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NO. COA09-382

NORTH CAROLINA COURT OF APPEALS

Filed: 2 March 2010

BOBBY LEE PLUMMER
Employee-Plaintiff,

v.

NORANDAL, USA,
Employer-Defendant

From the North Carolina
Industrial Commission
File No.: 226564

and

CIGNA/ACE USA/ESIS,
Carrier-Employer-
Defendant.

Appeal by Plaintiff from an Order and Award of the North Carolina Industrial Commission entered 5 December 2008. Heard in the Court of Appeals 30 September 2009.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Harmony Whalen Taylor and William A. Smith, for defendant-appellees.

ERVIN, Judge.

Plaintiff Bobby Lee Plummer appeals from a 5 December 2008 Order and Award of the Industrial Commission by Commissioner Christopher Scott denying his request for worker's compensation benefits based upon his contention that he had contracted asbestosis as a result of exposure to that substance in the course and scope of his employment with Norandal, USA. After careful

consideration of the record in light of the applicable law, we conclude that the Commission's decision should be affirmed.

I. Factual Background

A. Substantive Facts¹

The Norandal facility is located in Salisbury and was constructed in approximately 1965.² Plaintiff worked for Norandal and its predecessors briefly in the fall of 1974, was rehired on 1 January 1976, and was still employed by Norandal at the time of the 1 May 2006 hearing held before Deputy Commissioner Stephen T. Gheen.

At the Salisbury facility, raw and scrap aluminum is converted to foils of various thicknesses and grades. In the course of the manufacturing process, aluminum is melted and the molten aluminum is extruded through heat resistant "tips" to form sheets. After the sheets are formed, they are transported to a rolling mill, reduced to a thinner gauge material and then wound onto a core as either double or single sheets. The coils are then placed into annealing furnaces, where the aluminum is made stronger and more flexible and where oils and other residues from the production process are removed.

¹ The statement of substantive facts contained in this opinion is drawn from the findings of fact contained in the Commission's order, none of which were challenged in Plaintiff's brief as lacking adequate evidentiary support.

² The Salisbury plant was originally constructed by Republic Foil. Subsequently, the facility was purchased by National Aluminum. Norandal bought the Salisbury plant in 1989.

The "tips" used during the manufacturing process were made of machined Maranite, a substance that resembles sheet rock in appearance, but is much harder. The machining process used to make these "tips" involved drilling, sawing, and sanding Maranite sheets in order to produce the desired shape. During the 1960s and 1970s, the Maranite used in the Salisbury plant contained 25% to 50% asbestos. The Maranite manufacturer stopped making the asbestos-based product in 1978, so a ceramic-based product came into use at the Salisbury plant after the asbestos-based product ceased being available.

In addition, the annealing furnaces used in the Norandal facility contained asbestos insulation in the walls, ceilings, and floors. Although there was no exposed asbestos insulation at the time that the furnaces were installed, insulation had begun to fall from the furnace walls by 1985. Testing performed upon the insulation revealed that it contained 5% to 8% asbestos. The insulation in the annealing furnaces was removed on a furnace by furnace basis during the years from 1990 through 1998. Testing performed during the abatement of the first furnace revealed the presence of block insulation containing 15% to 30% asbestos and duct insulation containing 35% to 55% asbestos.

During his career at the Norandal plant, Plaintiff worked as an etching operator, as a mill helper and mill operator, and as a metal handler. Prior to an expansion of the plant in 1979 and 1980, Plaintiff worked beside the Maranite shop and entered that area occasionally to cool off. In addition, despite the fact that

his work station was not located near the annealing furnaces, Plaintiff would walk by them when going outside the building for a break. After the plant expansion, Plaintiff did not work in close proximity to the sources of asbestos dust in the facility. As a result of the design of the ventilation systems used in the plant, there were "multiple ways that dust containing asbestos fibers would spread within the plant." By the time that this matter was heard before the Deputy Commissioner in 2006, Plaintiff had smoked one to two packs of cigarettes per day for over thirty years.

On 2 May 2001, Plaintiff was examined by Dr. Dominic Graziano, a pulmonologist from West Virginia, who "read chest x-rays performed in January 2001 as showing irregular opacities in both lung bases with a 1/0 profusion." However, while "there were no pleural abnormalities," "[p]ulmonary function tests" showed "moderately severe obstructive and restrictive ventilatory impairment with increased lung volumes due to hyperinflation and moderate diffusion impairment." According to Dr. Graziano, Plaintiff suffered from asbestosis and chronic obstructive pulmonary disease.

