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## Benefits Without Proof: The North Carolina Supreme Court Creates a Presumption of Compensability in Workers' Compensation Death Benefits Actions

While the North Carolina Work[ers'] Compensation Act should be liberally construed so as to effectuate the legislative intent which is to be ascertained from the wording of the Act, the rule of liberal construction cannot be extended beyond the clearly expressed language of the act. "It is ours to construe the laws, and not to make them."<sup>1</sup>

North Carolina's workers' compensation statute<sup>2</sup> sets forth five elements that comprise a claim for death benefits.<sup>3</sup> The claimant bears the burden of proof for each of these elements.<sup>4</sup> Workers' compensation cases, therefore, usually turn on whether the facts fulfill the required elements. The courts traditionally have hesitated to create exceptions permitting recovery with proof of fewer than the five elements, or to transfer the burden of proof with respect to one or more elements to the defendant. Temptation to recognize exceptions or to allow recovery without rigorous proof grows, however, when a sympathetic claimant has simply botched his case and failed to establish the elements prescribed. The danger of allowing recovery in a case like this, of course, is that the means by which the court grants relief will be available to all future claimants, unless the exception is so closely tailored to the facts as to be inapplicable to other situations. To preserve in undiluted form the scheme established by North Carolina's General Assembly, and to avoid a steady expansion of workers' compensation coverage beyond that originally intended,<sup>5</sup> the courts must avoid creating sweeping exceptions, even when the alternative is to leave an individual without remedy.

In *Pickrell v. Motor Convoy, Inc.*<sup>6</sup> the North Carolina Supreme Court surrendered to temptation and recognized a previously unarticulated evidentiary presumption<sup>7</sup> in favor of a sympathetic death benefits claimant. The court held

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1. *Gilmore v. Hoke County Bd. of Educ.*, 222 N.C. 358, 366, 23 S.E.2d 292, 297 (1942) (quoting *State v. Barksdale*, 181 N.C. 621, 626, 107 S.E. 505, 508 (1921)).

2. N.C. GEN. STAT. §§ 97-1 to -122 (1985 & Supp. 1988). The short title of the statute is The North Carolina Workers' Compensation Act. *Id.* § 97-1 (1985).

3. Section 97-2(6) defines an injury that is compensable by workers' compensation as "only injury by accident arising out of and in the course of employment." N.C. GEN. STAT. § 97-2(6) (1985). In addition, § 97-2(10) provides that "the term 'death' as a basis for a right to compensation means only death resulting from an injury." *Id.* § 97-2(10) (1985); see also *id.* § 97-38 (Supp. 1988) (award to survivors when "death results proximately from a compensable injury or occupational disease"). Taken together, these sections indicate five elements for a death benefits claim: (1) the employee died as a proximate result (2) of an injury; (3) by accident; (4) arising out of employment; and (5) in the course of employment. See *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 374, 64 S.E.2d 265, 266 (1951); *Gilmore*, 222 N.C. at 365, 23 S.E.2d at 296.

4. *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 366, 368 S.E.2d 582, 584 (1988); *Taylor v. Twin City Club*, 260 N.C. 435, 437, 132 S.E.2d 865, 867 (1963); *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 374, 64 S.E.2d 265, 266 (1951); *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 761 (1950).

5. See *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 429, 146 S.E.2d 479, 486 (1966).

6. 322 N.C. 363, 368 S.E.2d 582 (1988).

7. A presumption is a rule of law that reduces the evidentiary burden on the party seeking to

that the unexplained death of an employee gives rise to a "presumption of compensability," relieving a survivor of the burden of producing evidence as to one or more of the elements of his death benefits action.<sup>8</sup>

This Note examines evidentiary burdens in North Carolina workers' compensation law and questions whether precedent exists for the presumption the *Pickrell* court recognized. The Note concludes that the "presumption of compensability" does not follow logically from prior decisions as the *Pickrell* court asserted, but instead departs significantly from the explicit proof-of-elements requirement of the Workers' Compensation Act and blurs traditional distinctions between workers' compensation and general health and life insurance. The Note further concludes that the court's presumption in favor of death benefits claimants saddles employers with an unfair evidentiary burden and encourages claimants to withhold evidence.

Clyde Pickrell was employed to drive truckloads of automobiles from his employer's terminal to dealers. His duties included inspecting new cars and vans for damage at the terminal and loading them onto tractor-trailers. Pickrell and other drivers typically inspected the roofs of vans for damage by standing on the bumpers or door frames of the vehicles. On January 17, 1983, in cold weather, Pickrell was found lying dead behind a van assigned to him. A small amount of blood emanated from his nose and ear. On the bumper of the van was a scuff mark that could have been made by Pickrell's shoe.<sup>9</sup>

A Deputy Commissioner of the Industrial Commission<sup>10</sup> denied Pickrell's

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establish a certain fact. In North Carolina, when a presumption applies it usually has the effect stated in the Rules of Evidence:

[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

N.C. R. EVID. 301. The burden cast upon the adverse party by the presumption is termed the burden of production or the burden of producing evidence. The proponent of the presumption continues to bear the burden of proof or persuasion. *Id.*

Rule 301 does not bind the courts to give the described effect to all presumptions. Statutes, judicial decisions, or another rule of evidence may specify a different effect, such as shifting the burden of persuasion. *Id.*; 2 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 215, at 187 n.94 (3d ed. 1988); *id.* § 218, at 194-96.

Other than the "true" or "mandatory" presumption, the effect of which is described in rule 301, two types of presumptions are common: conclusive and permissive. The conclusive presumption operates so that upon establishment of a basic fact, the presumed or elemental fact is deemed to be conclusively established, and contrary evidence will not be heard. *Id.* § 215, at 185. An example of a conclusive presumption in the Workers' Compensation Act is that a widow, widower, or dependent child is conclusively presumed to be dependent upon a deceased employee for support. N.C. GEN. STAT. § 97-39 (1985). Thus, once the basic fact is established that the claimant is the widow, widower, or dependent child of the deceased employee, the Industrial Commission should not hear evidence from the defendant-employer that the claimant was not dependent upon the deceased for support.

The permissive presumption allows but does not compel the finder of fact to find the presumed fact even if the adverse party introduces no evidence contrary to the presumption. Professor Brandis says this is, in reality, an "inference," and that confusion results from using the term "presumption" to describe this effect. 2 H. BRANDIS, *supra*, § 215, at 186.

8. *Pickrell*, 322 N.C. at 368-69, 368 S.E.2d at 585.

