NO. COA12-345

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 2012

CHRISTOPHER SCEARCE,
Plaintiff, Employee

v.

From the Industrial Commission
I.C. No. 148393

CHEMTEK, INC., Employer,
TRAVELERS, Carrier, and KEY RISK INSURANCE COMPANY/ASSIGNED RISK PLAN, Carrier, (BERKLEY RISK ADMINISTRATORS COMPANY, Administrator,
Defendants.

Appeal by Plaintiff and Defendants from opinion and award entered 28 November 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 August 2012.

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

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Kenneth E. Menzel, for Defendants Chemtek, Inc. and Key Risk Insurance Company.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Harmony Whalen Taylor and M. Duane Jones, for Defendant Travelers Insurance Company.

THIGPEN, Judge.

Plaintiff was diagnosed with acute myelogenous leukemia ("AML") on 5 September 2006. The lawsuit underlying this appeal is predicated upon Plaintiff's allegations that his exposure to the chemical benzene during and within the scope of his employment at Chemtek, Inc. ("Chemtek") caused or significantly contributed to the development of his disease. Plaintiff appeals from an opinion and award entered 28 November 2011 by the Full Commission of the North Carolina Industrial Commission ("the Full Commission" or "the Commission") denying his occupational disease claim. On appeal, Plaintiff raises several contentions, namely: (1) the Commission erred in failing to find his disease compensable; (2) the Commission erred in relying on medical causation testimony offered by one of Defendants' expert witnesses, a toxicologist; (3) the Commission erred in determining Plaintiff's level of benzene exposure; and (4) the Commission erred by considering Plaintiff's lawsuit against another prior employer in reaching its decision.

Defendants Chemtek, Key Risk Insurance Company ("Key Risk"), and Travelers Insurance Company ("Travelers") (collectively, "Defendants") also appeal from the Commission's 28 November 2011 ruling, contending the Commission erred in

failing to impose sanctions against Plaintiff for bringing and maintaining this action without reasonable grounds. For the reasons that follow, we affirm the portion of the Commission's opinion and award denying Plaintiff's claim, but remand to the Commission for a determination on the issue of sanctions.

I. Factual & Procedural Background

The evidence of record indicates that Plaintiff worked as a truck driver in the early 2000's and then as an employee at Entwistle, a weapons manufacturing company, from 2002 to 2005. While employed at Entwistle, Plaintiff was regularly exposed to the chemical toluene, which gave him headaches and caused the skin on his hands to crack. Plaintiff was advised to wear gloves, but chose not to, believing that they would reduce his productivity. Plaintiff has filed civil lawsuits against both previous employers, alleging that his exposure to gasoline while working as a truck driver and his exposure to toluene while working at Entwistle led to the development of his AML.

Plaintiff commenced his employment with Chemtek as a maintenance worker in 2005.[1] Around this time, Chemtek began manufacturing "PaveRx,"[2] a product "designed to protect airport

[1]Plaintiff had been employed previously by Chemtek as a temporary worker in the early 2000's.

[2]The product was initially labeled "Rejuvaseal," but was

runways" and one of the two sources of Plaintiff's alleged exposure to benzene during and within the scope of his employment at Chemtek. Dr. Michael Kinnaird, a chemist at Chemtek, was primarily responsible for developing PaveRx, which consisted of three component parts: (1) light carbolic oil; (2) RT-12; and (3) Aromatic 100. Although Dr. Kinnaird did not test the final product for the presence of benzene, he did review Material Safety Data Sheets ("MSDSs") describing the raw materials composing PaveRx and determined that neither PaveRx nor any of its component parts contained benzene.

Chemtek manufactured PaveRx at its facilities on nine occasions during Plaintiff's employment. Plaintiff was present at Chemtek on six of these occasions, and his role in the PaveRx manufacturing process consisted of "moving hoses, repairing electrical box malfunctions, and being generally present in the event that equipment maintenance or repair was needed." Plaintiff was also responsible for maintaining the PaveRx "pad," which Plaintiff described as having "a couple inches of tar caked on" it. Plaintiff wore safety glasses, but no other safety equipment while working in the presence of PaveRx, despite the fact that he could smell the product and that his

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later renamed "PaveRx."

pants would sometimes be covered in chemicals at the end of the work day.

