

Affirmed
Author: Riggsbee (order)
Ballance
Bunn (retired prior
to order)

NO. COA00-784

NORTH CAROLINA COURT OF APPEALS

Filed: 02 October 2001

DONALD ARTHUR,
Employee,
Plaintiff,

v.

From the North Carolina
Industrial Commission
Nos. 500689 & 436436

ATC PETROLEUM, INC.
Employer,

TRAVELERS INSURANCE COMPANY
Carrier,
Defendants

Appeal by plaintiff and defendants from an order filed 13 March 2000 by Commissioner Renee C. Riggsbee of the North Carolina Industrial Commission. Heard in the Court of Appeals 16 May 2001.

Law Offices of Robin E. Hudson, by Robin E. Hudson and John A. Hedrick for plaintiff.

Cranfill, Sumner & Hartzog, by Robin H. Terry and Kari R. Johnson for defendants.

THOMAS, Judge.

Defendants, ATC Petroleum, Inc. (ATC) and Travelers Insurance Company, appeal the denial of their motion to dismiss based on *res judicata* and violation of the statute of limitations in a 13 May 2000 order of the North Carolina Industrial Commission (Commission). Defendants set forth two assignments of error.

Plaintiff, Donald Arthur, appeals the denial of his motion to set aside a 25 May 1988 opinion and award involving an alleged injury to his lungs. Plaintiff also sets forth two assignments of

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error.

For the reasons discussed herein, we affirm the trial court.

The facts are as follows: Plaintiff was employed by defendant ATC from 1972 until 1983 as a maintenance supervisor. ATC, at that time, was in the business of processing and storing petroleum products.

On 26 December 1984, approximately one year after leaving ATC, he filed a Form 18 "Notice of Accident" with the Commission and requested a hearing, alleging that he had obtained restrictive lung disease as a result of exposure to hazardous materials while employed with ATC.

On 18 November 1985, a hearing was held before Chief Deputy Commissioner Forrest H. Shuford, II. Plaintiff testified that he had been exposed to numerous substances during his employment with ATC, including tetra-ethyl lead, sulfur dioxide, sulfur, lead, petroleum, fumes from petroleum products, asbestos and silica. In a 16 May 1986 opinion and award, Chief Deputy Commissioner Shuford found, *inter alia*, that: (1) plaintiff had smoked one pack of non-filtered cigarettes per day for over thirty-five years; (2) during his employment, plaintiff went into furnaces for cleaning two to three times per year for twenty-minute intervals; (3) occasionally, plaintiff was required to enter petroleum storage tanks; (4) plaintiff had some occasion to inhale fumes from petroleum products and sulfur dioxide; and (5) although plaintiff had mild damage to his lungs, he sustained no temporary total, temporary partial or permanent partial disability. Chief Deputy Commissioner Shuford

concluded that plaintiff had a mild chronic obstructive pulmonary disease (COPD) from exposure to sulfur dioxide. Plaintiff was awarded \$25,000 to compensate for the damage to his lungs.

Defendants appealed to the Full Commission, which heard the matter on 1 October 1986. On 3 October 1986, the Commission ordered plaintiff to be evaluated by a pulmonary specialist, whose findings, along with the entire record, would then be evaluated by another Deputy Commissioner.

On 31 December 1987, Deputy Commissioner Tamara R. Warstler entered an opinion and award wherein she found that, while plaintiff did suffer from COPD, it was not caused or aggravated by his exposure to any substance at work. Rather, it resulted from his long history of cigarette smoking. On 25 May 1988, the Full Commission affirmed Deputy Commissioner Warstler's order.

Without appeal or a motion to set aside the order, plaintiff filed a Form 18B with the Commission on 11 October 1993, alleging he was injured as a result of his employment with ATC due to exposure to asbestos and other substances. On 16 August 1995, defendants filed a motion to dismiss the new claim based on the doctrine of *res judicata* in that the claims of plaintiff were the same issues and matters involved in the 25 May 1988 opinion and award. This motion was denied by the Commission on 8 March 1996.

On 28 January 1998, almost ten years after the Commission entered its decision in plaintiff's first case, plaintiff filed a motion to set aside the 1988 opinion and award. Plaintiff alleged that he had been diagnosed with asbestosis and that his exposure to

lead and other petroleum products was more extensive than he had thought during the pendency of his prior claim.

On 13 March 2000, the Full Commission entered an order denying plaintiff's motion to set aside the 1988 opinion and award, based in part on the lapse of time involved in the case. The Commission also denied defendants' renewed motion to dismiss.

By their first assignment of error, defendants argue the trial court erred by refusing to dismiss plaintiff's most recent claim under the doctrine of *res judicata*. We disagree.

Ordinarily, the denial of a motion to dismiss or summary judgment is not immediately appealable. *Wilson v. Watson*, 136 N.C. App. 500, 524 S.E.2d 812 (2000). This Court has consistently held, however, that the "denial of a motion for summary judgment on the basis of *res judicata* affects a substantial right and entitles a party to an immediate appeal. *Id.* at 501, 524 S.E.2d at 813.

The essential elements of *res judicata* are: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in the prior suit and the present suit; and (3) an identity of parties or their privies in both suits. *Green v. Dixon*, 137 N.C. App. 305, 528 S.E.2d 51, *aff'd*, 352 N.C. 666, 535 S.E.2d 356 (2000).

In the instant case, the second element of *res judicata* is absent. Plaintiff's initial claim was based on exposure to toxic chemicals contained in petroleum. Plaintiff's subsequent claim was based on asbestosis. In his previous claim, plaintiff filed a Form 18, which is a Notice of Accident form. In his most recent claim,

he filed a Form 18B, which is specifically for lung damage cases including asbestosis, silicosis and byssinosis. The time for filing a claim due to asbestosis runs from the date the employee has been advised by a competent medical authority that he or she has the occupational disease asbestosis. *Lawson v. Cone Mills Corp.*, 68 N.C. App. 402, 315 S.E.2d 103 (1984). Plaintiff was not even diagnosed with asbestosis until 1993 and, therefore, has sought compensation for two distinct occupational diseases. While there may be some overlap in symptoms, each causes different illnesses and each requires its own form of treatment. The Commission properly denied defendants' motion to dismiss. Accordingly, we reject this assignment of error.

By their next assignment of error, defendants argue plaintiff's asbestosis claim is barred by the statute of limitations. We disagree.

N.C. Gen. Stat. § 97-58(c) provides that an employee must file a claim for compensation for asbestosis within two years from the date he or she is informed by a competent medical authority that he or she has the disease. N.C. Gen. Stat. § 97-58(c) (1999). See also *Lawson v. Cone Mills Corp.*, 68 N.C. App. 402, 315 S.E.2d 103 (1984).

In the instant case, plaintiff's asbestosis claim was filed on 6 October 1993 after he had been diagnosed with the disease in 1993 by Dr. Daniel Gottovi. This is within two years of diagnosis by a competent medical authority. As such, plaintiff's claim is not barred by the statute of limitations contained in section 97-58(c).

Accordingly, we reject this assignment of error.

By his two assignments of error, plaintiff contends that: (1) the Commission's order denying his motion to set aside the 1988 opinion and award was based on a misapprehension of law; and (2) the Commission's order denying his motion contained no findings of fact and therefore prevents this Court from reviewing the order. Because plaintiff's most recent claim remains alive, however, we hold this issue is moot.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Ass'n.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Here, our rejection of defendants' assignments of error on the new asbestosis claim results in any determination of plaintiff's assignments of error unnecessary.

AFFIRMED.

Judges WALKER and MCCULLOUGH concur.

Report per Rule 30(e).