An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-797

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

ERTLE P. MOORE,
Employee,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 263176

FLUOR DANIEL,
Employer,

RSK INSURANCE CO.,
Carrier,
Defendants.

Appeal by plaintiff from an opinion and award filed 28 February 2006 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 February 2007.

Scudder & Hedrick, by Samuel A. Scudder, for plaintiff appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Jan N. Pittman and Julia S. Hooten, for defendant appellees.

McCULLOUGH, Judge.

Ertle Moore (“plaintiff”) appeals from the North Carolina Industrial Commission’s (“the Commission”) opinion and award denying plaintiff’s claim for workers’ compensation benefits where plaintiff failed to establish that he had an occupational disease and further failed to establish that he sustained an injury by accident.

Plaintiff began working for Fluor Daniel ("defendant-employer") in 2002 as a welder on the Belew's Creek power plant jobsite in Greensboro, North Carolina. Plaintiff initially worked as a welder outside in the lay down yard for approximately two months. He was then transferred to work in the boiler house reinforcing steel beams. The inside of the boiler house was covered in gray fly ash which caused dust when walked through and had to be welded through or burned off. During the month of January, plaintiff saw his family physician due to problems with his sinuses, throat and coughing. At the end of January, plaintiff requested to work outside and refused to work in the boiler house around the fly ash. Plaintiff did not return to work for defendant-employer after 5 February 2003.

Plaintiff filed a notice of accident on 19 February 2003 reporting injuries on 20 January 2003 to the throat, nose, upper respiratory and psychological issues due to exposure to fly ash without a respirator. On 27 February 2003, defendant-employer denied plaintiff's workers' compensation claim. On 16 May 2005 Deputy Commissioner Adrian Phillips issued an opinion and award concluding that plaintiff sustained injuries by accident and had a compensable occupational disease entitling plaintiff to medical benefits. Plaintiff and defendant-employer appealed from the Deputy Commissioner's opinion and award.

The Commission reviewed the evidence on appeal and entered an opinion and award concluding that plaintiff did not sustain an injury by accident, failed to establish a compensable occupational disease claim and therefore was not entitled to benefits. Plaintiff appeals.

Plaintiff contends on appeal that the Commission applied the incorrect standard of law in determining whether he sustained an injury by accident and therefore such finding and conclusion are in error.

“[W]hen reviewing Industrial Commission decisions, appellate courts must examine ‘whether any competent evidence supports the Commission’s findings of fact and whether [those] findings . . . support the Commission’s conclusions of law.’“ *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (citation omitted). “Whether an accident arose out of the employment is a mixed question of law and fact.” *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 197, 128 S.E.2d 218, 221 (1962). If there is evidence to support the Commission’s findings concerning this issue, we are bound by those findings. *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E.2d 807, 809-10 (1982).

Section 97-2(6) of the North Carolina General Statutes defines an injury under the Workers’ Compensation Act as “injury by accident arising out of and in the course of the employment . . . .” N.C. Gen. Stat. §97-2(6) (2005). “‘Arising out of the employment’ refers to the origin or cause of the accidental injury, while ‘in the course of the employment’ refers to the time, place, and circumstances of the accidental injury.” *Roman v. Southland Transp. Co.*, 350 N.C. 549, 552, 515 S.E.2d 214, 216 (1999). In deciding whether there was an accident, the question on appeal is whether there was “““an unlooked for and untoward event which is not expected or designed by the [injured employee],”“‘ *Gladson v. Piedmont Stores*, 57 N.C. App. 579, 579, 292 S.E.2d 18, 18, *disc. review denied*, 306 N.C. 556, 294 S.E.2d 370 (1982) (citations omitted), or “““the interruption of the routine work and the introduction thereby of unusual conditions[,]”“‘ *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985) (citations omitted).

“[O]n 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.’“ *Adams v. AVX Corp.*, 349 N.C.

676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). (citation omitted). Even where the record contains competent evidence to the contrary, we must defer to the findings of the Commission where supported by any competent evidence at all. *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 259, 540 S.E.2d 768, 773 (2000), *aff'd*, 353 N.C. 520, 546 S.E.2d 87 (2001).