9. This is a summary of the court's rendition of the facts. *See id.* at 364-65, 368 S.E.2d at 583.

10. Under North Carolina's workers' compensation system, if an employer and an injured em-

widow's claim for death benefits. He found that the claimant had failed to meet her burden of proving that the death resulted from an injury by accident because of the complete absence of medical evidence<sup>11</sup> of the cause of Pickrell's death.<sup>12</sup> The deputy held that physical evidence was sufficient, however, to permit an inference that an accident had occurred.<sup>13</sup> The full Commission and the North Carolina Court of Appeals affirmed the denial of benefits.<sup>14</sup>

The North Carolina Supreme Court reversed the court of appeals.<sup>15</sup> In an opinion by Chief Justice Exum, the court held that a general presumption of compensability, sufficient to establish one or more unproven elements of a claim, arises in favor of a death benefits claimant whenever an employee dies in the course and scope of his employment under unexplained circumstances.<sup>16</sup> In the instant case, the presumption of compensability relieved the claimant of the burden of producing *any evidence* of the medical cause of the employee's death.<sup>17</sup>

Chief Justice Exum explained that the presumption of compensability described by the court is not a novelty, but is supported by previous workers' compensation decisions. In particular, he cited two death benefits decisions in which plaintiffs were allowed to recover due to presumptions, although they were unable to prove an element of their claims, either the element of "accidental" injury or injury "arising out of employment."<sup>18</sup> Although each case nominally addressed only a single element, the court viewed the presumptions in those

ployee or his dependents fail to reach agreement within fourteen days of the accident regarding compensation for the injury, either party may apply to the Industrial Commission for a hearing. N.C. GEN. STAT. § 97-83 (1985). The hearing may be conducted by a deputy to the Commission, *id.* § 97-84 (Supp. 1988), who is appointed by the Commission, *id.* § 97-79(b) (1985). Appeal may be taken from the award of the Deputy Commissioner to the full Commission, which conducts a de novo proceeding. *Id.* § 97-85. From the award of the full Commission, further appeal lies to the North Carolina Court of Appeals, although the findings of fact made by the Commission are conclusive. *Id.* § 97-86.

11. *Cf.* 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 38.83(a), at 7-273 (1987) (discussing the need to break up the element of accident to component parts of legal and medical causation); *id.* § 38.83(h), at 7-308 to -314 ("but if the employee's activity at the time involves no effort, or effort which cannot support *medically* a causal connection, it can be rightly said that the outcome was neither accidental nor causally related to the employment" (emphasis added)); *id.* § 38.83(i), at 7-319 ("Probably the commonest reason for defeated claims is simply the general inadequacy of proof connecting the injury medically with the employment."). See *supra* note 3 for a list of the elements of a death benefits claim.

12. *Pickrell*, 322 N.C. at 365-66 & n.1, 368 S.E.2d at 583 & n.1.

13. *Id.* at 365 n.1, 368 S.E.2d at 583 n.1.

14. The full Industrial Commission modified the findings of the Deputy Commissioner, holding that the evidence did not support even the inference of an accident. *Id.* at 365-66, 368 S.E.2d at 583. The court of appeals affirmed the result of both the Industrial Commission and the Deputy Commissioner denying death benefits, but reinstated the Deputy Commissioner's finding that the evidence permitted an inference that "decendent stepped up onto the bumper of the van during the course of his inspection and that he fell" accidentally. *Id.* at 366, 368 S.E.2d at 583-84. The court stated that although the Industrial Commission had denominated its finding one of fact, in reality it was a conclusion of law and thus within the ambit of appellate review. *Pickrell v. Motor Convoy, Inc.*, 82 N.C. App. 238, 241, 346 S.E.2d 164, 166 (1986), *rev'd on other grounds*, 322 N.C. 363, 372, 368 S.E.2d 582, 587 (1988).

15. *Pickrell*, 322 N.C. at 372, 368 S.E.2d at 587.

16. *Id.* at 368-69, 368 S.E.2d at 585.

17. *Id.* at 369-70, 368 S.E.2d at 585-86. See *supra* note 11 for a discussion of the usual need for medical evidence.

18. *Pickrell*, 322 N.C. at 367-69, 368 S.E.2d at 584-85 (citing *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939); *Harris v. Henry's Auto Parts, Inc.*, 57 N.C. App. 90, 290 S.E.2d

cases as having the broader effect of merging several elements of the claim into the single concept of "work-relatedness."<sup>19</sup> According to Chief Justice Exum, "It is [work-relatedness], *not the medical reasons for death*, which [is] critical in determining whether a claimant is entitled to workers' compensation benefits."<sup>20</sup> Thus, the *Pickrell* court held, "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*."<sup>21</sup>

Resolving ambiguity in the two underlying cases, the court also held that the presumption of compensability is a "true presumption."<sup>22</sup> When it arises "the defendant must come forward with some evidence that death occurred as a result of a noncompensable cause; otherwise, the claimant prevails."<sup>23</sup> The court stated that the resulting allocation of the burden of proof is fair because the employer is in a better position to present evidence of the cause of death than the survivor of the employee.<sup>24</sup>

Justice Meyer, joined by Justices Webb and Whichard, dissented, arguing that the majority misconstrued precedent in fashioning the presumption of compensability.<sup>25</sup> The dissenters argued that the presumptions in prior cases were limited expressly to the elements of proof of "accident" and "arising out of employment" and were not tantamount to a "new animal called a 'presumption of compensability.'"<sup>26</sup> Distinct elements of the claimant's burden of proof under the workers' compensation statute cannot be merged, the dissenters contended. The claimant must prove each element independently, although she may avail herself of presumptions for specific elements.<sup>27</sup> Justice Meyer stated that placing the burden of producing contrary evidence on the employer is unfair because of the employer's relative inability to secure medical evidence by autopsy. The dissent contended finally that the practical effect of the presumption of compensability is to allow "the potential of the perpetration of a fraud by withholding evidence."<sup>28</sup>

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716, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982)). See *infra* notes 63-73 and accompanying text for a discussion of *McGill*, and notes 54-62 and accompanying text for a discussion of *Harris*.

19. *Pickrell*, 322 N.C. at 368, 368 S.E.2d at 584-85.

20. *Id.* at 370, 368 S.E.2d at 586 (emphasis added).

21. *Id.* (emphasis added).

22. *Id.* at 371, 368 S.E.2d at 586. Courts, particularly in early decisions, have used the terms "presumption" and "inference" interchangeably and ambiguously. N.C. R. EVID. 301 commentary; 2 H. BRANDIS, *supra* note 7, § 215, at 184 & n.82. However, in the truest sense, a presumption *requires* the finder of fact to find the presumed fact upon proof of the basic or underlying fact and in the absence of contrary evidence from the adverse party, while an inference *allows*, but does not *compel* the trier of fact to conclude the presumed fact when the basic fact is proved. 2 H. BRANDIS, *supra* note 7, § 215, at 186-89.

23. *Pickrell*, 322 N.C. at 371, 368 S.E.2d at 586. See *supra* note 7 for a discussion of the effects of presumptions.

24. *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586.

25. *Id.* at 372-74, 368 S.E.2d at 587-88 (Meyer, J., dissenting).

26. *Id.* (Meyer, J., dissenting).

27. *Id.* (Meyer, J., dissenting).

28. *Id.* at 374, 368 S.E.2d at 588 (Meyer, J., dissenting). Justice Meyer implied that a claimant with access to the deceased employee's medical records may withhold evidence of personal afflictions, knowing that the employer-defendant cannot get the information and will lose without it. *Id.* (Meyer, J., dissenting).

The North Carolina courts' long-standing tradition of placing the evidentiary burdens upon workers' compensation claimants is the linchpin that balances two competing objectives of the Workers' Compensation Act. On one hand, the Workers' Compensation Act should be construed liberally to effectuate the objects for which it was passed: to give the employee a cause of action against the employer for injuries caused by the employer's enterprise.<sup>29</sup> On the other hand, the courts frequently allude to their obligation to prevent the workers' compensation system from developing into a general health and life insurance scheme.<sup>30</sup> Thus, although the employee has a more easily sustainable cause of action by statute than by common law, he must prove the elements of his statutory claim as if it were an ordinary civil action.

The courts consistently have protected this balance of objectives, but they also have recognized exceptions in the statute that slightly reallocate evidentiary burdens in special situations. The hallmark of these exceptions is their restrictive applicability to unusual circumstances in which the claimant could not reasonably be expected to carry his burden of proof. Exceptions include the "unexplained injury or death" doctrine, the "positional risk" doctrine, and the presumption against suicide.