The second source of Plaintiff's alleged exposure to benzene at Chemtek involved Plaintiff's use of a parts washer, which Plaintiff used "to clean grease and debris off the various items with which he was working." Plaintiff wore gloves while performing this task, but the gloves tore occasionally and were ineffective in preventing the mineral spirits used in the cleaning process from splashing up onto Plaintiff's arms, legs, and chest. Plaintiff used the parts washer for a period of one to two hours at a time, though not on a daily basis.

Plaintiff left his employment with Chemtek on 31 August 2006. Approximately one week later, Plaintiff was diagnosed with AML—Type M4, a rare subcategory of AML that involves translocation of the 16th chromosome. Following treatment, which included chemotherapy, Plaintiff was able to return to his maintenance position at Chemtek for a brief period of time before suffering a relapse in July 2007.[3] Plaintiff has been unable to work since that time.

On 3 March 2009, Plaintiff filed a Form 18 alleging that prolonged exposure to certain chemicals during and within the

[3]Plaintiff notes in his appellant brief that "the relevant period of exposure took place between May 2005 and August 2006."

scope of his employment at Chemtek contributed to his development of AML. Chemtek filed a Form 61 denying liability on grounds that "Plaintiff's position did not expose him a sufficient amount to any chemicals or substances that may have caused his [AML]," and that "[e]ven if Plaintiff had been exposed to any chemicals or substances as alleged by Plaintiff, the exposure to such chemicals/substances was not a significant contributing factor to Plaintiff's development of AML." Plaintiff thereafter filed a Form 33 requesting a hearing before the North Carolina Industrial Commission seeking benefits pursuant to N.C. Gen. Stat. §§ 97-31(24), 97-30, and 97-29, and attorneys' fees.

The parties entered into a Pre-Trial Agreement stipulating, *inter alia*, to the dates of Plaintiff's employment at Chemtek (May 2005 through 31 August 2006 and mid-Spring 2007 through mid-Summer 2007) and to the periods of coverage for Chemtek's insurance carriers Key Risk (31 March 2005 through 30 March 2006 and 16 May 2006 through August 2006) and Travelers (1 April 2006 through 15 May 2006). The matter came on for hearing before Deputy Commissioner George T. Glenn, II, on 17 May 2010 and 11 August 2010. On 29 April 2011, Deputy Commissioner Glenn filed an opinion and award denying Plaintiff's claim for occupational

disease. Plaintiff appealed to the Full Commission, and Defendants moved for sanctions against Plaintiff pursuant to N.C. Gen. Stat. § 97-88.1, asserting that Plaintiff had "brought and continued to prosecute this claim without reasonable grounds."

On 28 November 2011, the Full Commission filed an opinion and award affirming with modifications the opinion and award of the deputy commissioner. In reaching its decision, the Full Commission considered expert testimony from both sides concerning Plaintiff's alleged exposure to benzene and whether and to what degree this exposure contributed to Plaintiff's disease. The expert testimony proffered before the Commission consisted of the following:

(1) Stephen Petty, a certified industrial hygienist and chemical engineer, testified for Plaintiff and opined that Plaintiff was exposed to benzene both through his work with PaveRx and with the parts washer. With respect to Plaintiff's PaveRx exposure, Mr. Petty referenced studies from 1921, 1941, and 1957, which discussed the presence of benzene in petrochemicals, and cited a 1957 document for the proposition that benzene can cause leukemia. Mr. Petty also cited chemical engineering textbooks from the 1970s to demonstrate the presence

of benzene in coal products and a 1941 diagram produced by Koppers Company, Inc., a coal products manufacturer, to illustrate that coal contains benzene, and, therefore, that the coal product supplied to Chemtek to make PaveRx must have also contained benzene. Because Chemtek did not produce the MSDSs for the coal tar product actually used in manufacturing PaveRx, Mr. Petty relied on MSDSs from other companies describing the composition of coal tar, including an MSDS indicating the presence of benzene in coal tar to be as high as 60 to 90 percent. Mr. Petty also relied on a 2004 report produced by the National Toxicology Program of the United States Department of Health and Human Services indicating the presence of benzene in coal tar. With respect to Plaintiff's use of the parts washer, Mr. Petty stated that the varsol and mineral spirits used by Plaintiff to clean items in the parts washer would have contained benzene.

