A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any other purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered. See Rule of Appellate Procedure 30 (e)(3).

NO. COA99-1001

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

JAMES ROSS SEAGLE,
Employee,
Plaintiff;

v.

North Carolina Industrial Commission
I.C. File No. 028828

KENT-COFFEY MANUFACTURING COMPANY;
CONSOLIDATED FURNITURE, INC.;
MAGNAVOX FURNITURE, INC.;
THE SINGER COMPANY;
SINGER FURNITURE COMPANY;
SINGER SEWING MACHINE COMPANY;
SINGER SEWING MACHINE COMPANY LTD.,
A SUBSIDIARY OF SINGER CO., N.V.;
and/or
SSMC, INC.;
Employers;

NORTH CAROLINA INSURANCE GUARANTY
ASSOCIATION FOR NOW INSOLVENT
AMERICAN MUTUAL LIABILITY INS. CO.;
NORTHWESTERN NATIONAL INS. CO.;
NATIONAL UNION FIRE INS. CO.;
CRAWFORD AND COMPANY, ADJUSTING
AGENCY;
TRAVELERS INSURANCE COMPANY;
LIBERTY MUTUAL INSURANCE CO.;
and/or
SELF-INSURED, (ADJUSTING AGENCY),
CONSTITUTION STATE SERVICE CO.;
Carriers;
Defendants.

Appeal by defendants, Singer Sewing Machine Company, The Singer Company, SSMC, Inc., and National Union Fire Insurance Company, from an Opinion and Award of the North Carolina Industrial Commission filed 26 March 1999. Originally scheduled for hearing in the Court of Appeals on 27 April 2000, stayed by Order of this Court dated 23 March 2000 pending Proceedings in the United States Bankruptcy Court for the Southern District of New York until 8 November 2001. Reassigned to this panel by Order of Chief Judge of North Carolina Court of Appeals dated 15 November 2002.

Daniel and LeCroy, by Stephen T. Daniel and Alan LeCroy, for plaintiff-employee.

Cranfill, Sumner, and Hartzog, by Anthony T. Lathrop, for defendant, N.C. Insurance Guaranty Association for now insolvent American Mutual Insurance Company.

Golding, Meekins, Holden, Cosper & Stiles, by Henry C. Byrum, Jr., for defendant, National Union Fire Insurance Company.

Orbock, Bowden & Ruark, by Barbara Ruark for defendant, Travelers Insurance Company.

Alala, Mullen, Holland & Cooper, by Randolph Sumner for defendant, Liberty Mutual Insurance Company.

Brooks, Stevens and Pope, by Robert H. Stevens, Jr. for defendant, Singer Sewing Machine Company, LTD., a subsidiary of Singer Co. N.V.

Roberts, Stevens and Sizemore, by Steven W. Sizemore for defendant, Constitution State Services Company Adjusting Agency.

Morris, York, Williams, Surles and Brearley, by G. Lee Martin for defendant, Northwestern National Insurance Company.

WYNN, Judge.

This appeal follows a remand of this matter to the Industrial Commission under an earlier unpublished decision from this Court which is appended to this opinion for reference. In this second appeal, defendants contend that upon remand, the Industrial Commission erred by concluding plaintiff, James Ross Seagle, was last injuriously exposed to the hazards of asbestosis

between 1December 1986 and 1 June 1987 because the Commission found as fact that Mr. Seagle was exposed to insulation dust for a thirty day period after 30 June 1987. We, however, disagree with that contention; accordingly, we affirm the Industrial Commission's opinion and award.

Starting in 1945, Mr. Seagle worked for forty-five years maintaining the "Singer Defendants"**[Note 1]** heating and furnace system. Mr. Seagle was responsible for maintaining steam pipes insulated with asbestos. In the course of repairing these steam pipes, Mr. Seagle was required to break up the asbestos insulation with a hammer, beat the asbestos insulation into a fine dust, mix the asbestos dust with water to create a paste, and apply the asbestos paste to holes in the steam pipe's insulation.

During the 1986-1987 winter, the steam pipes froze and the heating system became inoperable. Accordingly, Mr. Seagle's job duties changed dramatically. From 31 January 1987 through 13 September 1987, instead of repairing steam pipes laden with asbestos, Mr. Seagle worked as a security guard and night watchman. On 13 September 1987, Mr. Seagle was transferred to a different plant.