The Commission made the following findings of fact:

> 11. At her deposition, Dr. Locklear testified that plaintiff's symptoms were consistent with exposure to fly ash, yet she was not sure what fly ash was and did not know how much exposure was needed to develop asthma or cause permanent damage. Dr. Locklear then testified that plaintiff's workplace exposure to fly ash was a significant contributing factor in the development of his lung condition. Dr. Locklear also reviewed the fly ash Material Safety Data Sheet and stated that plaintiff's exposure to fly ash placed him at an increased risk of developing his lung condition compared with the general population. Dr. Locklear explained, however, that it was more likely that plaintiff's exposure to fly ash could have caused pre-existing asthma to flare up, and she could not say that plaintiff's exposure to fly ash at work actually caused the development of his asthma. Dr. Locklear felt that although plaintiff did not sustain any permanent lung damage and was not disabled from working, he should avoid triggers that could cause a flare-up of his asthma, such as his job with defendant-employer.
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> 13. On August 11, 2004, plaintiff saw Dr. Andrew Ghio for an independent medical evaluation. Dr. Ghio has been board certified in internal medicine since 1984 and in pulmonary medicine since 1990, and is a former chairman of the Industrial Commission's Advisory Medical Committee. Dr. Ghio previously worked for the Centers for Disease Control in the division of respiratory disease studies, after which he completed training in pulmonary medicine and began work on the faculty at Duke University. Dr. Ghio is currently employed with the Environmental Protection Agency pursuing research in particle fibers. Dr. Ghio is familiar with fly ash and has conducted laboratory studies that use fly ash to determine the biological effects of air pollution particles. Dr. Ghio testified that he uses coal fly ash as a control in his studies, as it is a particle with very little biological activity.

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> 14. Upon review of plaintiff's medical records, Dr. Ghio stated that plaintiff had no evidence of any lung injury following the fly ash exposure, but that he may have asthma. After performing a physical examination, Dr. Ghio testified that plaintiff might have had some irritation of mucus membranes, but that he did not have a chronic injury. Regarding plaintiff's positive methacholine challenge test, Dr. Ghio explained that to have a positive test result, there must be a drop of 20 percent within the first three doses. Plaintiff did not have a 20 percent drop until the fifth dose. Dr. Ghio testified that even a normal individual responds to a methacholine challenge test on the fifth dose, and thus, plaintiff's methacholine challenge test was normal. Additionally, Dr. Ghio testified that plaintiff's fly ash exposure had no bearing on his complaints of shortness of breath and that "an exposure to a [fly ash] particle has never, ever in the history of all medical investigation been associated with fibrotic injury to the larynx." Dr. Ghio explained that plaintiff's description of the duration of his exposure to fly ash did not meet Dr. Ghio's definition for a prolonged exposure sufficient to cause plaintiff's symptoms. Dr. Ghio stated that plaintiff's asthma and other respiratory conditions were not caused by his exposure to fly ash, although exposure to fly ash can exacerbate asthma in an individual who already has it. Dr. Ghio further stated that plaintiff did not have any permanent partial disability.

A review of the depositions of Dr. Locklear and Dr. Ghio reveal that there was ample evidence to support the findings of fact made by the Commission. It is apparent that there was conflicting testimony by the two experts and the Commission gave greater weight to the opinion of Dr. Ghio than that of Dr. Locklear. Where the evidence of record supports the findings, this Court will not re-weigh the evidence on appeal, and we are bound by such findings. Therefore, this assignment of error is overruled.

On appeal plaintiff additionally assigned error to the conclusion that plaintiff failed to establish a compensable occupational disease claim under the standards of *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983). However, plaintiff subsequently abandoned the aforementioned assignment of error due to the ruling of the North Carolina Supreme Court in

Chambers v. Transit Mgmt.,___ N.C. ___, ___ S.E.2d ___ (2006) (No. 527A05), and therefore we will not address this issue on appeal.

Plaintiff further contends that the Commission erred in failing to make findings of fact and conclusions of law as to the issue of whether defendants should be sanctioned for failing to answer discovery truthfully.

"'[W]hen [a] matter is "appealed" to the full Commission . . . , it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties.'" *Cialino v. Wal-Mart Stores*, 156 N.C. App. 463, 474, 577 S.E.2d 345, 353 (2003) (citation omitted). Subsequent to the issuance of the Deputy Commissioner's opinion and award, plaintiff and defendant gave notice of appeal to the Commission from such decision. In plaintiff's application for review by the Commission, plaintiff alleged as error "[t]he Deputy Commissioner failed to make findings of fact, conclusions of law, and an award regarding the issue of sanctions against Defendants due to their discovery abuses[]" and further included such arguments in their brief to the Commission.

Where the issue was clearly before the Commission yet the opinion and award failed to address this issue, we must remand to the Commission for consideration as to whether defendants should be sanctioned.

Accordingly, we affirm in part and remand in part for entry of an opinion and award consistent with this opinion.

Affirmed in part; remanded in part.

Judges BRYANT and LEVINSON concur.

Report per Rule 30(e).