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NO. COA03-456

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2004

SYLVIA U. COOK, Widow, EMILY L. COOK, Daughter, and RYAN D. COOK, Son, of ROSCOE D. COOK, Employee,
Plaintiffs,

v.

North Carolina Industrial Commission
I.C. File No. 926481

WATSON ELECTRICAL CONSTRUCTION COMPANY,
Employer,

and

CNA INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 20 December 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 January 2004.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Scott J. Lasso, for defendant-appellants.

ELMORE, Judge.

Watson Electrical Construction Company (Watson) and CNA Insurance Company (collectively, defendants) appeal from an opinion and award of the North Carolina Industrial Commission awarding death benefits to the dependents of Roscoe D. Cook, Jr., following Mr. Cook's death in the hotel room where he was staying while on an out-of-town work assignment

for his employer, defendant Watson. For the reasons stated herein, we reverse the Full Commission's opinion and award.

Following Mr. Cook's death, his widow, Sylvia U. Cook (Ms. Cook) and his then-minor children Emily L. Cook and Ryan D. Cook sought death benefits from defendants. On 30 August 2001, Deputy Commissioner Morgan S. Chapman filed an opinion and award denying the family's claim. While the deputy commissioner concluded that Mr. Cook was "within the course of his employment while staying in his hotel room," she further concluded that "by establishing that the cause of decedent's death was ischemic heart disease" defendants had overcome the presumption, articulated by our Supreme Court in *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 367, 368 S.E.2d 582, 584 (1988), that where an employee is found dead under circumstances indicating that death occurred within the time and space limits of employment, absent any evidence of what caused his death, the employee's death resulted proximately from a work-related injury.

Mr. Cook's dependents thereafter appealed to the Full Commission, which, by an opinion and award filed on 20 December 2002, reversed the deputy commissioner and awarded death benefits. Commissioner Renee C. Riggsbee dissented.

The Commission found that Mr. Cook was 53 years old and employed by defendant Watson as a project supervisor when he died. Early on the morning of 16 November 1998, Mr. Cook left his home in Manteo, North Carolina and drove to Clayton, North Carolina to work on an out-of-town project for defendant Watson. After lunch that day, Mr. Cook told his supervisor, Edward Hinton, that earlier in the day he had experienced a sharp pain in his chest but that the pain had gone away. Mr. Cook completed the work day without incident and called his wife from

his hotel room that evening. Mr. Cook told Ms. Cook that he was tired but made no mention of chest pain.

The Commission further found that the next morning, Mr. Cook reported for work and performed his job duties as usual. Mr. Cook told Hinton that he had again experienced chest pain that morning, but that it was not as bad as the previous day. Mr. Cook advised Hinton that he had been diagnosed with acid reflux a few years ago, and that he might see a doctor the next morning. Mr. Cook called his wife Tuesday morning and afternoon and again made no mention of chest pain in either conversation. At the end of the work day, Mr. Cook returned to the hotel with defendant Watson's other employees.

The Commission further found that when Mr. Cook did not call his wife that night, Ms. Cook began calling his hotel room about 10:30 p.m. but got no answer. The next morning, after receiving a call at the job site from Ms. Cook asking him to go to the hotel and check on her husband, Hinton drove to the hotel and had the desk clerk let him into Mr. Cook's room. Hinton and the clerk discovered Mr. Cook's fully clothed body face down on the floor outside the bathroom. Hinton called police, who upon their arrival called the medical examiner for Johnston County, Dr. Leslie J. Taylor. Ms. Cook was then notified of her husband's death.

The Commission further found that because there was no evidence of violence at the scene or trauma to Mr. Cook's body, Dr. Taylor authorized removal of the body to the morgue, where he examined the body at approximately 10:00 that morning. Dr. Taylor did not recommend an autopsy, and none was performed. Dr. Taylor determined that Mr. Cook's death was caused by ischemic heart disease. However, the Commission made the following findings regarding Dr. Taylor's determination of Mr. Cook's cause of death:

> 8. Dr. Taylor never treated or even saw [Mr. Cook] while [Mr. Cook] was alive. Dr. Taylor did not have access to [Mr.

> Cook's] medical records and performed only a cursory examination.
>
> 9. Dr. Taylor's conclusions are without sufficient basis to establish a known cause of death and therefore are given no weight.

Based upon the foregoing findings, the Commission concluded as follows:

> 2. There is a rebuttable presumption that a death occurring within the course of employment is work-related when the medical reason for death is unknown. *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 370 S.E.2d 582 (1988).
>
> 3. Given that no autopsy was performed and that Dr. Taylor was unaware of [Mr. Cook's] medical history, Dr. Taylor's conclusions based on his cursory post mortem evaluation are without sufficient basis to overcome the *Pickrell* presumption in this case.
>
> 4. Mr. Cook's death on 17 November 1998 occurred during the course of employment for a medically unknown reason. Therefore, plaintiffs . . . as the only dependents on the date of death, are entitled to weekly benefits. G.S. §97-2(12), §97-38, §97-39.

