

*An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.*

NO. COA07-479

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2008

JAMES EARNEST JONES, SR.,  
Employee, Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 236401

E.I. DUPONT DE NEMOURS  
& COMPANY,  
Employer,

and

LUMBERMENS MUTUAL  
CASUALTY COMPANY,  
Carrier,  
Defendants.

Appeal by plaintiffs from Opinion and Award entered 2 February 2007 by the Industrial Commission of North Carolina. Heard in the Court of Appeals 1 November 2007.

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

*Lewis & Roberts, PLLC, by John D. Elvers and Sarah C. Blair, for defendant-appellees.*

STROUD, Judge.

Plaintiff appeals from the Opinion and Award of the Industrial Commission (“Commission”) filed on 2 February 2007, which denied workers’ compensation benefits for temporary total disability due to asbestosis and pleural plaques. We affirm.

I. Factual Background

Plaintiff, James Ernest Jones, Sr., started working for defendant-employer, Dupont, at its Brevard, North Carolina, facility on 3 February 1958. Plaintiff was significantly exposed to asbestos in 1969 and occasionally exposed to asbestos at other times. In 1980, he began to be examined and x-rayed as part of a broad plan by defendant-employer to monitor possible development of asbestosis in its employees. Plaintiff was still working at the Dupont facility in January 1987, when he suffered a heart attack and underwent quintuple cardiac bypass surgery. He returned to work in May 1987, working half days. After his return to work he experienced shortness of breath which inhibited his ability to walk and climb steps. His shortness of breath was attributed to his heart condition. Plaintiff subsequently retired in October 1987 at the advice of his physician. In 1991, plaintiff was found by the Social Security Administration to be disabled due to his heart condition.

Subsequent to his retirement, plaintiff continued to be monitored by defendant-employer for asbestosis. After an “abnormal x-ray,” plaintiff was sent on 8 November 2001 to Dr. Prechter, a pulmonologist, by defendant-employer. After examining plaintiff, reviewing his history, and ordering a CT scan, Dr. Prechter opined that plaintiff’s breathing problems were minimally related to asbestos exposure.

Plaintiff was seen by Dr. Schwartz, a pulmonologist, on 23 August 2002. Dr. Schwartz diagnosed plaintiff with “asbestosis and asbestos-induced pleural fibrosis” which caused restrictive lung function. In 2004, plaintiff was examined by Dr. Dobby, also a pulmonologist, who concluded that plaintiff’s December 2003 CT scan did show “significant amounts of asbestosis.”

## II. Procedural History

On 12 November 2002, plaintiff filed Form 18B with the Industrial Commission, seeking benefits for an occupational disease resulting from exposure to asbestos. Defendants denied that plaintiff was entitled to benefits, contending that he did not have a compensable occupational disease. The claim was initially heard before Deputy Commissioner Morgan S. Chapman on 1 December 2004. By an Opinion and Award filed on 29 July 2005 (“2005 Opinion and Award”), the deputy commissioner concluded that plaintiff had “not proven temporary total disability” and that portion of the claim was therefore denied. However, the deputy commissioner also concluded that plaintiff was entitled to \$40,000.00 and medical compensation for “permanent organ damage” to his lungs. Plaintiff appealed the 2005 Opinion and Award to the Full Commission.

The Full Commission reviewed plaintiff’s claim on 12 January 2006. In its Opinion and Award filed 2 February 2007 (“2007 Opinion and Award”), the Commission reached the same conclusions as the 2005 Opinion and Award. Plaintiff filed notice of appeal to this Court from the 2007 Opinion and Award. On appeal, plaintiff assigns error to seven findings of fact and to one conclusion of law in the 2007 Opinion and Award.

### III. Analysis

Plaintiff contends that

[i]t is incumbent upon the Commission to first determine whether plaintiff is disabled. . . .The plaintiff presented evidence in this claim that he was physically incapable of working. However, the Commission made no findings as to disability. The only finding was that the plaintiff was not disabled *as a result of asbestosis*. In so finding, the Commission failed to discuss much of the evidence and simply overlooked the fact that the plaintiff was disabled.

(Emphasis in original.)