(2) Dr. Nachman Brautbar, a physician and qualified medical examiner, also testified as an expert for Plaintiff. Dr. Brautbar relied on Mr. Petty's report in testifying that Plaintiff was exposed to "pretty high levels" of benzene — 23 parts per million years — while at Chemtek. Dr. Brautbar opined that Plaintiff's exposure to benzene through his exposure to

coal tar, solvent naphtha, coal tar oils, and mineral spirits at Chemtek placed him at an increased risk of and was a substantial factor in Plaintiff's development of AML.

(3) Dr. Kinnaird, Chemtek's chemist, testified as a witness for Defendants and stated that Mr. Petty's analysis was based on several flawed assumptions, including the assumption that coal tar was used in the manufacture of PaveRx and that Plaintiff had used certain mineral spirits in connection with the parts washer. Dr. Kinnaird believed "the possibility of benzene exposure secondary to the manufacture of PaveRx to be negligible at best."

(4) Defendants also offered testimony from Matthew Parker, a certified industrial hygienist. Mr. Parker testified that he had reviewed the MSDSs for the compounds Plaintiff worked with at Chemtek and found that none of the MSDSs identified benzene as a component. He concluded this meant the benzene concentration in each of the products was no greater than 0.1%, as a benzene concentration exceeding that level must be listed on the MSDS to comply with OSHA regulations. Mr. Parker assumed a "worst-case scenario" for exposure and concluded that Plaintiff's involvement with the PaveRx manufacturing process at Chemtek resulted in a benzene exposure of 0.005 parts per

million years, which is approximately 1/2000 the permissible benzene exposure limit under OSHA regulations. Mr. Parker further estimated Plaintiff's benzene exposure secondary to his use of the parts washer at 0.05 parts per million years.

(5) Robert James, Ph.D., a toxicologist, testified on Defendants' behalf and described Mr. Petty's analysis as "very flawed" in that it rested upon many assumptions that "tend[ed] to exaggerate the exposure duration, the exposure rate, and the exposure concentration to benzene." Dr. James explained that approximately 80 to 90 percent of AML cases are idiopathic, meaning that they result from genetic deficiencies and not from chemical exposure. Dr. James opined that Plaintiff's disease was likely idiopathic because Plaintiff's exposure to benzene was "de minimis" and could not have contributed to his disease. Dr. James noted that Plaintiff was 33 years old when he developed AML and that the median age for developing idiopathic AML—Type M4 is 34. Dr. James also cited Plaintiff's history of smoking as a possible contributing factor.

The Commission found as fact, *inter alia*, that "Mr. Petty based his exposure calculations on antiquated data involving constituent parts that were never present at the Chemtek facility[,]" and that "[t]he conclusions reached by Dr. James

are given more weight than the conclusion reached by Dr. Brautbar, as the exposure levels calculated by Dr. James are found to be better indicators of the actual level of benzene to which plaintiff was exposed." The Commission also entered findings of fact describing Plaintiff's history of smoking cigarettes, his second-hand exposure to cigarette smoke, and his "primary hobby," repairing and restoring cars, which Plaintiff had engaged in since the age of thirteen and which had exposed him to mineral spirits and brake cleaner.

Based on the evidence presented and the findings of fact as described above, the Commission concluded in substance that Plaintiff had failed to establish a prima facie case because he failed to show that his exposure to benzene through his employment with Chemtek contributed to his development of AML or placed Plaintiff at a greater risk of contracting AML than that of the general public. The Commission did not enter any findings of fact or conclusions of law addressing Defendants' request for sanctions. Both Plaintiff and Defendants timely filed notices of appeal with this Court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-29(a) (2011), as Plaintiff and Defendants appeal from a

final decision of the North Carolina Industrial Commission as a matter of right.

III. Analysis

A. Plaintiff's Appeal

1. Standard of Review

Appellate review of an opinion and award from the Industrial Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). "The full Commission's findings of fact 'are conclusive on appeal when supported by competent evidence,' even if there is evidence to support a contrary finding." *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 369, 616 S.E.2d 403, 408 (2005) (citation omitted). "Under our Workers' Compensation Act, 'the Commission is the fact finding body.' 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (citations omitted). "Although the Industrial Commission is the sole judge of the credibility and the evidentiary weight to be given to witness testimony, the

Commission's conclusions of law are fully reviewable[.]" *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003) (internal citation omitted).