Dr. Phillip Goodman, a radiologist at Duke Medical Center, reviewed Plaintiff's January 2001 x-rays.³ According to Dr. Goodman, Plaintiff's lateral film showed "increased lung volumes consistent with emphysema" and his PA film "demonstrated normal lungs and pleural space." Dr. Goodman did not believe that

³ Dr. Goodman thought that the lateral film was overexposed and that the PA film was slightly overexposed.

Plaintiff exhibited any evidence of asbestosis or asbestos-related pleural disease.

Similarly, additional x-rays taken of Plaintiff in August 2003 were read by a Dr. Dula. Dr. Dula observed "hyperexpansion of the lungs," which he believed to be "consistent with chronic obstructive pulmonary disease," but "found no interstitial changes or pleural plaques." A Dr. Erston "reviewed chest x-rays in February 2004 and also found no evidence of asbestosis."

Dr. Kremers, a pulmonologist practicing in Charlotte, examined Plaintiff on 18 September 2004 at the request of Defendants. According to Dr. Kremers, Plaintiff's "breath sounds were moderately diminished." Although a review of Plaintiff's x-rays revealed the presence of changes associated with emphysema, "there was no evidence of pulmonary fibrosis or pleural changes." Testing of Plaintiff's pulmonary functioning "revealed a severe obstructive defect and results consistent with tobacco-induced chronic obstructive lung disease with mild reversibility after bronchodilator medication." In Dr. Kremers' opinion, Plaintiff showed no signs of asbestosis.

B. Procedural Facts

On 4 April 2002, Plaintiff filed a Form 18B seeking worker's compensation for asbestosis. On 17 April 2003, Plaintiff requested that his claim be assigned for hearing. On 24 April 2003, Norandal and ACE USA/Cigna filed a Response to Request that Claim be Assigned for Hearing in which they denied compensability. On 25 December 2003, Plaintiff, Norandal, and CIGNA/ACE entered into a

stipulation which recited, among other things, that Defendants "deny that [Plaintiff] was exposed to the hazards of asbestos during his employment with Norandal" and that, in the event that Plaintiff "was injuriously exposed to the hazards of asbestos during his employment with Norandal," then "CIGNA/ACE and Norandal shall be responsible for any benefits awarded to [Plaintiff] for any occupational disease or other compensable condition under the Worker's Compensation Act."⁴ On 23 February 2004, Norandal and ACE USA/ESIS filed a Form 61 denying liability.

Plaintiff's claim was consolidated for hearing with similar claims advanced against Norandal by five other claimants.⁵ Defendants denied compensability in all six claims. Plaintiff's claim came on for hearing before Deputy Commissioner George T. Glenn, II, on 1 March 2004. Prior to the hearing, Deputy Commissioner Glenn ruled that, since Defendants "had not filed a Form 61 within 90 days of the initiation of the [Plaintiff's] claim," they were barred "from disputing the compensability of"

⁴ The Commission found that Global Indemnity, Royal and SunAlliance, Argonaut Insurance Company, Argonaut Midwest Insurance Company, National Union and Cigna/ACE USA/ESIS "provided worker's compensation coverage during [Plaintiff's] employment with" Norandal. Norandal and Royal and SunAlliance filed a Form 61 denying liability on 14 September 2003. In light of the parties' stipulation, the Commission concluded that "CIGNA/ACE USA/ESIS shall be responsible for any workers' compensation benefits awarded to the [Plaintiff] as a result of his employment with" Norandal.

⁵ The other proceedings consolidated with Plaintiff's claim were brought by Charles R. Bowles, Administrator of the Estate of Arnold Dean Bowles; Rondall O. Everhardt; William Wesley Pepper; Derwood Sink Puckett; and Alfred Thomas Daywalt. Commission orders entered in two of these cases have been appealed to this Court and are decided contemporaneously with this case in *Bowles v. Norandal, USA* (No. COA09-394) and *Pepper v. Norandal, USA* (No. COA09-383).

Plaintiff's claim. On 8 March 2005, Deputy Commissioner Glenn entered an Opinion and Award in which he found that neither Norandal nor its carrier had filed a Form 61 denying compensability and setting out a detailed justification for denying compensability in a timely manner. In addition, Deputy Commissioner Glenn found that Norandal and its carrier had failed to properly respond to discovery. As a result, Deputy Commissioner Glenn awarded Plaintiff compensation for injury to each of his lungs, increased the award by 10% based on a finding that Plaintiff's injury "was caused by the willful failure of the employer to comply with statutory requirements," and ordered the payment of attorneys fees to Plaintiff's counsel on the grounds that the "defense of this matter was not based upon reasonable grounds but was based upon stubborn litigiousness for which [P]laintiff should recover attorney's fees as part of the costs of this action." Defendants appealed to the Commission from Deputy Commissioner Glenn's order.

