NO. COA99-382

NORTH CAROLINA COURT OF APPEALS

Filed: 29 December 2000

FILED
00 DEC 29 AM 8:51
IN THE OFFICE OF THE
CLERK COURT OF APPEALS
OF NORTH CAROLINA

CLYDE SAMUEL ANDREWS,
Employee-Plaintiff-Appellee,

v.

Industrial Commission
I.C. File No. 254816

ITT GRINNELL PIPING COMPANY,
Employer-Defendant-Appellant,

and

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier-Defendant-Appellant.

Court of Appeals Slip Opinion

Appeal by defendants from opinion and award entered 23 September 1998 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 December 1999.

The Law Offices of Robin E. Hudson, by Robin E. Hudson and Samuel A. Scudder, for plaintiff-appellee.

Smith Helms Mullis & Moore, L.L.P., by George D. Kimberly, for defendant-appellants.

McGEE, Judge.

Defendant-employer ITT Grinnell Piping Company (ITT Grinnell) and defendant-carrier Liberty Mutual Insurance Company (Liberty Mutual) appeal an opinion and award of the North Carolina Industrial Commission (the Commission) entered 23 September 1998. The Commission, in reversing the deputy commissioner's opinion and award entered 30 June 1997, awarded plaintiff-employee Clyde Samuel Andrews workers' compensation benefits for his claim of exposure to asbestos.

Plaintiff was employed as a pipe fitter by ITT Grinnell,

formerly Carolina Industrial Piping Company, from February 1969 to October 1977. ITT Grinnell fabricated pipes for use in nuclear power plants. Plaintiff testified he wore asbestos gloves at work to handle hot pipes on a daily basis. He examined pipes to see if they were square, and if they were not, plaintiff would send the pipes to a stress relieving furnace for heating and reshaping. Pipes were transported on a railroad car bottom into a furnace. After completion of the stress relief, plaintiff would re-examine the pipes, which had asbestos on them. He worked in Bay One at the company for a "majority of the time" of his employment.

Adolphus Young, (Young) who was employed by ITT Grinnell from 1969 to 1984, testified that he also wore asbestos gloves during his employment. According to Young, he had to "use the gloves all the time." Young also said he operated a stress relieving furnace. He testified that on a regular basis he prepared pipes for the furnace by putting an asbestos wrap on them.

The Commission heard testimony of Jimmie Clark (Clark), who worked for ITT Grinnell from 1969 to 1985 as a pipe fitter. Clark wore asbestos gloves and worked most of the time in Bay Three. He testified that the stress relieving furnace used asbestos mortar.

Michael Valentine (Valentine), a senior welding engineer at ITT Grinnell from 1974 to 1985, testified that an asbestos wrap was not used in the stress relieving furnace. He also speculated that the ashes which accompanied the pipe after it was removed from the furnace were "related to . . . the protective coating" of the pipe. However, Valentine also acknowledged that ITT Grinnell "probably

used some form of asbestos wrap" before he began working there.

Dr. Robert Rostand (Dr. Rostand), a pulmonologist who treated plaintiff beginning in 1991, and Dr. C.D. Young (Dr. Young), a member of the North Carolina Industrial Commission's Advisory Medical Committee, testified in depositions to their conflicting opinions concerning whether plaintiff had asbestosis.

The Commission found as fact:

> 2. Plaintiff was employed by the defendant/employer as a pipe fitter from 1969 until October 1977. . . .
>
> . . . .
>
> 4. The Plaintiff's employment with Defendant/employer provided exposure to asbestos materials on a regular basis. These materials included asbestos welding gloves, asbestos blankets, asbestos pipe wrap, asbestos brick, asbestos mortar, asbestos dust from the railroad car from the outside furnace, and other asbestos containing materials. The plaintiff's last injurious exposure to asbestos was with Defendant/employer between the years 1974 through 1975. The plant stopped using asbestos containing products in 1975.
>
> . . . .
>
> 6. Plaintiff underwent his first and only Advisory Medical Committee examination by Dr. C.D. Young on June 3, 1993. It was Dr. Young's opinion that Plaintiff, more likely than not, had asbestosis. The Full Commission finds as a fact that plaintiff did have asbestosis.
>
> 7. The plaintiff contracted asbestosis as a result of his occupational exposure to asbestosis and his last injurious exposure to asbestosis was while employed with Defendant/employer. Plaintiff's exposure to asbestos in his employment placed him at an increased risk of developing asbestosis than the general public not so exposed.

> 8. The Full Commission gives greater weight to the testimony of Dr. C.D. Young, a member of the Advisory Medical Committee, than it does to that of Dr. Robert Rostand, a pulmonologist who treated plaintiff beginning in 1991. . . .

Based on these findings of fact, the Commission concluded:

> 1. Plaintiff has asbestosis as defined by N.C. Gen. Stat. § 97-62. Plaintiff's last injurious exposure to asbestos occurred while working for Defendant/employer before the plant stopped using asbestos materials. Therefore, Plaintiff is eligible for compensation pursuant to N.C. Gen. Stat. § 97-61.5.
>
> 2. In order for the uninsured Defendant/employer to incur liability in this case, Plaintiff's last injurious exposure to asbestos must have occurred during the time Defendant/employer was uninsured, which was before January 1, 1972. Plaintiff's last injurious exposure occurred after January 1, 1972. Therefore, the uninsured Defendant/employer has no liability. . . .
>
> . . . .
>
> 4. As a result of his contraction of asbestosis, Plaintiff is entitled to receive weekly compensation at the rate of $366.69 per week for a period of 104 weeks commencing as of June 3, 1993. N.C. Gen. Stat. § 97-61.5

The Commission awarded plaintiff workers' compensation benefits from Liberty Mutual. Defendants appeal from the opinion and award of the Commission.