2. Existence of a Compensable Occupational Disease

Plaintiff first contends the Commission erred in determining that his disease is not compensable. We disagree.

"For an injury to be compensable under our Workers' Compensation Act, it must be either the result of an accident arising out of and in the course of employment or an occupational disease." *Nix v. Collins & Aikman, Co.*, 151 N.C. App. 438, 442, 566 S.E.2d 176, 178-79 (2002) (citations and quotation marks omitted). Section 97-53 of our General Statutes sets forth a list of compensable occupational diseases due to chemical exposure. N.C. Gen. Stat. § 97-53 (2011). Because leukemia is not among the occupational diseases specifically enumerated under N.C. Gen. Stat. § 97-53, Plaintiff was required to prove that he suffered from an occupational disease under the catchall provision of N.C. Gen. Stat. § 97-53(13), which defines an occupational disease to include:

> Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary

> diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. Stat. § 97-53(13) (2011). In order to prove the existence of an occupational disease, the claimant must prove the following three elements: "'(1) the disease must be characteristic of a trade or occupation, (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment,' and (3) proof of a causal connection between the disease and the employment." ***Nix***, 151 N.C. App. at 442, 566 S.E.2d at 179 (quoting ***Hansel v. Sherman Textiles***, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981)). The third element, causation, requires the claimant to demonstrate that the employment "significantly contributed to, or was a significant causal factor in, the disease's development." ***Rutledge v. Tultex Corp.***, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983). The employment is a "significant contributing factor" if without it the occupational disease "'would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.'" ***Baker v. City of Sanford***, 120 N.C. App. 783, 788, 463 S.E.2d 559, 563 (1995) (quoting ***Rutledge***, 308 N.C. at 102, 301 S.E.2d at 370).

Our review of Plaintiff's arguments on this issue reveals Plaintiff's misunderstanding of the applicable standard of review. Plaintiff contends his exposure to benzene at Chemtek placed him at an increased risk of developing and contributed to his leukemia; however, instead of challenging the Commission's findings, Plaintiff merely recites evidence before the Commission that he asserts was sufficient to carry his burden in proving the existence of an occupational disease. Plaintiff fails to recognize that the Commission's findings of fact "are conclusive on appeal when supported by competent evidence ***even where evidence exists that would support a contrary finding***." *Keeton v. Circle K*, __ N.C. App. __, __, 719 S.E.2d 244, 247 (2011) (emphasis added) (citing *Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004)). As articulated *supra*, our standard of review precludes us from reweighing the evidence presented before the Commission. "The Industrial Commission and the appellate courts have distinct responsibilities when reviewing workers' compensation claims[,]" *Billings v. Gen. Parts, Inc.*, 187 N.C. App. 580, 584, 654 S.E.2d 254, 257 (2007), and this Court "'does not have the right to weigh the evidence and decide the issue on the basis of its weight. Th[is] [C]ourt's duty goes no further than to determine

whether the record contains any evidence tending to support the finding.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted).

We note that the following, uncontested findings of fact support the Commission's conclusion that Plaintiff failed to carry his burden in proving the existence of a compensable claim:

> 2. Plaintiff was diagnosed with [AML]—Type M4 on September 6, 2006, which involves an inversion of the 16th chromosome.
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> 3. In the early 2000's, plaintiff was employed by a previous employer as a truck driver. In a civil lawsuit filed by both plaintiff and his wife, the couple alleged that plaintiff was exposed to gasoline while employed by this company and that said exposure led to the development of his AML.
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> . . . .
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> 7. Entwistle has also been named as a defendant in a civil lawsuit filed by both plaintiff and his wife, who are alleging that plaintiff developed AML due to his exposure to toluene while employed by Entwistle.
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> 8. After leaving Entwistle in 2005, plaintiff began working for Chemtek as a maintenance worker in its maintenance department. . . .
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> 9. In late 2005, Chemtek began manufacturing a product . . . "PaveRx." . . .
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> 10. . . . Based upon his research and

review of the component parts which went into the overall PaveRx product, Dr. Kinnaird determined that neither the overall product nor any of its component parts contained benzene. Therefore, Dr. Kinnaird considered the possibility of benzene exposure secondary to the manufacture of PaveRk to be negligible at best.

