NO. COA10-1279
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

JAMES PRESSLEY TORRENCE, SR.,
Employee,
Plaintiff

v.

North Carolina Industrial Commission
I.C. NO. 061152

AEROQUIP n.k.a. EATON CORP.,
Employer, SELF-INSURED (SEDGWICK CMS, Third-Party Administrator),
Defendant

Appeal by defendant from Opinion and Award entered 22 April 2010 in the North Carolina Industrial Commission. Heard in the Court of Appeals 24 March 2011.

*Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Martha W. Surles and M. Duane Jones, for Defendant.*

*Wallace and Graham, P.A., by Michael B. Pross, for Plaintiff.*

THIGPEN, Judge.

James Pressley Torrence, Sr. (Plaintiff), worked for Aeroquip, Eaton Corp. (Defendant) from 1988 to 1990, during which time he was allegedly exposed to asbestos, from which Plaintiff developed asbestosis. Defendant appeals an Opinion

and Award from the Full Commission awarding Plaintiff compensation for his occupational disease, arguing the Full Commission erred by failing to admit probative evidence and failing to credit against Plaintiff's award the amount of a separate settlement agreement from a different employer, Fieldcrest Cannon, Inc. We affirm the Opinion and Award of the Full Commission.

The evidence tends to show Plaintiff was employed by Defendant from 17 August 1988 to 12 March 1990. Plaintiff also worked for Fieldcrest Cannon, from July 1983 to February 1988 and from March 1990 to June 1999.

Plaintiff's job with Defendant involved the grinding and filing of automobile parts. The automobile parts contained asbestos. Plaintiff worked for Defendant five to six days per week and eight hours per day. The grinding and filing created dust, which would get on the faces, bodies and clothes of Defendant's employees. Fans in the work area continually stirred the dust. Plaintiff was further exposed to asbestos in the workplace, which fell from pipe insulation that was in poor condition.

While working for Fieldcrest Cannon during the period of time from 1983 to 1988, Plaintiff worked approximately 100 to

150 feet away from asbestos insulated pipes, which were in good shape and not creating dust; Plaintiff was in closer proximity with the pipes approximately once per week. When Plaintiff returned to Fieldcrest Cannon in 1990, Plaintiff worked in an area far removed from asbestos and was not exposed to asbestos.

Dr. Stephen Proctor diagnosed Plaintiff with pleural thickening and asbestosis due to asbestos exposure. Dr. Proctor believed Plaintiff developed asbestosis and pleural thickening as a result of his exposure to asbestos dust while employed by Defendant. Dr. Fred Dula also opined Plaintiff's x-rays were consistent with asbestosis and bilateral pleural thickening along Plaintiff's chest walls.

The Full Commission concluded that Plaintiff developed asbestosis as a direct result of his employment with Defendant. The Full Commission also concluded that Plaintiff's last injurious exposure to asbestos occurred during his employment with Defendant, and Defendant "is the responsible employer for [P]laintiff's asbestosis." The Full Commission awarded Plaintiff $40,000 for damage to important internal organs and all medical expenses incurred as a result of his asbestosis. From this Opinion and Award, Defendant appeals.

I: Standard of Review

In reviewing a decision by the Industrial Commission, our Court's role "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991) (citation omitted). "The Commission's findings of fact are conclusive upon appeal if supported by competent evidence, even if there is evidence to support a contrary finding." *Kelly v. Duke Univ.*, 190 N.C. App. 733, 738, 661 S.E.2d 745, 748 (2008), *disc. review denied*, 363 N.C. 128, 675 S.E.2d 367 (2009) (citation omitted). On appeal, this Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight[;] [t]he court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *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) (quotation omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Id.*, 349 N.C. at 680, 509 S.E.2d at 413 (quotation omitted). "[F]indings of fact by the Commission may [only] be set aside on appeal when there is a complete lack of competent evidence to support them[.]"

*Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000) (citation omitted). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

I: Admission of Evidence

In its first argument on appeal, Defendant contends the Full Commission erred by failing to admit and consider evidence, including abatement records and a separate record on appeal, and that the Full Commission's failure to consider the contested evidence affected its ultimate conclusion that Defendant was liable for Plaintiff's compensable occupational disease. We disagree.