The unexplained-injury-or-death doctrine reduces the claimant's burden of proving the "arising out of employment" element of the workers' compensation claim.<sup>31</sup> When injury or death occurs mysteriously or in an unexplained manner while the employee clearly is in the scope of his employment, an inference or presumption arises in favor of the claimant that the injury arose out of employment.<sup>32</sup> North Carolina explicitly embraced this doctrine in *Taylor v. Twin City Club*<sup>33</sup> in 1963.

In *Taylor* a waiter for defendant restaurant fell and struck his head on a door, causing a deep, seven-inch laceration. The waiter was rendered uncon-

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29. See, e.g., *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586; *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972); *Keller v. Electric Wiring Co.*, 259 N.C. 222, 225, 130 S.E.2d 342, 344 (1963); see also *Williams v. Thompson*, 200 N.C. 463, 464, 157 S.E. 430, 430 (1931) (Workers' Compensation Act is liberally construed because it is a "humane undertaking"); *Rice v. Denny Roll & Panel Co.*, 199 N.C. 154, 157, 154 S.E. 69, 71 (1930) ("the several parts . . . of an act are to be construed in connection with every other part or section and all are to be considered as parts of a connected whole and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers"); *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 40, 153 S.E. 591, 593 (1930) ("benefits . . . should not be denied upon technical, narrow and strict interpretation").

30. *Bryan v. First Free Will Baptist Church*, 267 N.C. 111, 115, 147 S.E.2d 633, 635 (1966); *Duncan v. City of Charlotte*, 234 N.C. 86, 91, 66 S.E.2d 22, 25 (1951); *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 92, 63 S.E.2d 173, 176 (1951); see also *Rutledge v. Tultex Corp.*, 308 N.C. 85, 105, 301 S.E.2d 359, 371-72 (1983) (discussing need to strike balance between interpreting liberally and avoiding transformation of system into a general accident and health insurance law).

31. See *supra* note 3 stating the elements the claimant normally must prove.

32. See 1 A. LARSON, *supra* note 11, § 10.32, at 3-100, quoted in *Pickrell*, 322 N.C. at 367, 368 S.E.2d at 584.

33. 260 N.C. 435, 439-40, 132 S.E.2d 865, 868-69 (1963). The *Taylor* court relied on *Upton v. Great Cent. Ry.*, 1924 App. Cas. 302, the seminal English case in the development of the unexplained-injury-or-death doctrine. In *Upton* an employee fell and injured his knee while traversing a railway platform on an errand for his employer. He later died from blood poisoning. There was no evidence of the cause of his fall, yet the House of Lords held that the death arose out of employment. *Id.* at 302, 315-17.

scious and died from loss of blood.<sup>34</sup> The court held that the survivor's claim for benefits did not fail for lack of evidence as to the efficient cause of the waiter's fall; rather, the facts "permit[ted] the inference" that the fall arose out of employment.<sup>35</sup>

The *Taylor* court explained that the causal relationship inherent in the arising-out-of-employment element does not depend on either the negligence of the employer<sup>36</sup> or the contributory negligence of the employee.<sup>37</sup> Except in extreme cases of employee misconduct, therefore, employee fault does not preclude a finding that an accident arose from employment, and any inquiry into employee and employer fault is implicitly superfluous. Only the possibility that the employee's injury or death may have arisen from an idiopathic factor has an effect on claimant's ability to recover.<sup>38</sup> As to possible idiopathic causes, the *Taylor* court held that if the circumstances of the fall are unknown, an inference will be allowed that no idiopathic or personal cause existed and that the cause was neutral.<sup>39</sup> If "the Commission [then] finds from all of the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained."<sup>40</sup>

Although the North Carolina Supreme Court explicitly articulated and embraced the unexplained death and injury doctrine for the first time in *Taylor*, the doctrine had been a functional part of North Carolina workers' compensation law for some time prior to that decision. In *Robbins v. Bossong Hosiery Mills*,<sup>41</sup> an early workers' compensation case, claimant was injured when she lost her balance and fell while reaching up to a rack at her work place. The court stated, "There is no evidence tending to show that the fall was caused by a hazard to which the workman would have been exposed apart from the employment or from a hazard common to others."<sup>42</sup> Accordingly, the court concluded,

[W]here the employee, while about his work, suffers an injury in the ordinary course of the employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, *and the*

34. *Taylor*, 260 N.C. at 436-37, 132 S.E.2d at 866-67.

35. *Id.* at 440, 132 S.E.2d at 869 (citing *Upton*, 1924 App. Cas. at 315).

36. *Id.* at 438-39, 132 S.E.2d at 868.

37. *Id.* at 439-40, 132 S.E.2d at 869. The court stated that "the accident having been caused by the doing of [a business errand] even incautiously, it must, I think, be held that the accident arose out of the employment of the deceased." *Id.* (quoting *Upton*, 1924 App. Cas. at 315 (Opinion of Lord Atkinson)).

38. The *Taylor* court stated, "If a fall and the resultant injury arise solely from an idiopathic cause, or a cause independent of the employment, the injury is not compensable." *Id.* at 439, 132 S.E.2d at 868. An idiopathic injury is one that results from a cause peculiar to the individual or arises spontaneously. See WEBSTER'S NEW NINTH COLLEGIATE DICTIONARY 598 (1986).

39. *Taylor*, 260 N.C. at 439-40, 132 S.E.2d at 868-69. Professor Larson explains:

The theoretical justification is similar to that for unexplained falls and other neutral harms: The occurrence of the death within the course of employment at least indicates that the employment brought deceased within range of the harm, and the cause of harm, being unknown, is neutral and not personal.

1 A. LARSON, *supra* note 11, § 10.32, at 3-101 to 3-103.

40. *Taylor*, 260 N.C. at 439, 132 S.E.2d at 868.

41. 220 N.C. 246, 17 S.E.2d 20 (1941).

42. *Id.* at 247, 17 S.E.2d at 21.

*Commission finds* from all the attendant facts and circumstances that the injury arose out of the employment, *an award will be sustained*.<sup>43</sup>

The *Robbins* court neither referred to the unexplained injury or death doctrine by name, nor cited *Upton v. Great Central Railway Co.*,<sup>44</sup> the original unexplained injury or death doctrine case, but nonetheless it captured the essence of the doctrine in the permissible inference it described.<sup>45</sup>

The unexplained death and injury doctrine, as illustrated in *Taylor* and *Robbins*, is characteristic of the exceptions the North Carolina courts have developed to the general policy of allocating the burden of proof to the claimant in workers' compensation cases. The doctrine applies only when the factual cause of the employee's injury or death is unexplained. The reallocation of evidentiary burdens is limited, affecting only the arising-out-of-employment element of the claim and reducing claimant's evidentiary burden only if the Commission chooses to draw the permissible inference.<sup>46</sup> Finally, the inference (or presumption) is allowed because a claimant could not reasonably be expected to produce evidence on the arising-out-of-employment element when the only person with personal knowledge, the employee, is silenced by death.

A distinct, but closely related, exception providing for reallocation of the evidentiary burdens in workers' compensation cases is the doctrine of positional risks, which also gives rise to an inference or presumption on the element of arising-out-of-employment. This doctrine applies if the claimant can show that his accident occurred because "the employment required [him] to occupy what turned out to be a place of danger."<sup>47</sup> The unexplained injury and death doctrine is really a subpart of the positional risk doctrine,<sup>48</sup> although many decisions blend the two.<sup>49</sup>

43. *Id.* at 248, 17 S.E.2d at 21 (emphasis added). The language of both *Robbins* and *Taylor* indicates that the court was applying a *permissible inference* due to the unexplained death and injury doctrine, as contrasted with a *presumption*. See *supra* note 7 for a discussion of the distinction between a permissible inference and a true presumption.

