but is compensable if it is due to an accident. *Dillingham v. Yeargin Construction Co.*, 320 N.C. 499, 502-03, 358 S.E.2d 380, 382 (1987) (citing *Lawrence v. Mill*, 265 N.C. 329, 144 S.E.2d 3 (1965); *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 82 S.E.2d 410 (1954)). "In cases . . . where the circumstances bearing on work-relatedness are unknown and the death occurs within the course of employment, claimants 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." *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586. "[The presumption of compensability] may be used to help a claimant carry [her] burden of proving that death was caused by accident, or that it arose out of the decedent's employment, or both." *Id.* at 368, 368 S.E.2d at 585 (citing *McGill v. Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939) (holding that a presumption that the death was accidental was proper where a police chief was found shot by his own gun in a small room with its door and windows locked); *Harris v. Henry's Auto Parts*, 57 N.C. App. 90, 290 S.E.2d 716, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982) (holding that a presumption that the death arose out of decedent's employment was proper where a service station employee was shot dead on the premises)).

In the instant case, we are bound by this Court's prior holding in *Wooten v. Newcon Transp., Inc.*, 178 N.C. App. 698, 632 S.E.2d 525 (2006), *disc. rev. denied*, 361 N.C. 704, 655 S.E.2d 405 (2007). See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). In *Wooten*, the decedent ran off the highway, struck a guardrail, and died as the result of a heart attack. *Wooten*, 178 N.C. App. at 699, 632 S.E.2d at 526. Similar to the case *sub judice*, the decedent had a prior history of heart disease and the "[expert witness] did not know whether defendant had the accident because of a heart attack or

whether he had a heart attack because of the accident." *Id.* at 699-700, 632 S.E.2d at 526. The defendants in *Wooten* argued that the plaintiff was not entitled to the *Pickrell* presumption because "the presumption of compensability applies 'only where there is no evidence that decedent died other than by a compensable cause.'" *Id.* at 702, 632 S.E.2d at 528. (quoting *Gilbert v. Entenmann's, Inc.*, 113 N.C. App. 619, 623, 440 S.E.2d 115, 118 (1994)). We distinguished *Gilbert* because it involved a death from a subarachnoid hemorrhage, a noncompensable cause, whereas "an injury caused by a heart attack may be compensable if the heart attack is due to an accident" *Id.* at 702-03, 632 S.E.2d at 528 (quoting *Cody v. Snider Lumber Co.*, 328 N.C. 67, 71, 399 S.E.2d 104, 106 (1991)). Accordingly, we affirmed the Full Commission's conclusion that "[t]he evidence fail[ed] to show whether [the] decedent had a heart attack that caused the motor vehicle accident or whether the circumstances of the accident caused decedent's heart arrhythmia[,]" and held that the *Pickrell* presumption of compensability applied. *Id.* at 703, 632 S.E.2d at 528.

The facts of the case *sub judice* are nearly identical. Faulcon had a prior history of heart problems and died as the result of sudden cardiac death while driving. Dr. White testified that

[i]f [Faulcon] ran off the road or . . . if something had frightened him or something like that, that possibly could have contributed to him having the arrhythmia or that fast heartbeat at that time. Nobody knows for

sure. Nobody knows what triggers these things, per se.

Dr. White testified that there were numerous possibilities, from Faulcon's sleep apnea to a wasp, but "we honestly don't know [what triggered the arrhythmia]" because "[n]obody was there to describe . . . what happened at that time." Dr. White agreed with the statement that "we can't be sure of the sequence, and . . . we really can't be sure as to whether the act of driving and/or possibly running off the road triggered this event." This is competent evidence for the Full Commission to find that "there is insufficient evidence to determine whether [Faulcon] experienced a cardiac event which led to his automobile accident, or whether [Faulcon] experienced an automobile accident which led to his cardiac event." Therefore, pursuant to our holding in *Wooten*, the Full Commission did not err in concluding that "[i]n regard to whether [Faulcon]'s death occurred 'by accident' and 'arising out of' his employment, Plaintiffs are entitled to a presumption of compensability pursuant to *Pickrell*["

Defendant contends that if the *Pickrell* presumption properly was applied, defendant sufficiently rebutted the claim with the competent evidence in the record, yet defendant's brief fails to provide any reason or argument in support of this contention, stating only that "[i]n the alternative, if the *Pickrell* presumption was properly applied, defendant sufficiently rebutted the claim with the evidence presented in the record." This bare assertion, without more, is insufficient to support defendant's position. Accordingly, defendant's argument is overruled.

Finally, defendant contends that the Full Commission erred in finding that plaintiffs are entitled to compensation pursuant to the Workers' Compensation Act. In support of this contention, defendant simply refers us to "the reasons stated in [defendant's prior arguments] above." Because we hold that the Full Commission correctly applied the *Pickrell* presumption in finding that Faulcon did suffer a compensable injury by accident, and that defendant failed to rebut the presumption, defendant's final argument fails. Accordingly, we affirm the Full Commission's opinion and award.

Affirmed.

Judges GEER and BEASLEY concur.

Report per Rule 30(e).