"[E]videntiary procedures before administrative agencies are not so formal as litigation conducted in the superior courts." *Eury v. North Carolina Employment Sec. Comm'n*, 115 N.C. App. 590, 602, 446 S.E.2d 383, 390 (1994) (citations omitted). "Strictly speaking, the rules of evidence applicable in our general courts do not govern the Commission's own administrative fact-finding." *Haponski v. Constructor's, Inc.*, 87 N.C. App. 95, 97, 360 S.E.2d 109, 110 (1987) (citations omitted).

> The Industrial Commission is an administrative board, with *quasi-judicial*

> functions. The manner in which it transacts its business is a proper subject of statutory regulation and need not necessarily conform to court procedure except where the statute so requires, or where, in harmony with the statute, or where it fails to speak, the Court of last resort, in order to preserve the essentials of justice and the principles of due process of law, shall consider rules similar to those observed in strictly judicial investigations in courts of law to be indispensable or proper. . . . Under these conditions we might expect a liberal treatment by the courts of the procedure adopted by the Commission with respect to the reception and consideration of evidence upon a claim in "dispute."

*Maley v. Thomasville Furniture Co.*, 214 N.C. 589, 594, 200 S.E. 438, 441 (1938).

The Workers' Compensation Rules of the North Carolina Industrial Commission provide, "[e]xcept under unusual circumstances, all lay evidence must be offered at the initial hearing." 4 N.C.A.C. 10A.0612(c). "Lay evidence can only be offered after the initial hearing by order of a Commissioner or Deputy Commissioner." *Id.* Furthermore, Industrial Commission Rule 701(6) states that upon appeal to the Full Commission, "[n]o new evidence will be presented to or heard by the Full Commission unless the Commission in its discretion so permits." 4 N.C.A.C. 10A.0701(f).

N.C. Gen. Stat. § 97-85 provides, "the full Commission shall review the award [of a deputy commissioner], and, *if good ground be shown therefor*, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award[.]" A party "does not have a substantial right to require the Commission to hear additional evidence, and the duty to do so only applies if good ground is shown." *Allen v. Roberts Elec. Contrs.*, 143 N.C. App. 55, 65-66, 546 S.E.2d 133, 141 (2001). "[W]hether 'good ground be shown therefor[]' in any particular case is a matter within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of discretion." *Lynch v. M. B. Kahn Constr. Co.*, 41 N.C. App. 127, 131, 254 S.E.2d 236, 238, *cert. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979); *see also Chisholm v. Diamond Condominium Constr. Co.*, 83 N.C. App. 14, 20, 348 S.E.2d 596, 600 (1986), *disc. review denied*, 319 N.C. 103, 353 S.E.2d 106 (1987).

In the present case, the matter was heard before Deputy Commissioner George T. Glenn on 23 February 2009. Following the hearing, the record was held open to allow the parties to submit additional evidence. On 12 March 2009, Commissioner Glenn

ordered, at the request of the parties, that the parties "shall have 60 days (April 24, 2009) from the date of the hearing to submit any and all other evidence[.]" On April 22, Defendant submitted Defendant's Exhibit No. 8, the Record on Appeal for COA01-258, ***Baker v. Ivester***, and Defendant's Exhibit No. 9, abatement records from the North Carolina Department of Health and Human Services, Division of Public Health. On 24 April 2009, Plaintiff filed a motion to strike Defendant's Exhibits 8 and 9. In Plaintiff's motion, Plaintiff stated that Defendant's Exhibit 8 is "another copy of the same Court of Appeals Record on Appeal the Defense counsel offered at the hearing" on 24 February 2009, which, after objection by Plaintiff, "was not admitted by" Commissioner Glenn. With regard to Defendant's Exhibit 9, Plaintiff stated that Defendant "has not called any witness to either authenticate the materials or somehow make them relevant to this matter." Commissioner Glenn closed the record on 22 August 2009. Although Commissioner Glenn did not comment on whether he allowed the record on appeal and abatement records, Exhibits 8 and 9, into evidence, Commissioner Glenn did list the items he allowed into evidence during the period the record remained open, and Exhibits 8 and 9 were not included in the list.

On appeal to the Full Commission, Defendant provided the Full Commission an attached copy of Exhibits 8 and 9 and a letter stating, "[t]hese are part of the point[s] of error raised for Full Commission review." In a "Points of Error" attachment to Defendant's Form 44, Defendant further stated that "Deputy Commissioner Glenn erred in failing to admit into evidence and considering Defendant's Exhibits 8 and/or 9[.]" The Full Commission concluded, "[t]he appealing party has not shown good grounds to reconsider the evidence, receive further evidence, or rehear the parties and their representatives."