On 12 September 2005, after hearing the arguments of counsel and studying the parties' briefs, the Commission, in an Order by Commissioner Christopher Scott, concluded that "[t]he appealing party ha[d] shown good ground to reconsider the evidence in this matter;" reversed "the verbal Order by Deputy Commissioner Glenn made on or about February 25, 2004;" vacated "the March 8, 2005, Opinion and Award of Deputy Commissioner Glenn; and" remanded "the matter to a deputy commissioner for a full evidentiary hearing on all the issues in this matter." Although Plaintiff noted an appeal to this Court from the Commission's order, we dismissed Plaintiff's

appeal on the basis that it had been taken from an unappealable interlocutory order on 10 January 2006.

A consolidated hearing involving this and four other cases⁶ took place before Chief Deputy Commissioner Stephen T. Gheen beginning 1 May 2006. In an Order and Award filed 3 March 2008, Chief Deputy Commissioner Gheen denied Plaintiff's claim for workers' compensation benefits. Plaintiff appealed Chief Deputy Commissioner Gheen's decision to the Commission. By means of an Opinion and Award by Commissioner Christopher Scott filed 5 December 2008, the Commission affirmed Chief Deputy Commissioner Gheen's decision with minor modifications. In reaching this conclusion, the Commission found that "Dr. Graziano did not get an accurate history from [Plaintiff] or made incorrect assumptions about the nature of his exposure to asbestos dust as well as the nature of the asbestos-containing materials in the plant." In addition, the Commission determined that:

Pleural and interstitial changes caused by asbestos fibers do not improve or disappear with time. Consequently, if such changes are present, subsequent x-rays should show them [at] least as well as earlier films. Only one doctor indicated that plaintiff's x-rays revealed signs of interstitial fibrosis, and other doctors reviewing the same films did not see those changes. None of the subsequent x-ray films were read as showing any interstitial or pleural abnormalities. The greater weight of the medical evidence clearly established that plaintiff did not have asbestosis or asbestos-related pleural disease.

⁶ The record does not reflect which of the five cases listed in Footnote No. 2 above was not considered at the 1-2 May 2006 hearing before Chief Deputy Commissioner Gheen.

As a result, the Commission concluded that, “[a]s of the date of hearing before the Deputy Commissioner, [P]laintiff had not developed asbestosis” and denied Plaintiff’s claim for workers’ compensation benefits. On 17 December 2008, Plaintiff noted an appeal from the Commission’s decision to this Court.

II. Standard of Review

“The standard of appellate review of an opinion and award of the Industrial Commission is well-established.” *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997). “On appeal, we review decisions from the Industrial Commission to determine whether any competent evidence supports the findings of fact and whether the findings of fact support the conclusions of law.” *Silva v. Lowe’s Home Improvement*, ___ N.C. App. ___, ___, 676 S.E.2d 604, 609 (2009) (citing *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004)). The Commission’s findings of fact are conclusive on appeal if they are supported by competent evidence, even if the record contains evidence that would support contrary findings. *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). On the other hand, the Commission’s conclusions of law are subject to *de novo* review. *Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 86, 361 S.E.2d 575, 577 (1987).

III. Substantive Legal Analysis

A. Failure to Make Findings and Conclusions

First, Plaintiff contends that the Commission's 12 September 2005 order lacked required findings of fact and conclusions of law. After careful consideration, we conclude that Plaintiff's assertion is without merit.

According to N.C. Gen. Stat. § 97-85, a request for review of an Opinion and Award by a deputy commissioner may be made to the Commission "within 15 days from the date when notice of the award [has] been given" and, "if good ground be shown therefor," the Commission may "reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. . . ." Pursuant to the authority granted by N.C. Gen. Stat. § 97-85, the Commission reviewed Deputy Commissioner Glenn's order as the result of an appeal taken by Defendants and entered its 12 September 2005 Order. The question presented by Defendants' appeal was a purely legal one - did Deputy Commissioner Glenn correctly construe N.C. Gen. Stat. § 97-18(c) as precluding a defendant that failed to file a statement denying the compensability of a claim for worker's compensation benefits within 14 days of receiving notice of that claim from contesting the issue of compensability?