44. 124 App. Cas. 302; see *supra* note 33 (discussing *Upton*).

45. The unexplained death doctrine also appeared unarticulated in other pre-*Taylor* cases. See, e.g., *DeVine v. Dave Steel Co.*, 227 N.C. 684, 685, 44 S.E.2d 77, 78 (1947) (affirming award of death benefits on behalf of employee who fell while lowering flag, court held the impact of deceased's skull on ground was the *medical* cause of death, although the cause of the employee's fall was unknown); *Rewis v. New York Life Ins. Co.*, 226 N.C. 325, 328-30, 38 S.E.2d 97, 99-100 (1946) (affirming award of death benefits when employee with Crone's disease sought comfort at bathroom window and subsequently fell, unseen; the fall to the ground was the *medical* cause of death; although the cause of the fall was unknown, the Commission's inference that the employee slipped on slick tile was affirmed against the contention that the more likely cause of the fall was the employee's pre-existing idiopathic condition). See *supra* note 11 citing cases that discuss the need for evidence of medical and legal cause.

A North Carolina Court of Appeals case has articulated a possibly significant limitation to the unexplained death doctrine. In *Gilbert v. B & S Contractors, Inc.* the court of appeals held that only a *violent* death gives rise to a presumption or inference that death arose out of employment. 81 N.C. App. 110, 113, 343 S.E.2d 609, 611 (1986) (affirming denial of benefits when medical evidence indicated employee's collapse and death likely resulted from arterial disease, although electric shock was also possible). The supreme court made no reference to *Gilbert* in *Pickrell*, however, so the vitality of the limitation is questionable.

46. See *supra* note 7.

47. 1 A. LARSON, *supra* note 11, § 10, at 3-71.

48. See 1 A. LARSON, *supra* note 11, §§ 10.00, 10.31, 10.32, at 3-71, 3-87, 3-100.

49. Thus, in *Rewis v. New York Life Ins. Co.*, 226 N.C. 325, 38 S.E.2d 97 (1946), the supreme



The majority opinion in *Pickrell* relied in part on the unexplained death doctrine and, perhaps, the positional risk doctrine. Early in the decision, Chief Justice Exum quoted Professor Larson's discussion of the unexplained death doctrine.<sup>50</sup> The court described the quoted doctrine, however, as giving rise to a presumption "that the death resulted proximately from a work-related injury."<sup>51</sup> Further, the court defined "work-related" as "from an injury by accident arising out of employment."<sup>52</sup> Thus defined, the unexplained death presumption encompasses all of the elements of the death benefits claim except that the accident occurred "in the course and scope of employment."<sup>53</sup> The *Pickrell* court's statement of the doctrine is the most expansive ever by a North Carolina court.

The positional risk doctrine also might underlie the *Pickrell* court's reasoning, given that the deceased apparently was standing on the bumper of the van at the time of the accident, an elevated position that presented additional danger. The court did not mention the positional risk doctrine, however, and gave no indication that the doctrine was the source of its broad "work-relatedness" definition.

Apart from the unexplained death and injury doctrine and the positional risk doctrine, the *Pickrell* court emphasized and sought support from two particular workers' compensation cases in which evidentiary burdens were reallocated. Combining the doctrines and the two cases, the court fashioned its presumption of compensability.

One of the cases that the court relied on was *Harris v. Henry's Auto Parts, Inc.*<sup>54</sup> in which a service station employee was found shot dead in the station

court acknowledged, "It is true that no one saw the deceased slip on the tile, and in fact no one saw him fall to his death." *Id.* at 330, 38 S.E.2d at 100. Although this language implicates the unexplained death doctrine, the court did not restrict the basis of its decision to the unexplained death analysis. Rather, the court intermingled it with the positional risk doctrine, relating several situations in which the risks of the work locale determined the issue of compensability. *Id.* at 328-29, 38 S.E.2d at 99-100 (discussing *Rockford Hotel Co. v. Industrial Comm'n*, 300 Ill. 87, 88-89, 132 N.E. 759, 759-60 (1921) (worker's fall into ash pit and subsequent death arose out of employment because work placed employee near pit; compensation awarded notwithstanding direct cause of fall was employee's idiopathic condition)). *But cf.* *Vause v. Vause Farm Equip. Co.*, 233 N.C. 88, 98, 63 S.E.2d 173, 180-81 (1951) (distinguishing and holding uncompensable employee's injury caused by fall from truck during epileptic seizure on grounds that truck was stopped before onset of seizure, eliminating any employment-caused position of danger).

In *DeVine v. Dave Steel Co.*, 227 N.C. 684, 44 S.E.2d 77 (1947), the supreme court alluded to the positional risk doctrine, affirming a finding of the Industrial Commission that "the fall caused the death of plaintiffs' deceased and that he was subject to a peculiar hazard on account of being required to stand on the cement platform [from which he fell] and lower the flag." *Id.* at 685-86, 44 S.E.2d at 78. The court also impliedly invoked the unexplained death doctrine when it stated that "[t]he exact cause of the fall is not determined." *Id.* at 685, 44 S.E.2d at 78. Although these cases do not distinguish clearly between the effects of the unexplained death and injury and positional risk doctrines, the positional risk doctrine might apply when the unexplained injury or death doctrine does not. As an example, when an accident is observed by eyewitnesses, and therefore is explained, the positional risk doctrine could apply if the risk was indigenous to the location of the employment.

50. *Pickrell*, 322 N.C. at 367, 368 S.E.2d at 584 (quoting 1 A. LARSON, *supra* note 11, § 10.32, at 3-100).

51. *Id.*

52. *Id.* at 366, 368 S.E.2d at 584.

53. *See supra* note 3 (enumerating the statutory elements of the death benefit claim).

54. 57 N.C. App. 90, 290 S.E.2d 716, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982).

parking lot during his nighttime shift. The shot had been fired from behind a fence on the perimeter of the property. There was neither evidence of a robbery attempt nor a motive for the shooting.<sup>55</sup>

The Industrial Commission awarded death benefits and the court of appeals affirmed.<sup>56</sup> The decision of the court of appeals appears to have rested upon a combination of the unexplained death and positional risk doctrines. The *Harris* court stated, "This case requires resolution of a dispute regarding *only one of the elements [of the workers' compensation claim], the 'arising out of' element.*"<sup>57</sup> The court reiterated that the arising-out-of-employment element requires " 'some causal relation between the accident and the performance of some service of the employment.' "<sup>58</sup> Although the injury was caused by willful criminal assault, the *Harris* court stated it might yet have arisen out of the attendant's employment.<sup>59</sup> If the attack was shown to be personal and due to a risk not created by employment, however, it would not have satisfied the arising-out-of-employment element.<sup>60</sup>

The *Harris* court described the unexplained death doctrine and concluded, "Mr. Harris' death was unexplained. Because he was found dead on the premises of his employment at a time when he should have been there, we indulge a *presumption or inference* that his death arose out of the employment."<sup>61</sup> The court then stated: "The deceased's job was of a nature which would subject him to peril. . . . He was the sole employee on duty in, what the record shows, was a high crime area."<sup>62</sup> Thus, the court based its resolution of the sole issue—whether death arose out of employment—on both the unexplained death doctrine and the positional risk doctrine.