In 1988, Mr. Seagle began experiencing shortness of breath. Dr. N. M. Lewis diagnosed Mr. Seagle with chronic obstructive pulmonary disease. In September 1988, Dr. Lewis referred Mr. Seagle to Dr. James Donahue who reviewed Mr. Seagle's chest x-rays and found pleural, diaphragmatic calcifications, and intestinal markings consistent with asbestosis. Over the next three years Mr. Seagle's health began to deteriorate rapidly and he consistently missed work. On 14 March 1990, Mr. Seagle's condition rendered him unable to continue working.

On 16 April 1991, Mr. Seagle filed Form 18 notifying the "Singer Defendants" that he had contracted the occupational disease asbestosis as a result of injurious exposure to asbestos

while in their employment. On 16 January 1991, Mr. Seagle was examined by Dr. Rostand on behalf of the North Carolina Industrial Commission. Dr. Rostand, concurring in the opinions of Drs. Lewis and Donahue, concluded that Mr. Seagle suffered from asbestosis which was caused by exposure to asbestos at work. On 31 May 1995, a Deputy Commissioner issued an opinion and award finding that Mr. Seagle suffered from asbestosis resulting from exposure to asbestos insulation while employed by the "Singer Defendants." The Deputy Commissioner determined that Mr. Seagle's last exposure to the "hazards of asbestos" occurred between July 1, 1987 and September 13, 1987. Both parties appealed the Deputy Commissioner's opinion and award to the Full Commission: The "Singer Defendants" challenged liability and the Mr. Seagle challenged the date of last injurious exposure.

On 30 April 1997, the Full Commission filed an opinion and award concurring in the Deputy Commissioner's finding of asbestosis and the "Singer Defendants'" liability, but modifying the order with respect to Mr. Seagle's date of last injurious exposure. The Full Commission found:

> 6. Mr. Seagle's maintenance duties . . . until the winter of 1986-87, included maintaining two boilers . . . [and] maintaining the steam lines . . . .
>
> 7. The doors of the boilers and steam lines were insulated. The insulation contained asbestos. . . .
>
> 8. Particularly in the 1950's and 1960's, and throughout the period of time Mr. Seagle worked in Plant #1, Mr. Seagle installed and removed insulation as part of his maintenance duties. . . . These activities exposed [Mr. Seagle] to the hazards of asbestos. . . .
>
> . . .
>
> 32. The records of the Industrial Commission show that Plant #1 was owned by "Singer" from 1 January 1983 to 1 January

> 1989; that the employees therein were insured by . . . National Union Fire Insurance Company . . . . until 30 June 1987.

Accordingly, the Full Commission determined Mr. Seagle was last injuriously exposed to the hazards of asbestosis during the winter of 1986-1987, when National Union was the carrier for the "Singer Defendants." The "Singer Defendants" appealed from that opinion and award to this Court arguing that the Full Commission erred in finding Mr. Seagle was last injuriously exposed to the hazards of asbestosis between 1 December 1986 and 1 June 1986. Specifically, the "Singer Defendants" argued that the Full Commission's Finding of Fact 9 was inconsistent with the section of the Workers' Compensation Act creating and defining the liability for the last injurious exposure. In Finding of Fact 9, the Full Commission found that:

> 9. [After the heating system became inoperable in 1987], Mr. Seagle's duties consisted mainly of providing building security. During the period of time from the date production ceased, insulation on the steam pipes was deteriorating, breaking off of the pipes and falling on the floor. Mr. Seagle was exposed to insulation dust on a regular basis throughout this period.

The "Singer Defendants" pointed to N.C. Gen Stat. §97-57 which provides: "For the purpose of this section when an employee has been exposed to the hazards of asbestosis . . . for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious . . . ." Accordingly, the "Singer Defendants" demonstrated an obvious ambiguity between the Full Commission's opinion and award based upon a last injurious exposure of no later than 1 June 1987, and the statement in Finding of Fact 9 that "Mr. Seagle was exposed to insulation dust on a regular basis [between 31 January 1987 and 13 September 1987].

Recognizing this inconsistency, on 6 October 1998, this Court, in an unpublished opinion, affirmed in part and reversed in part the Full Commission's opinion and award. We

remanded the case to the Full Commission for "a finding regarding whether Mr. Seagle's exposure to insulation dust after the winter of 1986-1987 'proximately augmented [Mr. Seagle's] disease, however slight.'" In response to our remand, the Full Commission reissued its opinion and award on 26 March 1999 finding under Finding of Fact 11 that:

> 11. There is insufficient evidence of record from which to prove by the greater weight [of the evidence] that Mr. Seagle's exposure to insulation dust after 31 January 1987 and until his transfer to another plant on 13 September 1987 augmented his occupational diseases to any extent, however slight.