In its 12 September 2005 Order, the Commission began by stating that:

This matter is before the Full Commission upon the defendants' appeal from an Opinion and Award by Deputy Commissioner George T. Glenn II, filed on March 8, 2005, and a verbal Order by Deputy Commissioner Glenn made on or about February 25, 2004, which barred the defendants from disputing the compensability of the plaintiff's claim because the

defendants had not filed a Form 61 within 90 days of the initiation of the plaintiff's claim. The Full Commission heard oral arguments in this matter on August 10, 2005.

The Full Commission reviewed the prior Opinion and Award, based upon the record of the proceedings before Deputy Commissioner Glenn, and the briefs and oral arguments before the Full Commission. The appealing party has shown good ground to reconsider the evidence in this matter. Having reconsidered the evidence of record, the Full Commission hereby REVERSES the verbal Order by Deputy Commissioner Glenn made on or about February 25, 2004, VACATES the March 8, 2005, Opinion and Award of Deputy Commissioner Glenn, and REMANDS the matter to a deputy commissioner for a full evidentiary hearing on all of the issues in this matter.

As a result, "FOR GOOD CAUSE SHOWN," the Commission ordered that:

1. The verbal Order by Deputy Commissioner Glenn made on or about February 25, 2004, which barred the defendants from disputing the compensability of the plaintiff's claim because the defendants had not filed a Form 61 within 90 days of the initiation of the plaintiff's claim, is hereby REVERSED;
2. The March 8, 2005, Opinion and Award of Deputy Commissioner Glenn is hereby VACATED; and,
3. This matter is hereby REMANDED to Chief Deputy Commissioner Stephen T. Gheen for assignment to a deputy commissioner for a full evidentiary hearing on all of the issues in this case, and the entry of an Opinion and Award on the issues presented therein.

Thus, the 12 September 2005 order does not contain findings of fact and conclusions of law of the type that are traditionally found in final Commission orders.

In Plaintiff's view, the Commission's failure to include findings of fact and conclusions of law in the 12 September 2005

order violated the fundamental legal principle that the Commission "is required to make findings on crucial facts upon which the right to compensation depends." *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 5, 613 S.E.2d 715, 719, *aff'd. per curiam*, 360 N.C. 169, 622 S.E.2d 492 (2005).⁷ In *Watts*, the employee claimed to have sustained a work-related injury despite the fact that he had, on previous occasions, denied the occurrence of an on-the-job injury. *Id.* After a deputy commissioner rejected the employee's claim, the Commission reviewed the deputy commissioner's decision and granted the employee's request for temporary disability benefits. *Id.* On appeal, this Court found that the Commission had failed to make adequate findings of fact with respect to the issue of whether the employee had a reasonable excuse for failing to notify the employer of his injury at an earlier time and whether the lack of more timely notice had prejudiced the employer. *Id.* at 3, 613 S.E.2d at 719. As we noted in remanding the Commission's decision for additional findings, "[s]pecific findings on crucial issues are necessary if the reviewing court is to ascertain whether the findings of fact are supported by competent evidence. . . ." *Id.* at 5, 613 S.E.2d at 719. Unlike the situation in *Watts*, however, the Commission's decision to vacate Deputy Commissioner Glenn's 25 February 2004 and 8 March 2005 orders did not constitute a final Commission determination as to whether Plaintiff was

⁷ Plaintiff also relies on our decision in *Richardson v. Maxim Healthcare/Allegis Group*, 188 N.C. App. 337, 657 S.E.2d 34 (2008). However, since *Richardson* relies on *Watts*, we need not discuss it separately.

entitled to compensation. N.C. Gen. Stat. § 97-84 (stating that "[t]he award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed with the record of the proceedings"). For that reason, we believe that Plaintiff's reliance upon *Watts* is misplaced and that *Watts* in no way necessitates an appellate reversal of the Commission's 12 September 2005 order.

On its face, the 12 September 2005 order merely vacated an order by a deputy commissioner that was predicated on a legal principle that the Commission evidently believed to have been invalid and remanded this case to a deputy commissioner for a full hearing on the merits. Findings of fact and conclusions of law are a procedural device that are intended to ensure that the reasoning process employed by a lower court or administrative body is apparent to a reviewing court so that the reviewing court can adequately review the lower court or administrative body's decision. *Thomason v. Red Bird Cab Co., Inc.*, 235 N.C. 602, 605-06, 70 S.E.2d 706, 709 (1952) (stating that the Commission's findings of fact "must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them"). Putting aside for the moment the question of whether the Commission erred in concluding that Defendants' failure to file a Form 61 denying compensability within 90 days after the filing of Plaintiff's Form 18B precluded them from denying the compensability of Plaintiff's claim, we see no reason why the Commission's failure

