NO. COA07-223

NORTH CAROLINA COURT OF APPEALS

Filed: 18 December 2007

JAMES ROBERT EARLS,
Employee,
Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 014130

STARR DAVIS COMPANY, INC.,
Employer,

AETNA CASUALTY & SURETY
(STANDARD FIRE INSURANCE),
Carrier,
Defendants-Appellees.

Appeal by Plaintiff from order entered 16 November 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2007.

Wallace and Graham, P.A., by Edward L. Pauley, for Plaintiff-Appellant.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by Matthew D. Glidewell and Jeffrey A. Kadis, for Defendants-Appellees.

McGEE, Judge.

James Robert Earls (Plaintiff) filed a Form 18B dated 14 February 2000 claiming benefits for the occupational disease of asbestosis and/or asbestos-related pleural disease. Starr Davis Company, Inc. (Defendant-Employer) denied liability, and Deputy Commissioner Lorrie L. Dollar heard Plaintiff's claim on 17 July 2001. Deputy Commissioner Dollar entered an opinion and award on 30 April 2003 denying Plaintiff's claim.

Plaintiff appealed to the North Carolina Industrial Commission(the Commission), and the Commission entered the following order on 19 November 2003:

> The undersigned have reviewed the prior Opinion and Award based upon the record of the proceedings before Deputy Commissioner Dollar. The appealing party has shown good grounds to receive further evidence. It is therefore ORDERED that this case is hereby REMANDED to the Chief Deputy Commissioner for conduct of an evidentiary hearing for the purpose of obtaining additional evidence on the issues of compensability and last injurious exposure.

However, on remand, the parties advised Deputy Commissioner George T. Glenn II that "there would not be any additional evidence offered in this matter and that it should be decided on the evidence already contained in the record." Accordingly, Deputy Commissioner Glenn referred the case back to the Commission. The Commission entered an order on 16 November 2006 affirming with modifications Deputy Commissioner Dollar's opinion and award. Plaintiff appeals.

I.

Plaintiff first argues the Commission erred by failing to follow applicable statutory procedures. Specifically, Plaintiff argues the Commission violated N.C. Gen. Stat. §97-84 and Workers' Compensation Rule 611 by denying Plaintiff a hearing before a deputy commissioner and by eliminating the requirement that a deputy commissioner make findings of fact and conclusions of law. We disagree.

Plaintiff appears to argue that he was entitled to a new opinion and award from Deputy Commissioner Glenn. Plaintiff argues: "The . . . Commission heard the appeal and remanded the case due to the failure of the Deputy Commissioner to address all the facts and for Findings of Fact that deviated from the evidence. The matter was specifically referred to Deputy Commissioner George Glenn for further findings." However, despite Plaintiff's contention to the

contrary, the Commission remanded the case for the sole purpose of "obtaining additional evidence on the issues of compensability and last injurious exposure." When the parties decided not to introduce additional evidence, Deputy Commissioner Glenn properly referred the case back to the Commission. The Commission did not violate N.C. Gen. Stat. §97-84 or Workers' Compensation Rule 611 because Plaintiff had a hearing before Deputy Commissioner Dollar and she entered an opinion and award with findings of fact and conclusions of law.

Plaintiff further argues the Commission violated Workers' Compensation Rule 701 by failing to give Plaintiff an opportunity to file a brief with the Commission. Plaintiff contends he was entitled to file a brief with the Commission after the case was referred back to the Commission by Deputy Commissioner Glenn. We disagree. Following Deputy Commissioner Dollar's opinion and award, Plaintiff appealed to the Commission. Nothing in the record indicates that Plaintiff was denied the opportunity to file a brief with the Commission in support of his appeal. In fact, in response to Plaintiff's arguments, the Commission allowed Plaintiff the opportunity to introduce additional evidence before a deputy commissioner. However, Plaintiff chose not to do so. Plaintiff has not cited any authority in support of his argument that he was entitled to file a new brief after the case was referred back to the Commission, and we find none. Moreover, nothing in the record indicates that Plaintiff requested the opportunity to do so. We hold the Commission did not err, and we overrule these assignments of error.

II.