I.

Defendants argue that the Commission erred by finding that plaintiff suffered from asbestosis. Specifically, defendants contend that no physician's testimony supports the finding that plaintiff has asbestosis. We disagree.

This Court's standard of review in an appeal from the Commission is limited to two questions: (1) whether there is any competent evidence to support the Commission's findings of fact and (2) whether the findings support the Commission's conclusions of law. *See Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996) (citation omitted). In *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), our Supreme Court stated:

> N.C.G.S. § 97-86 provides that "an award of the Commission upon such review, as provided in G.S. § 97-85, shall be conclusive and binding as to all questions of fact." N.C.G.S. § 97-86 (1991). As we stated in *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 141 S.E.2d 632 (1965), "[t]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Id.* at 402, 141 S.E.2d at 633. The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence. *Doggett v. South Atl. Warehouse Co.*, 212 N.C. 599, 194 S.E. 111 (1937).

While the testimonies of Dr. Young and Dr. Rostand are conflicting, there is competent evidence in the record to support the findings of fact of the Commission. Dr. Young testified in his deposition that plaintiff had asbestosis:

> Q. Now, under "Medical Diagnosis," Number 1 is asbestosis?
>
> A. Yes.
>
> Q. And what was that diagnosis based on?
>
> A. As I just said, I referred to the chest x-ray findings in particular; his

history, indicating exposure. He had pulmonary function tests which, while not specific, did indicate a mild restriction, which is the pattern that we classically associate with asbestosis. . . .

Q. So, based on your complete evaluation of Mr. Andrews, including the pulmonary function tests and the chest x-rays as well as the history and the prior information you had available to you, did you have an opinion at that time as to whether it was more likely than not that Mr. Andrews had asbestosis?

MR. KIMBERLY: Objection.

A. Yes.

Q. (Ms. Hudson) And what was your opinion?

A. My opinion was that he did have asbestosis.

This evidence is sufficient to support the findings of fact that plaintiff has asbestosis. The Commission's findings of fact support its conclusion of law that plaintiff suffers from asbestosis. This assignment of error is overruled.

II.

Defendants contend the Commission erred by finding that Dr. Young's testimony be given greater weight than the testimony of Dr. Rostand. Specifically, defendants argue that Dr. Rostand's testimony should be given greater weight because Dr. Rostand had qualifications similar to Dr. Young and plaintiff had a longer treatment history with Dr. Rostand. We disagree.

Our Supreme Court expressly stated in *Adams*, 349 N.C. at 681, 509 S.E.2d at 414:

Thus, on appeal, this Court "does not have the

> right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding."

(Citations omitted.) As previously stated, there is sufficient evidence to support the Commission's findings, and those findings support its conclusions of law. Therefore, defendants' argument is without merit.

III.

Defendants further argue that the Commission erred in finding that plaintiff was exposed to asbestos on a regular basis and was injuriously exposed to asbestos during his employment with ITT Grinnell.

Defendants first contend that "none of the physicians involved with this case have stated with any degree of medical certainty that plaintiff suffers from asbestosis." Our Court rejected a similar argument in *Cooke v. P.H. Glatfelter/ECUSTA*, 130 N.C. App. 220, 502 S.E.2d 419 (1998). In *Cooke*, the defendant relied on the dictum of *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 542, 463 S.E.2d 259, 262 (1995), *aff'd per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996), in arguing that causation of the plaintiff's workplace disability must be established to a "reasonable degree of medical certainty." *Cooke*, 130 N.C. App. at 224, 502 S.E.2d at 422. Our Court rejected such an exacting standard and stated, "The *Phillips* court did not . . . establish a new and more onerous burden of proof for claimants . . . ." *Id.*

Defendants next argue that "no other evidence appears in the

record of an occupational exposure to asbestos" other than plaintiff's own testimony. To the contrary, the record before us includes testimony regarding plaintiff's exposure from two of plaintiff's co-workers, a senior engineer at ITT Grinnell, and one medical expert.

We also note that less evidence than was presented in this case was specifically found to be sufficient in *Woodell v. Starr Davis Co.*, 77 N.C. App. 352, 335 S.E.2d 48 (1985). In *Woodell*, the plaintiff filed a workers' compensation asbestos claim against an insulation contractor and its insurance carrier. *Id.* at 353, 335 S.E.2d at 49. Like defendants' argument in the case before us, the defendants in *Woodell* contended that the evidence produced did not support the Commission's finding or conclusion that the plaintiff was injuriously exposed to asbestos. *Id.* at 356, 335 S.E.2d at 50. Unlike plaintiff in our case, the plaintiff in *Woodell* was the *only* witness to testify that he worked with asbestos-containing pipes. The *Woodell* court held this evidence was sufficient. *Id.* at 356-57, 335 S.E.2d at 51. In the case at bar, plaintiff specifically testified that he wore asbestos gloves and that he would examine asbestos-laden pipes that came from the furnace. Young testified that he wore asbestos gloves and that he prepared pipes for the furnace by putting asbestos wraps on them. Clark also said he wore asbestos gloves and that the stress relieving furnace used asbestos mortar. Even Valentine, a witness for defendants and senior engineer at the plant, acknowledged that ITT Grinnell "probably used some form of asbestos wrap" before he arrived there in 1974.

Finally, Dr. Young opined that plaintiff's exposure to asbestos was more likely than not a cause or significant contributing factor to the diagnosis of plaintiff's asbestosis. Because the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, *see Anderson v. Construction Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965), we hold that the Commission properly found that plaintiff was exposed to asbestos. We affirm the order of the Commission.

Affirmed.

Judges HORTON and EDMUNDS concur.

Report per Rule 30(e).