From the Full Commission's opinion and award concluding that Mr. Cook's dependents are entitled to death benefits, defendants appeal.

On appeal, defendants bring forward two assignments of error and combine them in a single argument in their brief. Defendants argue that (1) there is insufficient record evidence to support the Commission's finding of fact number 9, that Dr. Taylor's conclusion that the cause of Mr. Cook's death was ischemic heart disease lacked a sufficient basis; and (2) the competent findings do not support the Commission's conclusion that because an insufficient basis exists to overcome the *Pickrell* presumption, Mr. Cook's dependents are entitled to death benefits. We find defendants' argument persuasive.

It is well-settled that this Court's review of an opinion and award of the Industrial Commission is limited to two questions: (1) whether there is any competent evidence of record to support the Commission's findings of fact; and (2) whether the Commission's findings of fact support its conclusions of law. *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Id.* However, if the challenged finding is a mixed question of law and fact, the Commission's finding is not binding on appeal, but rather is conclusive only where "there is sufficient evidence to sustain the facts involved." *Poe v. Raleigh/Durham Airport Authority*, 121 N.C. App. 117, 122, 464 S.E.2d 689, 692 (1995). Any findings not separately assigned as error are conclusively established on appeal. *Johnson v. Herbie's Place*, 157N.C. App. 168, 180, 579 S.E.2d 110, 118, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). In the present case, the only finding of fact with which defendants take issue is number 9, by which the Full Commission found that Dr. Taylor's conclusion that the cause of Mr. Cook's death was ischemic heart disease lacked a sufficient evidentiary basis. Although denominated as a finding of fact, number 9 is actually a mixed finding of fact and conclusion of law, and is therefore conclusive on appeal only if sufficient record evidence exists to sustain the facts involved. *Poe*, 121 N.C. App. at 122, 464 S.E.2d at 692. To the extent that number 9 is a finding of fact, we conclude that it is not supported by the competent record evidence.

In finding of fact number 6, the Commission found that "Dr. Taylor diagnosed 'Ischemic Heart Disease' as [Mr. Cook's] cause of death." Our review of the record indicates that, contrary to the Commission's finding of fact number 9, Dr. Taylor's determination of the cause of death

was *not* "without sufficient basis to establish a known cause of death." The facts of this case compel such a conclusion, despite the lack of an autopsy or a review of Mr. Cook's medical records by Dr. Taylor before making his determination. In findings of fact numbers 2 and 3, the Commission found that Mr. Cook told Hinton that he had experienced chest pain on each of the two days preceding Mr. Cook's death. These findings were consistent with Hinton's hearing testimony, and by deposition, Dr. Taylor testified that these recent episodes of chest pain were "absolutely" a factor in his determination that ischemic heart disease caused Mr. Cook's death. In finding of fact number 5, the Commission found that Mr. Cook's body was discovered on the morning of 18 November 1998, "lying face down on the floor outside of the bathroom fully clothed except for his boots. . . . [T]here was no evidence of trauma or violence[.]" These findings were consistent with Hinton's hearing testimony, as well as Dr. Taylor's report, and Dr. Taylor testified that these circumstances also influenced his determination. Dr. Taylor testified, and his written report also stated, that no alcohol or toxic substances were detected in Mr. Cook's blood.

Ms. Cook's hearing testimony indicated that at the time of his death her husband was 53 years old, approximately 6'1", weighed "about 208," and was "slightly overweight." Ms. Cook also testified that her husband had been a smoker for approximately 20 years before quitting in 1987. At his deposition, Dr. Taylor testified that Mr. Cook was "at risk by commonly accepted risk factors, number one being male, number two being middle-aged, number three, obese" of having ischemic heart disease. Each of these factors was readily apparent from Dr. Taylor's examination of Mr. Cook's body. Moreover, the following exchange took place at Dr. Taylor's deposition:

> Q And how are you able to make that -- that opinion or that diagnosis, based on the -- the examination, the given

history, how did you come to that conclusion [that the cause of Mr. Cook's death was ischemic heart disease]?

A Twenty-plus years of experience. He's a male, increased risk of heart disease. He gave a history of the previous day complaining of chest pain . . .. He was obese and he was found dead unexpectedly in his motel room.

Because we conclude that there was indeed a sufficient basis in the record evidence to support Dr. Taylor's determination that Mr. Cook's death was caused by ischemic heart disease, we hold that the Commission's finding of fact number 9 was not supported by competent evidence, and the Commission therefore erred in giving no weight to Dr. Taylor's conclusions.

We now turn to defendants' contention that the Commission's findings do not support its conclusion that an insufficient basis exists here to overcome the presumption of compensability to which a workers' compensation claimant is entitled for an unexplained injury resulting in death under *Pickrell*. In *Pickrell*, our Supreme Court stated that "[i]n order for a claimant to recover workers' compensation benefits for death, he must prove that death resulted from an injury (1) by accident; (2) arising out of his employment; and (3) in the course of the employment. The claimant has the burden of proving each of these elements." *Pickrell*, 322 N.C. at 366, 368 S.E.2d at 584 (citations omitted). It is well-settled in North Carolina that where, as in the present case, an employee's work requires him to travel, "[w]hile lodging in a hotel . . . [a traveling employee] is performing an act incident to his employment." *Cauble v. Soft-Play, Inc.*, 124 N.C. App. 526, 528, 477 S.E.2d 678, 679, *disc. review denied*, 345 N.C. 751, 485 S.E.2d 49 (1997) (citation omitted).