Defendant argues that the Full Commission's failure to reopen the case and consider the contested evidence affected its ultimate conclusion that Defendant was liable for Plaintiff's compensable occupational disease. Defendant specifically argues that the record on appeal and the abatement records tended to show that Defendant was not the employer that "last injuriously exposed" Plaintiff to asbestos, and therefore, Defendant should not be liable. *See* N.C. Gen. Stat. 97-57 (2009) ("In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance

carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable").

Our review is whether the Full Commission abused its discretion by concluding Defendant did not show good grounds for the admission of Exhibits 8 and 9. Although the record shows Defendant submitted a brief to the Full Commission, the brief is not included in the record on appeal. Other than copies of Exhibits 8 and 9, the letter stating the exhibits were part of the points of error raised for Full Commission review, and the statement that "Deputy Commissioner Glenn erred in failing to admit" Exhibits 8 and 9, the record is silent as to any showing by Defendant to the Full Commission that there were good grounds to reopen the case for the admission of Exhibits 8 and 9. A showing[1] of good grounds to receive further evidence requires more than simply a submission of the evidence the party desires that the Full Commission consider. *See Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 366, 163 S.E.2d 17, 19 (1968) (holding the Full Commission did not abuse its discretion in concluding the party had not shown good grounds to receive an additional

[1]We believe showing good grounds is similar to "show[ing] cause" which is defined as follows: "To produce a satisfactory explanation or excuse, usu. in connection with a motion or application to a court." Black's Law Dictionary 1505 (9th. ed. 2009).

affidavit from a medical doctor, because the party "did not state *any* grounds" in the motion, much less good grounds) (Emphasis in original). Because the record contains no evidence that Defendant presented the Full Commission with good grounds to reopen the case, we conclude the Full Commission did not abuse its discretion in denying the admission of the evidence.

II: Cross-Examination

In its second argument on appeal, Defendant contends the Full Commission erred by failing to remand the matter to the deputy commissioner to allow Defendant to properly cross-examine Plaintiff. We disagree.

We reiterate that a party "does not have a substantial right to require the Commission to hear additional evidence, and the duty to do so only applies if good ground is shown." *Allen*, 143 N.C. App. at 65-66, 546 S.E.2d at 141. "[T]he question of whether to reopen a case for the taking of additional evidence is addressed to the sound discretion of the [Full] Commission, and its decision is not reviewable on appeal in the absence of a manifest abuse of that discretion." *Pickrell v. Motor Convoy, Inc.*, 82 N.C. App. 238, 243-44, 346 S.E.2d 164, 168 (1986), *rev'd on other grounds*, 322 N.C. 363, 368 S.E.2d 582 (1988).

In the present case, Defendant argues on appeal that "the Deputy Commissioner did not allow Defendant to conduct a proper cross-examination of the Plaintiff" because the Deputy Commissioner "abrogat[ed] and abridg[ed]" Defendant's cross-examination.

On appeal to the Full Commission, Defendant's "Points of Error" state that "Deputy Commissioner Glenn erred in failing to require Plaintiff to establish his last injurious exposure[.]" The record on appeal, however, is otherwise silent as to any showing by Defendant before the Full Commission demonstrating good grounds to allow Defendant to cross-examine Plaintiff a second time. Because the law requires that a party show good grounds to reopen a case for the admission of further testimony, and because the record contains no evidence that Defendant presented the Full Commission with good grounds to reopen the case, we conclude the Full Commission did not abuse its discretion in determining there were not good grounds to remand the matter to the deputy commissioner to allow Defendant to cross-examine Plaintiff a second time. *See Klopman Mills, Inc.*, 2 N.C. App. at 366, 163 S.E.2d at 19

III: Credit

In its third and final argument on appeal, Defendant contends the Full Commission erred by failing to award Defendant a credit for the proceeds of a settlement previously paid in this claim. We disagree.