In *McGill v. Town of Lumberton*,<sup>63</sup> the other case on which the *Pickrell* court relied, the issue was whether to apply an inference or presumption to the unproved "accident" element of claimant's case. Defendant town's police chief was found shot dead in a manner suggesting suicide.<sup>64</sup> The supreme court held that the claimant for death benefits was "entitled at least to the benefit of the *inference* of accident [as opposed to suicide] from which, nothing else appearing, the Commission may find but is not compelled to find, the fact of death resulting

55. *Id.* at 90-91, 290 S.E.2d at 716-17.

56. *Id.* at 96, 290 S.E.2d at 720.

57. *Id.* at 91, 290 S.E.2d at 717 (emphasis added). The unexplained death and positional risk doctrines traditionally have been directed to the element of arising out of employment. *See supra* notes 32, 34, 40, 43 and accompanying text.

58. *Harris*, 57 N.C. App. at 92, 290 S.E.2d at 717 (quoting *Taylor v. Twin City Club*, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963)).

59. *Id.* at 95, 290 S.E.2d at 719.

60. *Id.* at 93, 290 S.E.2d at 718.

61. *Id.* at 95, 290 S.E.2d at 719 (emphasis added).

62. *Id.* at 96, 290 S.E.2d at 719.

63. 215 N.C. 752, 3 S.E.2d 324 (1939).

64. *Id.* at 753, 3 S.E.2d at 325. The police chief was found dead in a room that could not be entered without a key. He was killed by a single bullet that entered his forehead at the root of the nose and traveled back and downward through his brain. The revolver that fired the bullet was found near the police chief's body. *Id.* at 755, 3 S.E.2d at 326-27 (Barnhill, J., dissenting).

from injury by accident."<sup>65</sup> Although the court referred to the evidentiary rule as an "inference," its effect is that of a presumption in some parts of the opinion, and related authority discusses a *presumption* against suicide.<sup>66</sup> The court noted that explicit language in the Workers' Compensation Act and the common law support application of a presumption against suicide.<sup>67</sup>

The *McGill* court held that in the workers' compensation context the presumption "is sufficient to raise a *prima facie* case as to accident only."<sup>68</sup> Further, the court stated that once the claimant successfully invoked the presumption, "[t]hen if [an] employer claims [the] death of [an] employee is by suicide, the statute places the burden on [the employer] to go forward with proof negating the factual inference of death by accident."<sup>69</sup> This language clearly shifts to the defendant the burden of *production* on the issue of accident, but not the burden of persuasion, and therefore constitutes a true presumption.<sup>70</sup>

The *McGill* court did not discuss the arising-out-of-employment element or any other element of the claim. Instead, it remanded the case to the Industrial Commission for reconsideration in light of the presumption against suicide.<sup>71</sup> The *McGill* majority did not make any statement concerning a merger of elements of the claim or place the case in a procedural posture indicating that their decision resolved the entire claim. In fact, by stating that the presumption made a *prima facie* case of "accident only," the majority affirmatively indicated that it did not intend the presumption to be determinative of the entire claim or to merge elements of the claim.<sup>72</sup> On remand, the claimant was required to prove

65. *Id.* at 754, 3 S.E.2d at 326 (emphasis added).

66. See *supra* note 22 for a discussion of the interchangeable use of "presumption" and "inference" in early decisions. See *infra* text accompanying notes 69-70 for a discussion of the presumption-like effect in *McGill*.

67. *McGill*, 215 N.C. at 754, 3 S.E.2d at 326; see N.C. GEN. STAT. § 97-12 (1985). "No compensation shall be payable if the injury or death to the employee was proximately caused by: . . . (3) His willful intention to injure or kill himself or another. . . . *The burden of proof shall be upon him who claims an exemption or forfeiture under this section.*" *Id.* (emphasis added). This language creates a presumption which shifts not only the burden of production, but the ultimate burden of persuasion as well. See *supra* note 7 for a discussion of the General Assembly's power to create presumptions of greater than normal effect. The effect is clearly greater than that of an inference. Despite this rather strong language, however, the *McGill* court applied an apparent presumption that shifted only the burden of production. See *infra* text accompanying notes 69-70.

At common law, there is also a presumption against suicide. The presumption derives from the notion that love of life prevents rational persons from committing suicide. 2 H. BRANDIS, *supra* note 7, § 224, at 211-12 n.82. The presumption most frequently arises in the context of actions to recover on accidental death clauses of life insurance policies. *Id.* § 224, at 211; see *Moore v. Union Fidelity Life Ins. Co.*, 297 N.C. 375, 378-82, 255 S.E.2d 160, 163-65 (1979); *Warren v. Pilot Life Ins. Co.*, 215 N.C. 402, 404-05, 2 S.E.2d 17, 18 (1939); *Gorham v. Pacific Mut. Life Ins. Co.*, 214 N.C. 526, 528-30, 200 S.E. 5, 6-8 (1938); *Parker v. New York Life Ins. Co.*, 188 N.C. 403, 405, 125 S.E. 6, 7 (1924).

68. *McGill*, 215 N.C. at 754, 3 S.E.2d at 326 (emphasis added).

69. *Id.*

70. See *supra* note 7 for a discussion of evidentiary burdens allocated by presumptions.

71. *McGill*, 215 N.C. at 754, 3 S.E.2d at 326. The *Pickrell* court attached great significance to this fact. See *infra* notes 95-97 and accompanying text.

72. *McGill*, 215 N.C. at 754, 3 S.E.2d at 326 (emphasis added). Justice Barnhill, however, criticized the *McGill* majority for what he believed to be a disposition of the entire claim, arguing that recognition of the presumption did not compensate for lack of proof on the elements other than accident.

The evidence in the case cannot be construed as establishing a *prima facie* cause of action

the other elements of the claim, while the presumption of accident would require the employer to meet "the burden on him to go forward with proof negating the factual inference of death by accident" or risk a peremptory instruction on that issue.<sup>73</sup>

Combining the presumptions in *McGill* and *Harris* and the new, broad definition of the unexplained death doctrine, the *Pickrell* court crafted the rule that the death benefits claimant was entitled to rely on a general presumption of compensability because her husband died unobserved.<sup>74</sup> The authorities, however, in no way support the adopted rule. The presumption in *McGill* helped to meet the claimant's burden on only the accident element of the claim.<sup>75</sup> The inference or presumption in *Harris*, derived from the unexplained death and positional risk doctrines, helped claimant make a prima facie case on the *arising-out-of-employment* element.<sup>76</sup> Neither of these presumptions, however, related in any way to the element of "death proximately caused by injury."<sup>77</sup> Moreover, neither presumption dealt with absence of medical evidence, proof of which is fundamental to establishing the element of accident.<sup>78</sup>

To arrive at its conclusion, the supreme court either must have found a way to shake these presumptions loose from their moorings to specific elements of the workers' compensation claim, or it must have concluded that certain elements of the traditional claim were not involved in *Pickrell* because of its facts. Neither of these propositions is supportable.

The *Pickrell* court's juxtaposition of the dissimilar presumptions in *McGill* and *Harris* and its discussion of the unexplained death doctrine in the context of work-relatedness indicate an effort to obfuscate previously clear connections between presumptions or inferences and isolated elements of the workers' compensation claim. For example, the court used the unexplained death doctrine, in part, as the basis for a presumption eliminating the need for the claimant to

unless we hold that mere evidence that the deceased died from a pistol shot wound is evidence not only of accidental death, but is also evidence that he suffered such injury by accident which arose out of and in the course of his employment.