Plaintiff also argues that several of the Commission's findings of fact were unsupported by the evidence and that the Commission failed to consider all of the evidence. Our review of an opinion and award by the Commission is limited to two inquiries: (1) whether there is any competent evidence in the record to support the Commission's findings of fact; and (2) whether

the Commission's conclusions of law are justified by its findings of fact. *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996). If supported by competent evidence, the Commission's findings are conclusive even if the evidence might also support contrary findings. *Jones v. Candler Mobile Village*, 118 N.C. App. 719, 721, 457 S.E.2d 315, 317 (1995). The Commission's conclusions of law are reviewable *de novo*. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). It is well settled that the 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). On appeal, this Court may not re-weigh evidence or assess credibility of witnesses. *Adams v. AVX Corp.*,349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999).

Plaintiff first challenges finding of fact number five, in which the Commission found the following:

> On April 20, 1999, Dr. Albert Curseen, an internal medicine physician, examined [P]laintiff and diagnosed him with asbestosis. Dr. Curseen saw [P]laintiff on referral from [P]laintiff's attorney on April 7, 1999. There is no evidence that Dr. Curseen personally obtained or reviewed any chest x-rays for [P]laintiff. The evidence shows that on that date, Dr. Curseen examined [P]laintiff for thirty to forty-five minutes. That was [P]laintiff's only contact with Dr. Curseen at the time of the diagnosis, and [P]laintiff has not seen Dr. Curseen since that date. Further, there is no evidence in the record to support a finding that Dr. Curseen has ever been recognized as a certified B reader or has any expertise as a radiologist.

Plaintiff challenges the following sentence in finding of fact number five: "There is no evidence that Dr. Curseen personally obtained or reviewed any chest x-rays for [P]laintiff." Plaintiff argues this finding was unsupported because, while Dr. Curseen did not review x-rays during his initial visit with Plaintiff, Dr. Curseen did obtain and review x-rays later, and prepared an

addendum to his report. However, the Commission did not find that Dr. Curseen never reviewed any x-rays. When the challenged sentence is placed in context, it is clear that the Commission found that Dr. Curseen had not reviewed any x-rays at the time he made his diagnosis. It is undisputed that he did not review any x-rays before making his initial diagnosis. Therefore, the challenged finding was supported by the evidence.

Plaintiff also challenges the Commission's finding that "there is no evidence in the record to support a finding that Dr. Curseen has ever been recognized as a certified B reader or has any expertise as a radiologist." This finding is also supported by the evidence because Dr. Curseen is not a radiologist. Rather, Dr. Curseen testified that he was a physician practicing in the field of "[pulmonary and critical care[,]" and was board certified in internal medicine. Although Dr. Curseen testified that he reviewed x-rays as a regular part of his practice, he was not board certified in radiology and did not testify that he was a certified B reader. Accordingly, this finding was supported by evidence in the record.

Plaintiff further challenges the portion of finding of fact number six that provides: "Dr. Bearden did not make specific findings regarding possible asbestosis, as this [was] not his area of practice." Plaintiff also challenges finding of fact number seven, which states:

> Dr. Bearden also repeated [P]laintiff's history of asbestosis; however, in his deposition, Dr. Bearden noted he had relied on Dr. Fogarty's assessments on any alleged asbestosis. Dr. Bearden did not independently diagnose [P]laintiff with asbestosis and deferred to Dr. Fogarty's opinion as to the diagnosis of asbestosis.

These findings are also supported by evidence in the record. Dr. Bearden testified that he was board certified in "internal medicine, medical oncology" and further testified that he specialized in oncology and hematology. Dr. Bearden did not testify that he specialized in pulmonology. Moreover, Dr. Bearden testified that he did not examine Plaintiff for the purpose of determining

whether Plaintiff had asbestosis. Further, Dr. Bearden testified that he did not diagnose Plaintiff with asbestosis:

> Q. And in your entire file, wherever the term "asbestosis" appears, is it fair to say -- and you correct me if I'm wrong, but is it fair to say that when you indicate [Plaintiff] has asbestosis, that is based on the diagnosis of another physician?
>
> A. History, diagnosis of another physician, C.T. scan review, and C.T. scan interpretation by a respected radiologist.
>
> Q. But you never independently diagnosed [Plaintiff] yourself with asbestosis?
>
> A. No, I didn't make the initial diagnosis.