11. PaveRx was manufactured by Chemtek on a total of nine occasions during the entirety of plaintiff's employment. . . . [P]laintiff was present at the Chemtek facility for only six of the nine occasions on which PaveRx was manufactured.

. . . .

14. Plaintiff began smoking cigarettes in his early twenties and occasionally smoked cigars. During his youth, his mother smoked and as a result he was exposed to smoke until he left home.

15. As a primary hobby, plaintiff repaired and restored automobiles for his personal use. This hobby began between ages of 10 and 12 . . . [and] required him to clean the carburetor with mineral spirits. He also performed brake work on these automobiles, which required the use of brake cleaner.

16. . . . [Plaintiff] also maintained the lawn mower, which involved minimal exposure to gasoline and other petroleum products.

. . . .

18. Mr. Petty admitted that, in calculating plaintiff's alleged level of exposure at Chemtek, he had not taken into account most of the MSDSs for the various compounds that went into creating the PaveRx or that were used in connection with the parts washer.

Instead, Mr. Petty concluded that the MSDSs he pulled from alternate sources, such as textbooks, libraries, and various commercial services, more closely resembled the products used at Chemtek.

19. Mr. Petty noted that none of the MSDSs for the PaveRx, its constituent parts, or the mineral spirits used in connection with the parts washer listed benzene as an ingredient. . . .

20. Rather than relying upon the facts supported by the evidence presented in this matter, Mr. Petty based his exposure calculations on antiquated data involving constituent parts that were never present at the Chemtek facility. . . .

. . . .

22. Based upon Mr. Petty's calculations, Dr. Nachman Brautbar, a medical practitioner retained by plaintiff, opined that plaintiff was exposed to significant levels of benzene secondary to his employment with Chemtek which placed him at an increased risk of developing AML. . . .

23. Dr. Brautbar indicated that the way in which benzene causes leukemia is not fully known. He acknowledged that the vast majority of individuals that are exposed to benzene do not ultimately develop AML. As such, he noted that it was possible for an individual who had been exposed to benzene to develop leukemia, but the benzene exposure would not be the cause of such leukemia.

24. Dr. Brautbar also noted that he saw references to plaintiff being exposed to harmful substances outside of his employment with defendant-employer. Such exposures

> included plaintiff's hobby of working with cars as well as his smoking history[,] . . . as cigarette smoking is responsible for more than half of all leukemia diagnoses.

Plaintiff does not challenge any of these factual findings, and they are therefore binding on appeal. *Cohen v. McLawhorn*, __ N.C. App. __, __, 704 S.E.2d 519, 524 (2010) ("Unchallenged findings of fact are presumed to be supported by competent evidence, and are binding on appeal." (quotation marks and citations omitted)). Furthermore, these findings of fact support the Commission's conclusions of law 4 and 6, which state:

> 4. . . . Plaintiff has failed to prove that his employment with defendant placed him at greater risk that [sic] the general public of contracting a compensable occupational disease or that plaintiff's employment with defendant-employer caused him to contract a compensable disease.
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> . . . .
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> 6. Because plaintiff failed to carry his burden of proving that his employment with defendant-employer was a significant contributing factor to his development of AML and placed him at an increased risk of developing AML as compared to members of the general public not so employed, he has failed to prove that he suffers from a compensable occupational disease. . . .

These conclusions, in turn, indicate that Plaintiff failed to establish a prima facie case and accordingly support the

Commission's denial of Plaintiff's occupational disease claim. Plaintiff's argument on this issue is overruled.

3. Dr. James' Expert Testimony

Plaintiff next contends the Commission erred in relying on the testimony of Defendants' expert, Dr. James, on the issue of causation because Dr. James is a toxicologist, not a medical doctor. We cannot agree.