*Id.* at 756, 3 S.E.2d at 327 (Barnhill, J., dissenting).

73. See *id.* at 754, 3 S.E.2d at 326. The effect indicated comports with the ordinary effect of a true presumption. See *supra* note 7. No *directed verdict* on the whole claim results when the party adverse to the presumption fails to meet his burden of producing contrary evidence; rather, the court will instruct the jury that the *presumed fact* only is deemed proved. The remaining issues in the case must yet be proved by the plaintiff. Of course, if the only issue in the case is that to which the presumption applies, the adverse party's failure to meet the burden of going forward would warrant a directed verdict against that party. N.C. R. EVID. 301 commentary.

74. *Pickrell*, 322 N.C. at 369, 368 S.E.2d at 586.

75. See *supra* notes 63-73 and accompanying text.

76. See *supra* notes 54-62 and accompanying text.

77. See *supra* note 3 for a list of the elements of a death benefits claim.

78. 1B A. LARSON, *supra* note 11, § 38.83(i), at 7-319 ("Probably the commonest reason for defeated claims is simply the general inadequacy of proof connecting the injury medically with the employment."); Comment, *Injury by Accident in Workers' Compensation: Alternatives to an Outmoded Doctrine*, 59 N.C.L. REV. 175, 205-11 (1980) (proposing New York's wear and tear rule and other alternative formulations for the accident element and stating, "Of course in New York, as in North Carolina, *medical causation* in fact must also be established." (emphasis added)); see *supra* note 11.

establish a medical cause of death. In *Harris v. Henry's Auto Parts, Inc.*,<sup>79</sup> *Taylor v. Twin City Club*,<sup>80</sup> and *Robbins v. Bossong Hosiery Mills, Inc.*,<sup>81</sup> however, the unexplained death doctrine created presumptions or inferences *only* on the arising-out-of-employment element.<sup>82</sup> Professor Larson has stated specifically that the unexplained death doctrine does not compensate for the failure to produce medical cause of death evidence:

[T]he unexplained-death rule is designed for cases in which, by the nature of the facts, the claimant cannot reasonably be expected to furnish the usual evidence on cause of death. When this is not so, the presumption should not be expected to take the place of normal medical evidence establishing the nature of the injury and its relation to the death.<sup>83</sup>

In *Pickrell* the unexplained death doctrine was applied to do precisely that which Professor Larson stated it should not. The claimant in *Pickrell* made no showing of inability to produce medical evidence. Justice Meyer, in dissent, noted that the claimant did not produce even a death certificate, much less medical expert testimony or an autopsy report.<sup>84</sup>

The *Pickrell* court itself quoted authorities stating that the presumption or inference arising from the unexplained death doctrine relates only to the issue of whether the death or injury arose out of employment.<sup>85</sup> There is thus no au-

79. 57 N.C. App. 90, 91, 290 S.E.2d 716, 717, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982); *see supra* notes 54-62 and accompanying text.

80. 260 N.C. 435, 439, 132 S.E.2d 865, 868 (1963); *see supra* notes 34-40 and accompanying text.

81. 220 N.C. 246, 247, 17 S.E.2d 20, 21 (1941) ("Did the accident *arise out of the employment?* On this record, this is the decisive question." (emphasis added)); *see supra* notes 42-43 and accompanying text; *see also* *DeVine v. Dave Steel Co.*, 227 N.C. 684, 685, 44 S.E.2d 77, 78 (1947) (death resulting from accident occurring while employee was "in the discharge of his duties . . . permits the inference . . . that it was a compensable injury"); *Rewis v. New York Life Ins. Co.*, 226 N.C. 325, 327, 38 S.E.2d 97, 98 (1946) ("Whether [the accident] *arose out of employment* is the mooted question." (emphasis added)).

82. Medical evidence is a component of the accident element and perhaps death-proximally-resulting-from-injury, but not "arising out of employment." Professor Larson states,

The issue [of compensability of injuries arising out of idiopathic conditions, but exacerbated by employment, and thus arising out of employment] must be carefully distinguished from the *medical question whether the final injury or death was in fact the result of the fall itself*, rather than of the heart attack or other idiopathic condition. When a man suffers a severe blow on the head and a heart attack in one accident, it becomes necessary to disentangle the chain of causation and determine whether it was the head injury or the heart condition that caused the death.

1 A. LARSON, *supra* note 11, § 12.10, at 3-308 n.1 (emphasis added). Thus, in *Rewis*, 226 N.C. at 328, 38 S.E.2d at 99, while the cause of deceased's fall from the window and whether it arose out of employment was not determinable, it was clear that the cause of his death was the impact from the fall, not the Crone's disease afflicting him. *See supra* notes 45, 49. In *DeVine*, 227 N.C. at 685, 44 S.E.2d at 78, the cause of deceased's death was found to be the cracking of his skull upon the cement platform. The unknown factor was why he fell and whether the fall arose out of employment. *See supra* notes 45, 49; *see also Pickrell*, 322 N.C. at 372-73, 368 S.E.2d at 587 (Meyer, J., dissenting) ("I note that the unexplained death provisions upon which Professor Larson relies in his treatise to justify the use of a presumption in a claimant's favor apply only when *the cause of death is known*, but the circumstances are not.").

83. 1 A. LARSON, *supra* note 11, § 10.32(a), at 3-122 to -123.

84. *Pickrell*, 322 N.C. at 374, 368 S.E.2d at 588 (Meyer, J., dissenting).

85. *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586 (quoting 1 A. LARSON, *supra* note 11, § 10.32, at 3-100; 100 C.J.S. *Workmen's Compensation* § 513 (1958)).

thority for the proposition that the unexplained death doctrine and the positional risk doctrine may relate to other elements of the workers' compensation claim, such as accident and medical cause of death. All authority is to the contrary.

Having loosened the bond between the unexplained death doctrine, as applied in *Harris*, and the arising-out-of-employment element, the *Pickrell* court also stated that the *McGill* presumption against suicide was not limited to the accident element, but helped to prove work-relatedness as well.<sup>86</sup> All authority for the presumption in *McGill*, however, states that the presumption relates only to one element. The *McGill* court declared the presumption to be of "accident only";<sup>87</sup> the Workers' Compensation Act shifts the burden of proof to the defendant *only* on the issue of suicide;<sup>88</sup> and the common-law presumption *only* helps disprove suicide.<sup>89</sup> None of these authorities suggests this presumption has general application to all elements of the workers' compensation claim.

The *Pickrell* court might have argued that medical cause of death is a component ingredient of the accident element<sup>90</sup> that the *McGill* presumption specifically addressed. Applying the *McGill* accident presumption, therefore, would offset the absence of medical evidence. The *Pickrell* court did not make this connection, however, perhaps because the presumption in *McGill* operated only against the defense that the deceased committed suicide. Notwithstanding this shortcoming, even if the presumption established all components of the accident element, leapfrogging the medical evidence requirement, it does not help prove the separate death-proximately-caused element.

Despite the antithetical cast of all the authority, the supreme court found that the *McGill* and *Harris* presumptions, "read together, support the proposition that the presumption is really one of compensability."<sup>91</sup> By naming the presumption one of "compensability" and by stating that the presumption "may be used to help a claimant carry his burden of proving that death was caused by accident, or that it arose out of the decedent's employment, or both,"<sup>92</sup> the court created a wild card presumption, applicable to any element of the claim. Thus, the *Pickrell* court judicially has added North Carolina to the small minority of jurisdictions that recognize a general presumption of compensability in workers' compensation claims, albeit only in the unexplained death context. The other jurisdictions that follow such a doctrine have enacted it expressly in their workers' compensation statutes.<sup>93</sup> The North Carolina General Assembly's failure to

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86. *Id.* at 368, 368 S.E.2d at 585.