to include findings of fact and conclusions of law in its 12 September 2005 order has in any way prejudiced Plaintiff's ability to challenge the lawfulness of the Commission's determination that Deputy Commissioner Glenn erred by treating Defendants' failure to file a Form 61 within 90 days of the filing of Plaintiff's Form 18B as a waiver of the right to dispute the issue of compensability. Plaintiff has not pointed to any disputed issue of fact that the Commission should have resolved or identified any other way in which his ability to challenge the Commission's decision on appeal has been impaired by the absence of findings and conclusions from the 12 September 2005 order. In the absence of such a showing, we cannot find that the Commission erred by failing to include findings and conclusions in the 12 September 2005 order. As a result, we conclude that the Commission did not err by failing to include findings of fact or conclusions of law in its order vacating Deputy Commissioner Glenn's order and remanding this case for a full hearing on all issues that were in dispute between the parties.

B. Failure to File and Serve a Statement of Denial
Within 14 Days of Notice of Plaintiff's Claim

Secondly, Plaintiff contends that Defendants waived the right to contest the compensability of Plaintiff's claim by failing to file and serve a statement denying that Plaintiff had sustained a compensable injury by accident or suffered from a compensable occupational disease within 14 days from the date upon which Plaintiff filed his Form 18B as required by N.C. Gen. Stat. § 97-

18(c). After careful consideration of the record in light of the applicable law, we find Plaintiff's argument unpersuasive.

On 4 April 2002, Petitioner filed a Form 18B asserting his right to receive workers' compensation benefits on the basis of a claim that he had contracted asbestosis in the course and scope of his employment at Norandal. On 14 September 2002, Norandal and Royal and SunAlliance submitted a Form 61 denying compensability. ACE USA/ESIS, the carrier ultimately deemed to have coverage responsibility relating to Plaintiff's claim, did not submit a Form 61 denying compensability until 23 February 2004. As a result, both of the two Form 61s ultimately filed in this case were submitted more than five months after the filing of Plaintiff's Form 18B. According to Plaintiff, Defendants' failure to file and serve a statement denying the compensability of his claim in a more timely manner precluded them from resisting his claim for benefits.

Plaintiff's argument hinges upon his interpretation of N.C. Gen. Stat. § 97-18(c), which provided at all relevant times that:

If the employer denies the employee's right to compensation, the employer shall notify the Commission, on or before the fourteenth day after it has written or actual notice of the injury or death, and advise the employee in writing of its refusal to pay compensation on a form prescribed by the Commission. . . .

Workers Compensation Rule 601 tracked the language of N.C. Gen. Stat. § 97-18(c).⁸ In the event that the employer lacks sufficient

⁸ Rule 601 of the Workers Compensation Rules provided that, "if the employer or insurance carrier denies liability in any case, a detailed statement of the basis of denial must be set forth in a letter of denial or Form 61" and that, "upon notice of a claim, the employer must admit or deny compensability of the claim to the

information to admit or deny compensability, Plaintiff contends that it was required to proceed under N.C. Gen. Stat. § 97-18(d), which provided for purposes of this case that:

In any claim for compensation in which the employer or insurer is uncertain on reasonable grounds whether the claim is compensable or whether it has liability for the claim under this Article, the employer or insurer may initiate compensation payments without prejudice and without admitting liability. The initial payment shall be accompanied by a form prescribed by and filed with the Commission, stating that the payments are being made without prejudice. Payments made pursuant to this subsection may continue until the employer or insurer contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury or death, whichever occurs first, unless an extension is granted pursuant to this section. Prior to the expiration of the 90-day period, the employer or insurer may upon reasonable grounds apply to the Commission for an extension of not more than 30 days. The initiation of payment does not affect the right of the employer or insurer to continue to investigate or deny the compensability of the claim or its liability therefor during this period. If at any time during the 90-day period or extension thereof, the employer or insurer contests the compensability of the claim or its liability therefor, it may suspend payment of compensation and shall promptly notify the Commission and the employee on a form prescribed by the Commission. The employer or insurer must provide on the prescribed form a detailed statement of its grounds for denying compensability of the claim or its liability therefor. If the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death, or within such additional

Commission within 14 days after the employer has written or actual notice of the claim, or commence payment without prejudice pursuant to N.C. Gen. Stat. § 97-18(d)."

period as may be granted by the Commission, it waives the right to contest the compensability of and its liability for the claim under this Article. However, the employer or insurer may contest the compensability of or its liability for the claim after the 90-day period or extension thereof when it can show that material evidence was discovered after that period that could not have been reasonably discovered earlier, in which event the employer or insurer may terminate or suspend compensation subject to the provisions of [N.C. Gen. Stat. §] 97-18.1.