This Court has previously held that the admissibility of expert testimony in a workers' compensation case is governed by Rule 702 of the North Carolina Rules of Evidence. *Lane v. Am. Nat'l Can Co.*, 181 N.C. App. 527, 532, 640 S.E.2d 732, 736 (2007). Rule 702 provides, in pertinent part:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2011). "In cases involving complicated medical questions, only an expert can give competent opinion testimony as to the issue of causation." *Kelly v. Duke Univ.*, 190 N.C. App. 733, 739, 661 S.E.2d 745, 748 (2008). "'[T]he opinion testimony of an expert witness is competent if there is evidence to show that, through study or experience, or

both, the witness has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Terry v. PPG Indus., Inc.*, 156 N.C. App. 512, 518, 577 S.E.2d 326, 332 (2003) (citation omitted) (alteration in original).

Here, Dr. James testified on Defendants' behalf as an expert in toxicology and offered an opinion as to Plaintiff's level of benzene exposure secondary to his employment at Chemtek. Dr. James described his field of specialty as follows:

> A toxicologist is a person that studies the adverse effects of chemicals. That's a major goal of their work. The second one is to try to identify safe exposure levels, where possible, or procedures. So it is an identification and understanding of the toxicities of the chemicals and to try to use that understanding to develop safe exposure levels or prevent adverse exposures.

Dr. James testified that while he does not diagnose diseases or treat patients, it is within the purview of his expertise to determine whether an individual's exposure to a particular chemical was sufficient to contribute to the individual's development of a particular disease, such as cancer.

In *Baker v. City of Sanford*, this Court made clear that an expert witness need not be a medical doctor in order to offer competent testimony on the issue of causation:

> In determining complex causation in workers' compensation cases, the Commission may, of course, consider medical testimony, ***but its consideration is not limited to such testimony. The Commission is not limited to the consideration of expert medical testimony in cases involving complex medical issues***, and the Commission need not find in accordance with plaintiff's expert medical testimony if the defendant does not offer expert medical testimony to the contrary.

120 N.C. App. 783, 787, 463 S.E.2d 559, 562 (1995) (emphasis added) (citations and quotation marks omitted). Nonetheless, Plaintiff contends that a toxicologist is qualified to testify regarding only "general causation," but not "specific causation." In other words, according to Plaintiff, Dr. James was qualified to testify as to "whether the chemical in question is capable of causing disease[,]" but not as to "whether a specific substance caused disease in a particular individual."

Preliminarily, we note that Plaintiff offers no authority in support of his assertion that Dr. James was qualified to testify regarding "general causation" only. *See* N.C. R. App. P. 28(b)(6). Regardless, we need not resolve this issue in order to reach our holding, as the Commission's ruling rested upon Plaintiff's failure to establish his case, not upon the credibility of Defendants' expert witnesses. Even assuming *arguendo* that Dr. James could not testify regarding whether

Plaintiff's benzene exposure contributed to his AML, this would not alter the Commission's conclusion that Plaintiff failed to establish a prima facie case. *See Baker*, 120 N.C. App. at 787, 463 S.E.2d at 562 ("[T]he Commission need not find in accordance with plaintiff's expert medical testimony if the defendant does not offer expert medical testimony to the contrary." (citation and quotation marks omitted)). As discussed in Part II(A)(1) *supra*, this conclusion is supported by the Commission's findings of fact, which, in turn, are supported by the evidence.

We also note that Plaintiff takes issue with the Commission's finding of fact 34, which states:

> The conclusions reached by Dr. James are given more weight than the conclusion reached by Dr. Brautbar, as the exposure levels calculated by Dr. James are found to be better indicators of the actual level of benzene to which plaintiff was exposed.

Plaintiff argues that "[b]ased on [finding of fact 34], the Commission erroneously concluded that Plaintiff's expert opinion was based merely upon speculation and conjecture and as a result Plaintiff failed to carry his burden of proving that he suffered a compensable occupational disease." We disagree with Plaintiff's characterization of the Commission's finding of fact 34, as this "finding," which, in substance, is not a finding of fact at all, indicates only that the Commission afforded more

weight to Dr. James' testimony than to that of Dr. Brautbar, not that it found Dr. Brautbar's testimony speculative.