87. *McGill*, 215 N.C. at 754, 3 S.E.2d at 326 (emphasis added); see *supra* note 72 and accompanying text.

88. See *supra* note 67.

89. See *supra* note 67.

90. See *supra* notes 3, 78, 82.

91. *Pickrell*, 322 N.C. at 368, 368 S.E.2d at 585.

92. *Id.* (emphasis added).

93. See D.C. CODE ANN. § 36-321(1) (1981); FLA. STAT. ANN. § 440.26 (West 1981); MASS. ANN. LAWS ch. 152, § 7A (Law. Co-op. 1976); N.Y. WORK. COMP. LAW § 21 (McKinney 1965); see also Note, *The Presumption of Compensability in the Workers' Compensation Act*, 30 HOW. L.J. 505, 506-513 (1988) (discussing the Washington, D.C. Workers' Compensation Act).

include a wild card presumption probably was purposeful. The express presumptions located in other parts of the statute demonstrate the General Assembly's ability to draft presumptions when desired.<sup>94</sup>

An alternative interpretation of the *Pickrell* decision is that the court dispensed with the element analysis of the workers' compensation claim because of the unexplained death context. The court's assessment of *McGill* and *Harris* indicates this approach. The court characterized the two cases as "in effect, *merg[ing] the elements* of 'arising out of' and 'accident.'"<sup>95</sup> Additionally, the court stated that there was "no reason not to apply a presumption of compensability where the evidence shows that death occurred while the decedent was within the course and scope of employment, but the medical reason for death is not adduced."<sup>96</sup>

The view that the *Pickrell* court intended to abandon the element analysis finds further support in Chief Justice Exum's assertion that the *McGill* court did not analyze the arising-out-of-employment element, but only the "accident" element, and that the *Harris* court did not inquire into the "accident" element, but only into whether the employee's death arose out of employment. From these conspicuous gaps in the courts' analyses, the Chief Justice concluded that the *McGill* and *Harris* presumptions do not relate purposefully or solely to specific elements, but rather help the claimant in a general way to prove a work-related death theory.<sup>97</sup>

The court's conclusion is not inescapable by any means. The failure of the *McGill* and *Harris* courts to examine other issues of the workers' compensation claims has other possible explanations. In both cases the other elements were not in controversy on appeal. In *Harris* the court of appeals stated at the outset, "This case requires resolution of a dispute regarding only one of the elements, the 'arising out of' element."<sup>98</sup> Because defendant did not challenge the Commission's conclusions as to other elements, there was no need for the court to consider them. Thus, the court's failure to consider elements other than "arising out of" does not imply that the other elements of the claim were unimportant or did not require proof.

A similar justification exists for the *McGill* court's failure to address elements other than accident. The *McGill* court identified the Commission's failure to give effect to the presumption against suicide, supported by both statutory and common law. It therefore remanded the case to the Commission for application of the legal principles the court had articulated. The court stated that the

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94. See N.C. GEN. STAT. § 97-3 (1985) (presumption that all employees and employers come under provisions of statute); *id.* § 97-5 (contracts of service presumed to continue subject to Workers' Compensation Act); *id.* § 97-39 (widow, widower, or dependent child *conclusively* presumed to be dependent for support upon deceased employee).

95. *Pickrell*, 322 N.C. at 368, 368 S.E.2d at 585 (emphasis added).

96. *Id.* at 369, 368 S.E.2d at 585-86.

97. *Id.* at 368, 368 S.E.2d at 585.

98. *Harris v. Henry's Auto Parts, Inc.*, 57 N.C. App. 90, 91, 290 S.E.2d 716, 717, *disc. rev. denied*, 306 N.C. 384, 294 S.E.2d 208 (1982). The Industrial Commission's finding concerning this element was the only ruling defendant questioned on appeal. Defendant Appellant's Brief at 1, *Harris* (No. 8110IC802).

Commission "may proceed to findings of fact and a determination of the claim in accordance with prescribed practice."<sup>99</sup> Because the Industrial Commission had to retry the facts of the case, further comment by the court regarding other elements was unnecessary.

Other language in *McGill* clearly embraces the elemental analysis of the workers' compensation claim. The court stated that the presumption or inference arose to allow a finding of "accident—a constituent part of the condition antecedent to compensation, injury by accident arising out of and in the course of employment."<sup>100</sup> The court stated further that "this inference is sufficient to raise a prima facie case as to accident only."<sup>101</sup> The *McGill* court thus reaffirmed the proof-of-elements approach to workers' compensation claims even as it applied the presumption against suicide to prove one of those elements.

In summary, *McGill*, *Harris*, and the unexplained death and positional risk doctrines do not support either theory upon which the result in *Pickrell* may be based. These authorities neither suggest the demise of the elemental aspect of the workers' compensation claim nor do they create a floating presumption to be applied to any element missing the required quantum of proof. The presumptions in the prior cases relate specifically to single elements. Claimant in *Pickrell*, therefore, might have been entitled to separate inferences or presumptions on the accident and arising-out-of-employment elements, but no authority exists for a general presumption of compensability covering all elements.

In addition to its suspect analysis of the elements of the workers' compensation claim addressed by presumptions, the *Pickrell* court applied precedent in a peculiar manner to recognize a true presumption of compensability, rather than a mere inference.<sup>102</sup> After having discussed *McGill* and *Harris* in the course of analyzing the relationship between presumptions or inferences and singular elements of the claim, the court completely dropped *Harris* from its discussion of the evidentiary effect of the newly recognized presumption of compensability. The court found that the evidentiary device in *McGill* was a true presumption and that *Pickrell* was entitled to a presumption of compensability of similar effect.<sup>103</sup> As a result, the court directed that on remand the "defendant must come forward with some evidence that death occurred as a result of a non-compensable cause; otherwise, the claimant prevails."<sup>104</sup>

The court's failure to consider *Harris* at this point of the decision is difficult to understand. *Harris* carried forward the ambivalence between inference and presumption that appeared in previous unexplained death doctrine cases.<sup>105</sup>

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99. *McGill*, 215 N.C. at 755, 3 S.E.2d at 326 (emphasis added).

100. *Id.* at 754, 3 S.E.2d at 326 (emphasis added).

101. *Id.* (emphasis added).

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

103. *Id.* at 371, 368 S.E.2d at 586-87; see also *supra* note 7 (discussing the effect of a true presumption).

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

105. *Harris*, 57 N.C. App. at 95, 290 S.E.2d at 719 ("[W]e indulge a presumption or inference that his death arose out of the employment." (emphasis added)). Moreover, the procedural posture of *Harris* did not indicate the effect of a true presumption as opposed to an inference, since the court



*Taylor* and *Robbins* repeatedly spoke of a "presumption or inference," but applied the effect of an inference.<sup>106</sup> These cases, in contrast to *McGill*, appear to militate against recognizing a true presumption, yet the *Pickrell* court ignored this conflict.