The *Pickrell* Court held that where the evidence shows an employee died within the course and scope of his employment and there is no evidence tending to show whether the cause of death was an injury by accident arising out of employment, the claimant is entitled to a

presumption of compensability. *Id.* at 367-68, 368 S.E.2d at 584-85. "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 v. Kraft Food Serv., Inc*., 140 N.C. App. 124, 128, 535 S.E.2d 606, 609 (2000). Stated another way, "[t]he *Pickrell* presumption shifts the burden of proving compensability from the plaintiff to the defendant, but it does not eliminate the Commission's duty to weigh all of the evidence before it and make appropriate findings of fact." *Janney v. J.W. Jones Lumber Co.*, 145 N.C. App. 402, 406, 550 S.E.2d 543, 547 (2001). As our Supreme Court stated in *Pickrell*:

> [T]he presumption of compensability in a workers' compensation case is a true presumption. Thus, in those cases where the claimant is entitled to rely on the presumption, the defendant must come forward with some evidence that death occurred as a result of a non-compensable cause; otherwise, the claimant prevails. In the presence of evidence that death was not compensable, the presumption disappears.

Pickrell, 322 N.C. at 371, 368 S.E.2d at 586.

In the present case, the Commission concluded that Mr. Cook's dependents were entitled to the *Pickrell* presumption, i.e., that Mr. Cook's cause of death was an injury by accident arising out of his employment. The Commission further concluded that Dr. Taylor's determination of Mr. Cook's cause of death as ischemic heart disease was "without sufficient basis to overcome the *Pickrell* presumption in this case." Defendants, however, presented evidence and the Commission found as fact that Mr. Cook reported episodes of chest pain to his supervisor, Hinton, on each of the two days preceding his death. Defendants also presented evidence and the Commission found as fact that Mr. Cook's fully-clothed body was found face-down in his hotel room, with no evidence of trauma or violence. The Commission also found as fact that Dr. Taylor determined ischemic heart disease was the cause of Mr. Cook's death but erroneously

found that Dr. Taylor's determination was to be given no weight, despite the presence before the Commission of competent and credible evidence in support of Dr. Taylor's conclusions, as discussed *supra*. We conclude that these findings, along with Dr. Taylor's testimony and the documentary evidence presented in support thereof, do *not* support the Commission's conclusion that defendants failed to rebut the *Pickrell* presumption. To the contrary, we conclude that because defendants have "come forward with some evidence that death occurred as a result of a non-compensable cause," defendants have successfully rebutted the *Pickrell* presumption of compensability. *Pickrell*, 322 N.C. at 371, 368 S.E.2d at 586; *see also Cody v. Snider Lumber Co.*, 328 N.C. 67, 71, 399 S.E.2d 104, 106 (1991) (heart attack is not a compensable injury within the meaning of the workers' compensation statute when it occurs while the employee is "conducting his work in the usual way").

Because we conclude defendants have presented sufficient evidence to rebut the *Pickrell* presumption, the Commission is required to weigh the evidence and make appropriate findings of fact as to the cause of Mr. Cook's death. *Janney*, 145 N.C. App. at 406, 550 S.E.2d at 547. This the Commission did not do. "When an employee is conducting his work in the usual way and suffers a heart attack, the injury does not arise by accident and is not compensable. However, an injury caused by a heart attack may be compensable if the heart attack is due to an accident, such as when the heart attack is due to unusual or extraordinary exertion, or extreme conditions." *Madison v. Int'l Paper Co.*, __ N.C. App. __, __, 598 S.E.2d 196, __ (2004) (internal quotations omitted). Our review of the record indicates that Mr. Cook's dependents have failed to present any evidence that Mr. Cook's death arose from an accident arising out of and in the course of his employment. The undisputed evidence before the Commission is that Mr. Cook was found dead in his hotel room after the end of a workday in which he had experienced chest pains and was

observed laughing and joking with his co-workers on his way from the job site to the hotel. There is no evidence of record that Mr. Cook had been conducting his work in anything other than his usual manner before he died, or that his employment had subjected him to unusual exertion or extreme conditions of any kind. Moreover, the evidence tended to show that Mr. Cook, as a middle-aged, slightly overweight male and former smoker, possessed several widely accepted risk factors for ischemic heart disease.

In sum, we hold that the Commission's conclusions that defendants have failed to present evidence sufficient to overcome the *Pickrell* presumption, and that Mr. Cook's death is compensable as an accident arising from and in the course of his employment, are unsupported by its findings of fact and by the record evidence. We reverse the Full Commission's opinion and award and remand this matter for the Commission to make further findings of fact and conclusions of law consistent with this opinion.

Reversed and remanded.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).