Thus, on remand the Full Commission again found as fact, and concluded as a matter of law, that the "Singer Defendants" and National Union were jointly and severally liable for Mr. Seagle's asbestosis. From this opinion and award, the "Singer Defendants" appeal.

By every assignment of error on appeal, the "Singer Defendants" argue that N.C. Gen. Stat. §97-57 creates an irrebuttable presumption that the last thirty days of work subjecting a claimant to the hazards of asbestos is the period of last injurious exposure. Therefore, defendants argue, Mr. Seagle's exposure to insulation dust after 1 June 1987 was injurious. Although the "Singer Defendants" are correct about the irrebuttable presumption, they fail to recognize that the Full Commission, on remand, made a factual determination that the evidence in the record did not support a finding that Mr. Seagle was subject to the hazards of asbestosis after 1 June 1987. After carefully reviewing the record, we hold that the Full Commission's Finding of Fact 11 is supported by competent evidence.

"Under our Workers' Compensation Act, 'the Commission is the fact finding body.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)). "The Commission's findings of fact "'are conclusive on appeal if supported by any competent evidence.'" *Adams,* 349 N.C. at

681, 509 S.E.2d at 414 (quoting *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). Thus, this Court is precluded from weighing the evidence on appeal; rather, we can do no more than "'determine whether the record contains any evidence tending to support the [challenged] finding.'" *Adams,* 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted).

Here, the "Singer Defendants" are challenging the Commission's Finding of Fact 11. The "Singer Defendants" note that N.C. Gen. Stat. §97-57 provides: "For the purpose of this section when an employee has been exposed to the hazards of asbestosis . . . for as much as 30 working days . . . within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious." Thus, the factual finding was whether Mr. Seagle was exposed "to the hazards of asbestosis" after 1 June 1987 for a thirty day period. The record is replete with "competent" evidence that Mr. Seagle was not exposed to the hazards of asbestosis after 31 January 1987; Mr. Seagle spent less that five hours a week in the plant after 31 January 1987; and Mr. Seagle ceased performing insulation maintenance after 31 January 1987. Accordingly, these assignments of error are without merit.

In the alternative, the "Singer Defendants" apparently argue Finding of Fact 9 is inconsistent with Finding of Fact 11. In Finding of Fact 9 the Commission found that "Mr. Seagle was exposed to insulation dust on a regular basis [between 31 January 1987 and13 September 1987]." However, in Finding of Fact 11 the Full Commission found that: "There is insufficient evidence of record from which to prove by the greater weight [of the evidence] that Mr. Seagle's exposure to insulation dust after 31 January 1987 and until his transfer to another plant on 13 September 1987 augmented his occupational diseases to any extent, however slight." Although individual factual findings might be facially inconsistent, this mere inconsistency does not render the factual findings null and void as a matter of law. Rather, we have consistently held

that "if the evidence before the Commission is capable of supporting two conflicting findings, the determination of the Commission is conclusive on appeal." *Blankley v. White Swan Uniform Rentals*, 107 N.C. App. 751, 754, 421 S.E.2d 603, 605 (1992). Thus, even if the Commission recited facts tending to support the "Singer Defendants," the "Commission has the duty and authority to resolve conflicts in the testimony." *Id.*; *see also* Hawley *v. Wayne Dale Const.*, 146 N.C. App. 423, 428, 552 S.E.2d 269, 272 (2001) (holding that the "Commission may weigh the evidence and believe all, none or some of the evidence") (citations omitted). Accordingly, this assignment of error is without merit.

In sum, because "there is some competent evidence in the record to support" the Commission's findings of fact, "we hold that the Commission's findings of fact [are] conclusive on appeal." *Adams*, 349 N.C. at 682, 509 S.E.2d at 414. We also conclude that these findings of fact support the Commission's conclusions of law.

Affirmed.

Judges GREENE and McCULLOUGH concur.

Report per Rule 30(e).

NOTE

1. As noted, Mr. Seagle worked at one plant for forty-five years. Over the course of his employment, ownership and insurance carriers of the plant changed on numerous occasions. As evidenced by the record, the procedural history of this case is complex and filled with amendments adding new parties and dismissals eliminating other parties. This procedural complexity has been resolved below, and no issues are presented herein. Accordingly, throughout this opinion defendants are referred to as the "Singer Defendants."