Finally, we reject Plaintiff's argument that "[a]s a medical doctor, Dr. Brautbar is far more qualified [than Dr. James] to render an opinion as to whether a particular substance – benzene – caused or contributed to the development of Plaintiff's disease – leukemia." Having addressed the issue of causation *supra*, we note that to the extent this is merely an attack upon Dr. James' credibility, "the Commission is required to make credibility judgments and must necessarily give greater weight to the testimony of some doctors as compared to others in deciding particular cases." *Huffman v. Moore County*, __ N.C. App. __, __, 704 S.E.2d 17, 30 (2010), *review denied*, 365 N.C. 328, 717 S.E.2d 397 (2011). This Court is not at liberty to re-weigh testimony or second-guess the Commission's assignment of credibility with respect to the expert testimony presented by the parties. *See id.* ("As long as an expert witness is qualified to render an opinion concerning the subject at issue and bases his or her opinions on evidence properly contained in the record, . . . the Commission is entitled to rely on that testimony in making its decision." (internal citation and

parenthetical omitted)). Plaintiff's contentions on this issue are overruled.

4. Plaintiff's Benzene Exposure

Plaintiff next raises several contentions relating to the Commission's findings and conclusions regarding Plaintiff's level of benzene exposure. We conclude that these contentions are meritless.

Plaintiff first argues that the Commission "erroneously found that none of the constituent parts of the products [that Plaintiff worked with at Chemtek] list benzene as an ingredient." Although Plaintiff does not challenge a specific finding of fact, we presume that Plaintiff takes issue with finding of fact 19, which states:

> 19. Mr. Petty noted that none of the MSDSs for the PaveRx, its constituent parts, or the mineral spirits used in connection with the parts washer listed benzene as an ingredient. He was of the opinion that benzene was present in these products based upon his research and the nature of the substances that were used to make PaveRx.

Plaintiff avers this finding of fact represents a finding by the Commission that benzene was not present in PaveRx. We disagree. Finding of fact 19 merely reflects testimony that the presence of benzene was not *listed* as an ingredient for any of PaveRx's component parts. The evidence before the Commission indicated

that benzene content must be listed as an ingredient on a product's MSDS only if the presence of benzene in that particular product reaches a concentration level of 0.1% or where an individual using the product could be exposed to excessive levels of benzene. Plaintiff's mischaracterization of the Commission's finding renders this argument irrelevant.

Plaintiff next argues the Commission erred in relying on calculations performed by Defendants' expert witnesses, Mr. Parker and Dr. James, in assessing Plaintiff's benzene exposure because their "exposure assessments amounted to nothing more than conjecture and speculation." While Plaintiff presents this argument as an attack on "speculative" testimony, the argument essentially consists of a challenge to the credibility of Defendants' experts and a request that this Court reweigh the testimony presented before the Commission. We repeat that it is not the function of this Court to reweigh the evidence in this manner. Plaintiff's remaining contentions on this issue are without merit and are accordingly overruled.

5. Plaintiff's Other Lawsuits and Last Injurious Exposure

Finally, Plaintiff contends the Commission erred in considering his civil action against a prior employer in reaching its decision because that action is "irrelevant" and

because "[u]nder North Carolina's Workers' Compensation Act, an employee is entitled to benefits based on his 'last injurious exposure,' meaning the company where Plaintiff was last exposed to the harmful product is liable for the claim." We are not persuaded.

The Commission found as fact:

> 3. In the early 2000's, plaintiff was employed by a previous employer as a truck driver. In a civil lawsuit filed by both plaintiff and his wife, the couple alleged that plaintiff was exposed to gasoline while employed by this company and that said exposure led to the development of his AML.
>
> . . . .
>
> 7. Entwistle has also been named as a defendant in a civil lawsuit filed by both plaintiff and his wife, who are alleging that plaintiff developed AML due to his exposure to toluene while employed by Entwistle.

Preliminarily, we note Plaintiff's assertion that the Commission "appear[ed] to rest its decision in part on [his] involvement in a civil claim in which he alleged exposure to ***benzene*** at a prior employer." (Emphasis added). Neither of the findings recited above make reference to allegations of benzene exposure. Further, even assuming ***arguendo*** the Commission relied on these findings in reaching its decision, Plaintiff has offered no authority or reason in support of his assertion that

the Commission erred in considering his other civil lawsuits, and we accordingly deem the argument abandoned. *See* N.C. R. App. P. 28(b)(6).