In this case, when Plaintiff initiated his workers' compensation claim, Plaintiff included both Fieldcrest Cannon and Defendant on his Form 18B. Plaintiff thereafter settled the portion of the claim against Fieldcrest Cannon. In the Agreement of Final Settlement and Release, Fieldcrest Cannon and Plaintiff agreed to the following:

> WHEREAS, the Employer contends that it has no liability to the Employee for any compensation under the North Carolina Workers' Compensation Act, inasmuch as the Employee was not exposed to the hazards of asbestos or other occupational lung disease and is not suffering from the disease of asbestosis or any of its related consequences and further denies that the employee has an occupational hearing loss or any other occupational disease due to employment with employer; and . . .
>
> WHEREAS, both parties acknowledge that the issues herein have been strongly contested by the Employee and the Employer; and . . .
>
> WHEREAS, the Employee and Employer desire to compromise and settle all matters in controversy among themselves, without the necessity of any hearing before the North Carolina Industrial Commission, subject to the approval of said Commission, as by law provided; both parties acknowledge that the

> desired settlement of this matter is the result of their desire to avoid lengthy and perhaps fruitless litigation, and that the settlement is not the result of any pending or threatened sanctions.

Furthermore, in the Order Approving Compromise Settlement Agreement, the Industrial Commission noted the following:

> It is expressly recognized that plaintiff's claim is strongly contested, that defendant is not by this agreement admitting, nor is the Industrial Commission finding, liability and that plaintiff, by accepting the agreement is avoiding the risk that the claim will be totally denied by the Commission.

Defendant, however, chose not to settle and proceeded to hearing.

On appeal to the Full Commission, Defendant stated in its attachment to the points of error that "Deputy Commissioner Glenn erred in failing to give the Defendant-Employer a credit for benefits paid by Fieldcrest Cannon for the Clincher[2] approved by the Commission in this claim[.]" The Full Commission, in its Opinion and Award, did not provide Defendant an offset based on the amount of the settlement between Plaintiff and Fieldcrest Cannon. The Commission, however, did not make findings of fact

---

[2]A "clincher" settlement agreement is "a form of voluntary settlement recognized by the Commission and used to finally resolve contested or disputed workers' compensation cases." ***Freeman v. Rothrock***, __ N.C. App. __, __, 689 S.E.2d 569, 574 (2010) (quotation omitted).

and conclusions of law with regard to an offset or credit. This notwithstanding, "questions of law are reviewed *de novo*." *Nicholson v. Edwards Wood Prods.*, 175 N.C. App. 773, 776, 625 S.E.2d 562, 564 (2006) (citation omitted).

Without citing any workers' compensation opinion from either this Court or our Supreme Court, nor any other Rule of the Industrial Commission or North Carolina statute as authority, Defendant argues that the award to Plaintiff in this case should be offset by the settlement amount received by Plaintiff from Fieldcrest Cannon.

This Court addressed a similar question in the context of a "clincher" settlement agreement in *Freeman v. Rothrock*, __ N.C. App. __, __, 689 S.E.2d 569, 574 (2010). In *Rothrock*, the defendants argued that they were entitled to a credit against the compensation for which they were liable, based on payments that were made to the plaintiff in prior settlements of prior claims. This Court upheld the Full Commission's findings and conclusions rejecting the defendants' argument that they were entitled to a credit from the plaintiff's settlement.

We believe *Rothrock* is instructive in this case. Here, even though Plaintiff included both Fieldcrest Cannon and Defendant on his Form 18B when Plaintiff initiated his workers'

compensation claim, the facts surrounding Plaintiff's claim against Fieldcrest Cannon and Plaintiff's claim against Defendant are completely different. The Full Commission concluded that Plaintiff developed asbestosis as a direct result of his employment with Defendant. The Full Commission also concluded that Plaintiff's last injurious exposure to asbestos occurred during his employment with Defendant, and Defendant "is the responsible employer for [P]laintiff's asbestosis." The Full Commission made no such conclusion or finding with regard to Fieldcrest Cannon. In fact, Fieldcress Cannon stated in the settlement agreement "that it has no liability to the Employee for any compensation under the North Carolina Workers' Compensation Act[,]" and the Commission reiterated, "defendant is not by this agreement admitting, nor is the Industrial Commission finding, liability[.]"

Based on the foregoing facts of this case and our Court's holding in ***Rothrock***, we conclude the Full Commission did not err by failing to award Defendant a credit for the proceeds of a settlement previously paid by Fieldcrest Cannon.

In summary, we conclude that the Full Commission did not abuse its discretion by deciding Defendant had not shown good grounds to enter into evidence Defendant's Exhibits 8 and 9; nor

by deciding Defendant had not shown good grounds for the remand of the matter to the Deputy Commissioner for another cross-examination of Plaintiff. We further conclude the Full Commission did not err by failing to offset Plaintiff's Award based on Plaintiff's settlement with Fieldcrest Cannon.

AFFIRMED.

Judges STROUD and HUNTER, JR. concur.

Report per Rule 30(e).