As a result, under Plaintiff's construction of these two statutory provisions, a defendant had three choices, apart from paying compensation by a Form 60, upon receiving notice that an employee claimed to have been injured or to have contracted an occupational disease in the course and scope of his employment: (1) notify the employee that the defendant is denying that the claim is compensable within 14 days of receiving notice of the employee's claim, thereby preserving the right to contest the employee's right to receive compensation without making interim compensation payments; (2) begin making interim compensation payments without prejudice to the defendant's right to investigate the claim further, thereby obtaining at least 90, and possibly 120 days, to investigate the employee's claim before having to notify the employee that the defendant denies the compensability of the claim; or (3) failing to either notify the employee that the defendant denies the compensability of the claim within the 14 day period specified in N.C. Gen. Stat. § 97-18(c) or to begin making interim compensation payments pursuant to N.C. Gen. Stat. § 97-18(d), at

which point, in Plaintiff's view, the defendant has waived the right to contest the compensability of the employee's claim.

The essential issue before the Court is one of statutory construction. "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 143 L. Ed. 2d 671 (1999)). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Board of Commr's*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). "Legislative purpose is first ascertained from the plain words of the statute." *Electric Supply Co. of Durham v. Swain Electric Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "Where the language of a statute is unambiguous, the language of the statute controls." *McNally v. Allstate Ins. Co.*, 142 N.C. App. 680, 682, 544 S.E.2d 807, 809, *disc. review denied*, 353 N.C. 728, 552 S.E.2d 163 (2001). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Perkins v. Arkansas Trucking Servs., Inc.*, 351 N.C.634, 638, 528 S.E.2d 902, 904 (2000).

In order to address Plaintiff's argument, we must consider two separate, albeit related issues. First, we must examine whether compliance with the 14 day period enunciated in N.C. Gen. Stat. §

97-18(c) is mandatory.⁹ Secondly, assuming that the answer to the first question is in the affirmative, we must examine whether Plaintiff is correct in concluding that the Commission was required to preclude Defendants from contesting the compensability of Plaintiff's claim as a sanction for failing to notify Plaintiff that it was denying the compensability of his claim within the 14 day period specified in N.C. Gen. Stat. § 97-18(c). We will address each of these issues in turn.

The use of the word "shall" in N.C. Gen. Stat. § 97-18(c) clearly indicates the mandatory nature of the 14-day deadline set out in the relevant statutory provision. *Multiple Claimants v. N.C. Dept. Of Health and Human Services*, 361 N.C. 372, 378, 646 S.E.2d 356, 360 (2007) (stating that "[i]t is well established that 'the word "shall" is generally imperative or mandatory'" (quoting *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979); *Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405 553 S.E.2d 84, 87 (2001) (stating that "[t]he word 'shall' is defined as 'must' or 'used in laws, regulations, or directives to express what is mandatory'" (quoting *Webster's Collegiate Dictionary* 1081 (9th ed. 1991)). As a result, N.C. Gen. Stat. § 97-18(c) clearly required Norandal and its workers' compensation carrier to file and serve a statement denying the compensability of

⁹ Nothing in the plain language of N.C. Gen. Stat. § 97-18(d) suggests that it has any application outside the "pay without prejudice" context. Since Defendants did not begin to "pay without prejudice," N.C. Gen. Stat. § 97-18(d) does not apply to the present situation. For that reason, we will not discuss that portion of Plaintiff's argument that focuses on N.C. Gen. Stat. § 97-18(d) in any detail in the remainder of this opinion.

Plaintiff's claim within 14 days of receiving notice that he contended that he was entitled to compensation as the result of having contracted asbestosis in the course and scope of his employment. The record establishes that Norandal and CIGNA/ACE USA/ESIS did not make such a filing within the statutorily-required time period. Thus, the Court has no alternative except to address the issue of whether the Commission was required to address Defendants' failure to comply with the 14 day time limitation set out in N.C. Gen. Stat. § 97-18(c) by precluding them from denying the compensability of Plaintiff's claim, as he contends should have been done.