Rather, Dr. Bearden noted that Plaintiff's pulmonary physician was Dr. Charles Fogarty, and Dr. Bearden testified that he would defer to Dr. Fogarty with regard to any asbestosis diagnosis. In an office note dated 16 November 2001, Dr. Bearden noted:

> [Plaintiff] does have thickening on his pleura on CT scan which is compatible with asbestosis. [Plaintiff] has had all of his chest x-rays in Dr. Fogarty's office. Dr. Fogarty says that it is compatible with asbestosis. I was not able to say clearly one way or the other. I was just quoting the opinions of two other physicians who had seen [Plaintiff]. I did not make this specific diagnosis myself.

Based upon the above evidence, the Commission's findings of fact were adequately supported.

Plaintiff also challenges finding of fact number eight, which states:

> Dr. Fogarty noted [P]laintiff's "diagnosis of asbestosis" based upon [P]laintiff's subjective account of his medical history, rather than reviewing competent medical records. It is noted that Dr. Fogarty was not even aware of which physician diagnosed [P]laintiff with asbestosis. Therefore, Dr. Fogarty's recitation of "diagnosis of asbestosis" is not competent evidence that [P]laintiff contracted the occupational disease, but is merely a restatement of [P]laintiff's medical history as related by [P]laintiff.

Plaintiff further challenges the Commission's finding that Dr. Fogarty "declined to diagnos[e] [P]laintiff with asbestosis."

However, Dr. Fogarty testified as follows:

> Q. Did you diagnose [Plaintiff] with asbestosis?
>
> A. No. All that I did was repeat [Plaintiff's] stated diagnosis. I don't think that I have the information to diagnose [Plaintiff] with asbestosis in the sense that to do that, you have to have a -- you have to have evidence of the exposure. And asbestosis refers to parenchymal involvement, not the pleural calcification. And we don't -- usually we have rales that you can hear. Certainly in the advanced cases, you expect to hear some rales. Sometimes you can see them before they show up on a chest film. And you'd have some hint -- if it's advanced, you would expect there's some hint on a chest film of a CT scan of parenchymal involvement.
>
> Q. And you didn't see any of that?
>
> A. No, sir.

Dr. Fogarty also testified that Plaintiff said he had been diagnosed with asbestosis. However, Dr. Fogarty did not know who diagnosed Plaintiff. Further, Dr. Fogarty testified that he did not treat Plaintiff for the purpose of determining what caused Plaintiff's symptoms: "The whole thrust was -- again, I should have known better -- the whole thrust [was] we [were] not interested in finding out what caused this, we [were] not interested in litigation. We [were] just interested in improving [Plaintiff's] functional status." Accordingly, the Commission's findings of fact were supported by competent evidence.

Plaintiff also argues that the Commission failed to consider much of the evidence. "Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). "The Commission is not required, however, to find

facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead, the Commission must find those facts which are necessary to support its conclusions of law." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000) (citations omitted).

In the present case, the Commission found as follows: "15. Plaintiff has submitted the records of B-readers and radiologists who indicate that radiological studies of [P]laintiff's lungs show changes consistent with asbestos exposure. However, no diagnosis of asbestosis was made. Further, no testimony was presented from these physicians." Based upon this finding of fact, it is clear that the Commission considered all of the evidence presented. However, the Commission determined that while these physicians opined that Plaintiff's lungs showed changes "consistent with asbestos exposure," none of the physicians diagnosed Plaintiff with asbestosis. Plaintiff cites to medical reports from Dr. Frederick Dula, Dr. Phillip Lucas, Dr. Richard Bernstein, Dr. John Wu, and Dr. Michael Alexander. However, these physicians, as reflected in the Commission's finding, did not diagnose Plaintiff with asbestosis. Rather, they simply noted that their findings were consistent with asbestosis. Accordingly, finding number fifteen was supported by competent evidence. Furthermore, finding number fifteen demonstrates that the Commission considered all of the evidence presented. We overrule the assignments of error grouped under this argument.

Affirmed.

Judges TYSON and ELMORE concur.

Report per Rule 30(e).