Moreover, Plaintiff's contention that the "last injurious exposure" doctrine applies in the instant case is misguided. N.C. Gen. Stat. § 97-57 "provides that a defendant employer is liable to an employee for onset of an occupational disease if the employee demonstrates that he (1) suffers from a compensable occupational disease, and (2) was last injuriously exposed to the hazards of the disease while employed by the defendant employer." *Jarrett v. McCreary Modern, Inc.*, 167 N.C. App. 234, 238, 605 S.E.2d 197, 200 (2004) (citing N.C. Gen. Stat. § 97-57). By definition, a claimant can suffer a "last injurious exposure" only if she can prove that she suffered from an injurious exposure in the first place. *See id.*; *see also City of Durham v. Safety Nat. Cas. Corp.*, 196 N.C. App. 761, 764, 675 S.E.2d 393, 395 (2009) (explaining that the purpose of the "last injurious exposure" doctrine is to avoid needless and expensive litigation where the claimant suffers injury spanning across multiple employers and it would be difficult to determine the relative contribution of each employer in assessing liability). Here, Plaintiff has failed to establish the threshold element

required to invoke the doctrine, namely, the existence of a compensable occupational disease. Furthermore, Plaintiff failed to present any evidence indicating that he had contracted or began developing his AML prior to assuming his employment with Chemtek. Plaintiff's argument appears to be an attempt to invoke a reduced burden of proof in proving causation, and therefore compensability. *See Gay v. J.P. Stevens & Co., Inc.*, 79 N.C. App. 324, 331, 339 S.E.2d 490, 494 (1986) (stating that an employer is liable for a "last injurious exposure" where "the occupational exposure in question is such that it augments the disease process to any degree, however slight") (citing *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362). A "last injurious exposure" analysis is inapplicable in the instant case, however, and Plaintiff's argument is overruled.

B. Defendants' Appeal

Defendants contend that the Commission erred in failing to impose sanctions — namely, an award of attorneys' fees and court costs in Defendants' favor — against Plaintiff and ask that this Court impose these sanctions in disposing of this appeal. Defendants argue sanctions are appropriate because Plaintiff has brought and maintained this action without reasonable grounds in violation of N.C. Gen. Stat. § 97-88.1.

N.C. Gen. Stat. § 97-88.1 provides as follows: "If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." N.C. Gen. Stat. § 97-88.1 (2011). "'The purpose of [this] section is to prevent stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees.'" *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 474, 577 S.E.2d 345, 353 (2003) (citation omitted) (alteration in original). We do not reach the question of whether Plaintiff has violated N.C. Gen. Stat. § 97-88.1 in bringing and maintaining this action, however, as our review of the record indicates that the Commission failed to address this issue in rendering its opinion and award.

This Court's prior ruling in *Cialino* is dispositive on this issue. There, the plaintiff-employee appealed from a ruling of the Commission and argued, *inter alia*, that the Commission had "erred by failing to address her request for attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1." *Id.* at 474, 577 S.E.2d

at 353. We stated the following in holding that the Commission's failure to address this issue was error:

> Ms. Cialino urges this Court to decide the issue of her entitlement to attorney's fees in this appeal; we decline to do so. Instead, we believe the Commission is better suited, in this particular case, to determine whether Wal-Mart had a "reasonable basis" to defend the claim. Accordingly, we remand this issue to the full Commission.

Id. at 474-75, 577 S.E.2d at 353 (internal citation omitted).

Here, Defendants' brief to the Commission articulated a specific request for sanctions pursuant to N.C. Gen. Stat. § 97-88.1. The Commission's 28 November 2011 opinion and award neglects this request entirely in failing to set forth any findings of fact or conclusions of law on the issue. We conclude that the Commission is in the best position to make this initial determination, and we accordingly remand to the Commission for this limited purpose.

IV. Conclusion

For the foregoing reasons, we affirm the portion of the Commission's opinion and award denying Plaintiff's occupational disease claim, and we remand this case to the Commission to address Defendants' request for sanctions.

AFFIRMED in part; REMANDED in part.

Judges MCGEE and BEASLEY concur.

Report per Rule 30(e).