Although Plaintiff claims that the fact that N.C. Gen. Stat. § 97-18(c) begins by stating that the employer must provide notice in a timely manner "[i]f [it] denies the employee's right to compensation" compels the conclusion that "an employer who fails to comply with the mandatory procedures [set out in the relevant statutory language] is precluded from denying the claim and is therefore precluded from contesting the compensability of the claim" and that "[t]o hold otherwise would result in this statutory mandate having no mandatory effect," we do not believe that the relevant statutory language is reasonably susceptible of such construction. Simply put, the fact that N.C. Gen. Stat. § 97-18(c) is couched in mandatory language says nothing about the nature of the sanction, if any, that should be imposed in the event that a particular defendant fails to deny compensability within 14 days of receiving notice of a claim for compensation. Instead, N.C. Gen.

Stat. § 97-18 simply fails to address the sanctions issue. As a result, nothing about the literal language of N.C. Gen. Stat. § 97-18 in any way suggests that the only available sanction for a defendant's noncompliance with the 14 day notice provision of N.C. Gen. Stat. § 97-18(c) is precluding that defendant from denying the compensability of the plaintiff's claim for benefits. On the contrary, well-recognized principles of North Carolina law establish that the General Assembly's failure to specify a sanction to be imposed in the event of a defendant's failure to comply with the 14 day notice provision of N.C. Gen. Stat. § 97-18(c) means that no particular automatic sanction for noncompliance exists.

First, "[m]any courts have observed that statutory time periods are generally considered to be directory rather than mandatory¹⁰ unless the legislature expresses a consequence for failure to comply within the time period." *State ex rel. Utilities Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 277, 435 S.E.2d 553, 559 (1993), *disc. review denied by* 335 N.C. 564, 441 S.E.2d 125 (1994) (citing *Mileizer v. Resolution Trust Co.*, 952 F.2d 879, 883 (5th Cir. 1992) and *Thomas v. Barry*, 729 F.2d 1469, 1470, *ftn. 5* (D.C. Circ. 1984)). In essence, "[i]f the provisions are mandatory, they are jurisdictional; if directory, they are not." *Id.* In determining that a particular statutory provision was directory rather than mandatory, we reasoned in *Empire Power* that:

¹⁰ Obviously, we used the term "mandatory" in a different sense in *Empire Power* than we used it in holding that compliance with the 14 day limitation period set out in N.C. Gen. Stat. § 97-18(c) was mandatory.

Section 62-82 clearly specifies that one provision is mandatory, and that is the one that *requires* that a certificate be issued if the Commission does not order a hearing at all and there is no complaint filed within ten days of the last date of publication. However, the statute is silent as to the consequences, if any, which would result from the Commission's failure to commence a hearing within the three-month time period. When the General Assembly, in the same statute, expressly provides for the automatic issuance of a certificate under different circumstances (the Commission does not order a hearing and no complaint is filed), the only logical conclusion is that the General Assembly only intended for an automatic issuance to occur in that specific situation. [citation omitted]

. . . .

The Commission's automatic issuance of a certificate, when complaints and motions to intervene have been filed in the matter and a sufficient showing of public need has not been made, would be contrary to the purpose of section 62-110.1(a). The primary purpose of the statute is to provide for the orderly expansion of the State's electric generating capacity in order to create the most reliable and economical power supply possible and to avoid the costly overbuilding of generation resources. [citation omitted]. In order to give effect to this purpose, we find the language in section 62-82 to be directory and, thus, not jurisdictional.

Id. at 277-78, 435 S.E.2d at 559-60 (emphasis in the original. Using similar logic, we conclude that the General Assembly's failure to specify a consequence for a defendant's failure to comply with N.C. Gen. Stat. § 97-18(c) indicates, contrary to Plaintiff's argument, that it did not intend that such noncompliance would automatically result in the loss of the defendant's right to deny compensability. Thus, *Empire Power* clearly indicates that the Commission was not required to preclude

Defendants from denying the compensability of Plaintiff's claim as a result of their failure to file and serve a denial of compensability in a timely manner.

Secondly, the General Assembly amended N.C. Gen. Stat. § 97-18(c), effective 1 October 2005, so as to give the Commission the authority to extend the time within which a defendant is entitled to provide notice that it is denying the compensability of a plaintiff's claim for worker's compensation benefits and enacted N.C. Gen. Stat. § 97-18(j), which authorizes the imposition of "reasonable sanctions against an employer or insurer" that fails to make a timely filing admitting the compensability of an employee's claim, denying the compensability of the employee's claim, or initiating payments without prejudice. 2005 N.C. Sess. L. c. 448, s 4. Interestingly, N.C. Gen. Stat. § 97-18(j) specifically provides that "reasonable sanctions shall not prohibit the employer or insurer from contesting the compensability of or its liability for the claim.