Instead, the *Pickrell* court relied entirely on the effect given to the evidentiary device in *McGill* for its conclusion that claimant could rely on a true presumption. The court correctly assessed *McGill* as having applied a presumption, rather than an inference, despite confusion about that issue within *McGill*.<sup>107</sup> The court did not explain adequately, however, the parallel it drew between *McGill* and *Pickrell*. The *McGill* presumption of accident was enacted expressly by statute.<sup>108</sup> No statute requires the presumption described by *Pickrell*. It is unclear, therefore, why the *Pickrell* presumption more closely resembles the *McGill* presumption than the *Harris* inference. The disappearance of *Harris* from the decision at this stage cuts against the *Pickrell* court's earlier argument that the *Harris* and *McGill* presumptions are the same presumption of work-relatedness.<sup>109</sup>

Finally, after recognizing the presumption of compensability and analyzing its effect, the *Pickrell* court stated that practical concerns justify the presumption because it is fair and serves the policy of liberal construction of the Workers' Compensation Act.<sup>110</sup> The court noted that the employer can develop evidence regarding circumstances of death more easily because he assigns work to the employee and knows its risks and because he is usually the last to see the employee alive.<sup>111</sup> As for medical cause of death evidence, the court stated that an employer may seek an autopsy from the county medical examiner and offer the death certificate in evidence "if [the] employer[ ] deem[s] it necessary to determine the medical reason for death."<sup>112</sup>

In this portion of the decision, the court confuses the unexplained death doctrine with the new presumption of compensability. The circumstances of death evidence, which the employer can prove more easily than the claimant, consists only of the manner in which the death occurred—the evidence that would prove whether the accident arose out of employment. In *Pickrell*, for

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of appeals affirmed an award by the Industrial Commission, rather than reversing a denial of benefits.

106. See *supra* note 43 and accompanying text; see also *Taylor v. Twin City Club*, 260 N.C. 435, 440, 132 S.E.2d 865, 869 (1963) ("The facts found by the Commission in the instant case *permit the inference* that the fall had its origin in the employment." (emphasis added)); *DeVine v. Dave Steel Co.*, 227 N.C. 684, 685, 44 S.E.2d 77, 78 (1947) ("This *permits the inference*, which the Commission has drawn, that it was a compensable injury." (emphasis added)); *Rewis v. New York Life Ins. Co.*, 226 N.C. 325, 330, 38 S.E.2d 97, 100 (1946) ("The proof adduced at the hearing would seem to *permit the inferences* drawn by the Commission, even though other inferences may appear equally plausible." (emphasis added)); *Robbins v. Bossong Hosiery Mills*, 220 N.C. 246, 248, 17 S.E.2d 20, 21 (1941) ("No other sufficient explanation appearing, . . . the conclusion that the injury arose out of the employment was *permissible* and should be sustained." (emphasis added)).

107. See *supra* notes 65-70 and accompanying text.

108. See N.C. GEN. STAT. § 97-12 (1985); *supra* note 67.

109. See *supra* note 86.

110. *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586; see *supra* note 29.

111. *Pickrell*, 322 N.C. at 370, 368 S.E.2d at 586.

112. *Id.* at 370, 368 S.E.2d at 586; see N.C. GEN. STAT. § 130A-383 (1986).

example, the employer had a better opportunity than the claimant to observe whether performance of his duty caused the deceased to fall from the bumper of the van. This advantage, which the employer admittedly possesses, is traditionally the primary argument in support of the unexplained death doctrine.<sup>113</sup> In a situation like this, the court provides the claimant a presumption or inference on the arising-out-of-employment element because it is unfair to require practically unobtainable proof.

The employer does not have an advantage in access to or production of medical cause of death evidence, however. In *Pickrell* Justice Meyer argued in dissent that the survivor has better access to medical evidence because he has a statutory right to an autopsy. The employer's ability to obtain an autopsy, on the other hand, rests in the medical examiner's discretion.<sup>114</sup> Therefore, the traditional reason for applying a presumption or inference displacing the ordinary evidentiary burden fails to exist with medical cause of death evidence. The *Pickrell* court, however, did not actually assert that the employer has a better opportunity to obtain medical evidence. Rather, the court stated the employer could produce the evidence, *if it thought medical cause of death important*.<sup>115</sup> The court apparently was not shifting the burden as to medical cause of death evidence by means of the presumption, but was converting medical cause of death from a vital component of the accident and death-proximately-resulting-from-injury elements to an affirmative defense available to defendant. The court failed, however, to state any authority for its position. The *Pickrell* court's conclusion that the presumption of compensability was fair to the employer flies in the face of the General Assembly's concept of fairness, as expressed in the workers' compensation statute.

Statutes, not common law, create workers' compensation claims.<sup>116</sup> The statute represents a carefully crafted balance of the interests of employers and employees. It improves a worker's chances of recovery without exposing the employer to prohibitive liability.<sup>117</sup> Broad, judicially created exceptions or departures from the analysis prescribed by statute potentially upset this balance. Although unforeseen situations that place an extraordinary burden on one party inevitably require doctrines altering the evidentiary burdens, the development of such doctrines is less likely to upset the balance of interests set by the General Assembly if the doctrines are defined restrictively and created only when the favored party faces a truly unfair disadvantage.

In creating a presumption of compensability, the *Pickrell* court probably did not proceed cautiously enough. Claimant in *Pickrell* was able to prove that the deceased was acting in the course and scope of employment and that he died.<sup>118</sup> Because of circumstantial physical evidence, the court inferred, in the

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113. See 1 A. LARSON, *supra* note 11, § 10.32, at 3-103 to -110.

114. *Pickrell*, 322 N.C. at 373-74, 368 S.E.2d at 588 (Meyer, J., dissenting); see N.C. GEN. STAT. §§ 130A-389(a), 130A-398 (1986); see also *id.* § 130A-383 (medical examiner's jurisdiction).

115. See *supra* text accompanying note 112.

116. See *supra* notes 2-3 and accompanying text.

117. See *supra* notes 29-30 and accompanying text.

118. See *supra* note 9 and accompanying text.

claimant's favor, that an accident occurred.<sup>119</sup> Because of the unexplained death doctrine, claimant was entitled to a presumption or inference that the injury arose out of employment.<sup>120</sup> Claimant failed, however, to offer any evidence that decedent's injury was medically caused by the inferred accident or that death was proximately caused by injury, nor did claimant offer an explanation for the failure to produce this evidence. The North Carolina Supreme Court, nevertheless, created an evidentiary presumption broad enough to allow claimant to recover.

The *Pickrell* decision has made it easier for a claimant to make out a claim for unobserved injury or death than for one that is observed. The presumption places the onus upon an employer to discover any diseases afflicting the deceased and to prove one of them was the medical cause of death.<sup>121</sup> This allocation of the evidentiary burden might not be disturbing when the employee has been run over by a truck, but the fairness is far from evident when a fifty-seven-year-old employee, like Mr. Pickrell,<sup>122</sup> is found dead with scarcely a mark on his body.

Perhaps the most disturbing aspect of the supreme court's decision in *Pickrell*, however, is that the court presents its decision as a restatement of existing case law. No presumption or inference previously presented in North Carolina workers' compensation law applies to multiple elements of a claim or submerges the element-by-element analysis set forth in the Workers' Compensation Act. If the court perceived inequities in *Pickrell* sufficient to justify a new, broader doctrine for reallocating evidentiary burdens, a full explanation of the necessity and framework of the new doctrine would have been in order.

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119. See *supra* notes 13-17 and accompanying text.

120. See *supra* notes 31-45 and accompanying text.

121. See *supra* notes 110-115 and accompanying text.

122. See Plaintiff-Appellant's Brief at 3, *Pickrell* (No. 8610IC69).