The Industrial Commission must make specific findings of fact to support its conclusions, sufficient for meaningful appellate review, on “crucial questions” when there is conflicting evidence in the record. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 596, 290 S.E.2d 682, 684 (1982).

It was not controverted in the case *sub judice* that plaintiff was disabled. The question before the Commission was whether plaintiff was disabled *as a result of a compensable injury*. Therefore, the Commission was not required to make a finding concerning whether plaintiff was disabled as a threshold matter. This assignment of error is without merit.

Plaintiff contends that the Commission erred when it failed to find that his disability was caused by asbestosis. Specifically, plaintiff assigns error to the findings of the Commission that: (1) “plaintiff’s shortness of breath [in 2001] was primarily the result of his heart problem and mild chronic obstructive pulmonary disease” rather than asbestosis, (2) plaintiff did not have significant asbestosis in 2003, (3) an August 2004 review of plaintiff’s latest CT scan “did not reveal much evidence of interstitial [lung] disease,” (4) plaintiff did not have “significant interstitial [lung] disease,” (5) in 1991, plaintiff was found by the Social Security Administration to be “disabled due to his heart condition,” (6) “[p]laintiff was not diagnosed with asbestosis until August 2002 when Dr. Schwartz saw him at the request of his attorney,” and (7) plaintiff’s asbestosis was “mild” and he had retired “due to unrelated heart problems and [plaintiff] had never attempted to return to work in any other capacity.”

Plaintiff did not argue on appeal that these findings were unsupported by any competent evidence. Rather, he argued that the “the Commission discounted or disregarded much of the evidence presented in the claim.” Specifically, plaintiff notes the testimony of Dr. Schwartz and contends that the Commission improperly gave greater weight to the testimony of Dr. Dombay,

who testified that plaintiff's shortness of breath was due primarily to his heart problems and smoking-related disease, than that of Dr. Schwartz, who testified that plaintiff's shortness of breath was due primarily to asbestosis.

"It is the exclusive province of the Industrial Commission to weigh and evaluate the evidence before it and find the facts." *Lucas v. Thomas Built Buses*, 88 N.C. App. 587, 589, 364 S.E.2d 147, 149 (1988). While "[t]he Industrial Commission may not discount or disregard any evidence, [it] may choose not to believe the evidence after considering it." *Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996). This Court does not re-weigh the evidence supporting the Commission's findings of fact. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

[T]he Commission's findings of fact are binding on appeal if they are supported by competent evidence, even if there is evidence to support a contrary finding. Put another way, the Commission's findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them.

*Estate of Gainey v. Southern Flooring and Acoustical Co., Inc.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 646 S.E.2d 604, 607 (2007) (citations and quotation marks omitted).

The Commission's specific references show that it considered the testimony of Dr. Schwartz, but decided to give greater weight to the testimony of Dr. Domby and Dr. Prechter. There is no indication in the record that the testimony of Dr. Domby and Dr. Prechter was not competent evidence, therefore it was the prerogative of the Commission to give the evidence whatever weight it saw fit. The burden was on plaintiff to show that his disability was reasonably related to his employment, *Holley v. ACTS, Inc.*, 357 N.C. 228, 231, 581 S.E.2d 750, 752 (2003), and the finding that plaintiff's shortness of breath was primarily the result of heart problems and smoking-related disease was sufficient to support the Commission's conclusion that plaintiff had

not met his burden of proving that his disability resulted from asbestosis. This assignment of error is overruled.

Finally, plaintiff argues at length in his brief that the Commission erred in finding that “the pleura is not an important part of the body and is part of the lung.” “Except for jurisdictional questions, failure to assign error to the Commission’s findings of fact renders them binding on appellate review.” *Estate of Gainey*, \_\_\_ N.C. App. at \_\_\_, 646 S.E.2d at 607. The Commission found as fact that “the pleura is not a distinct and separate organ” from the lungs. Plaintiff did not assign error to that finding; argument in the brief notwithstanding, the Commission’s finding is binding on appeal.

We conclude that the findings of the Industrial Commission were supported by competent evidence in the record, and its conclusions of law were supported by its findings of fact. Accordingly, we affirm the 2 February 2007 Opinion and Award of the Industrial Commission.

Affirmed.

Judges TYSON and JACKSON concur.

Report per Rule 30(e).