When the legislature amends a statute, a presumption arises that its intent was either to (1) change the substance of the original act or (2) clarify the meaning of it. *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E.2d 481 (1968). Where the legislature amends an ambiguous statute, no presumption arises that its intent was to change the substance of the original act. *Id.* Rather, the purpose of the amendment may be merely to "improve the diction or to clarify that which was previously doubtful." *Id.* at 260, 162 S.E.2d at 484.

Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 240, 328 S.E.2d 274, 280 (1985). In view of the fact

that the pre-2005 version of N.C. Gen. Stat. § 97-18(c) did not address the consequences that would result in the event that a defendant failed to provide timely notification that it denied the compensability of a claim for worker's compensation benefits, we believe that the amendments to N.C. Gen. Stat. § 97-18 worked by 2005 N.C. Sess. L. c. 448, S. 4 were intended to be clarifying in nature and provide strong evidence that the General Assembly did not intend that a defendant be automatically precluded from contesting the compensability of a claim for worker's compensation benefits in the event that it failed to provide notice that it was denying the compensability of the plaintiff's claim within the statutorily-mandated period.

In seeking to persuade us that Defendants' failure to provide notice of its denial of the compensability of Plaintiff's claim for worker's compensation benefits within the time limitation specified by N.C. Gen. Stat. § 97-18(c) precluded Defendants from contesting the compensability of Plaintiff's claim, Plaintiff points to N.C. Gen. Stat. §§ 97-24 and 97-47 as examples of other statutory provisions within the Workers Compensation Act that provide that a party's failure to take certain actions within a statutorily-specified period of time has the effect of precluding that party from asserting various rights under the Act. For example, N.C. Gen. Stat. § 97-24 provides that, unless an employee files a claim for benefits within two years, "the right to compensation under this Article shall be forever barred." *See Reinhardt v. Women's Pavilion, Inc.*, 102 N.C. App. 83, 86, 401 S.E.2d 138, 140 (1991)

(stating that "[t]he timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to timely file is a jurisdictional bar for the Industrial Commission"). Similarly, N.C. Gen. Stat. § 97-47 provides that the Commission may review and modify an award, but that "no such review shall be made after two years from the date of the last payment of compensation. . . ." See *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 587-88, 281 S.E.2d 463, 466 (1981) (holding that the two-year limitation of N.C. Gen. Stat. § 97-47 is not jurisdictional but provides a defense which the employer may assert). While N.C. Gen. Stat. § 97-24 "forever bar[s]" the claim and N.C. Gen. Stat. § 97-47 declares that "no such review shall be made after two years," N.C. Gen. Stat. § 97-18(c) does not, as we have previously noted, contain any provision delineating the consequences that would result from a defendant's failure to provide notice that it denied the compensability of a claim for worker's compensation benefits in a timely manner.¹¹ As a result, we do not find Plaintiff's arguments that the Commission had no choice in the aftermath of Defendants' failure to file and serve a denial of compensability within 14 days after receiving notice of Plaintiff's claim except to preclude Defendants from contesting Plaintiff's right to receive benefits to be persuasive.

¹¹ Similarly, N.C. Gen. Stat. § 97-18(d) is equally irrelevant to the present discussion since it contains a specific sanction for failure to provide a timely notice of a denial of compensability in the "pay without prejudice" context.

The only challenge that Plaintiff has advanced in opposition to the Commission's decision to overturn Deputy Commissioner Glenn's decision rested on his construction of N.C. Gen. Stat. § 97-18(c). Having concluded that the Commission correctly overturned Deputy Commissioner Glenn's determination that Defendants had forfeited the right to contest the compensability of Plaintiff's claim by failing to file and serve a denial of compensability within 14 days of receiving notice of that claim, we have addressed the remaining challenge that Plaintiff has advanced in opposition to the Commission's order. As a result, given our conclusion that the Commission correctly construed N.C. Gen. Stat. § 97-18(c), we further conclude that the Commission did not err by vacating and reversing Deputy Commissioner Glenn's order and remanding this case for a full hearing on the merits.

IV. Conclusion

As a result, for the reasons set forth above, we conclude that the Commission did not err by failing to make findings and conclusions in the 12 September 2005 order or by vacating and reversing Deputy Commissioner Glenn's orders and remanding this case to deputy commissioner for a full hearing on the merits. Thus, the Commission's order is affirmed.

AFFIRMED.

Judges GEER and STROUD concur.

Report per Rule 30(e).