NO. COA10-522

NORTH CAROLINA COURT OF APPEALS

Filed: 15 March 2011

GROVER M. ENSLEY,
Plaintiff-employee,

v.

North Carolina
Industrial Commission
I.C. No. 676703

FMC CORPORATION,
Defendant-employer,
SELF-INSURED,

and

BROADSPIRE, A CRAWFORD COMPANY,
Defendant-servicing agent.

Appeal by defendants from Opinion and Award entered 29 December 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 November 2010.

Wallace & Graham, P.A., by Edward L. Pauley, for plaintiff-appellee.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones and Mathew E. Flatow, for defendant-appellants.

STEELMAN, Judge.

The Commission properly awarded plaintiff permanent and total disability benefits where plaintiff was unable to work in any capacity as a result of his asbestosis. The Commission did not err in calculating plaintiff's average weekly wage where it utilized the final method under N.C. Gen. Stat. § 97-2(5) and awarded plaintiff the maximum compensation rate for 2006 as the amount of

plaintiff's weekly compensation. Where the Commission failed to make sufficient findings of fact regarding its award of attorney's fees, this issue is remanded to the Commission for further findings and conclusions. Where the Commission failed to order plaintiff's disability benefits to begin on the date of diagnosis, this issue is reversed and remanded.

I. Factual and Procedural Background

Grover Ensley (plaintiff) was employed by FMC Corporation (FMC) at a chemical plant that manufactured lithium products. From 1962 until 1974, plaintiff performed various jobs, including operating machinery that made different chemicals and removing metal from "dipping cells" that were insulated with asbestos. Plaintiff often installed asbestos insulation in the cells. In order to make the insulation, plaintiff would pour vermiculite powder from a bag and mix it with water. As the powder was poured from the bag, dust would escape and plaintiff breathed this dust into his lungs. While working on the cells, plaintiff used asbestos lined aluminum coats and asbestos gloves, which caused plaintiff's skin to itch.

In 1974, plaintiff became a supervisor and oversaw ten to forty employees. Plaintiff continued to work on the machinery and around asbestos insulation. As a supervisor, plaintiff's chief responsibility was the main chemical building. There was asbestos insulation throughout the building surrounding the steam lines.

In October 1996, plaintiff was on short-term disability for approximately six months because of high blood pressure. Plaintiff

attempted to return to working four-hour days; however, his blood pressure remained high and he experienced anxiety attacks. Plaintiff applied for long-term disability and social security benefits, but his applications were denied. Plaintiff then took a voluntary reduction in force severance package and retired in January 1998. Plaintiff has not obtained other employment since he retired from FMC. In 2002, plaintiff had a cardiac catheterization, three coronary bypasses, and spent nineteen days in the hospital. Plaintiff subsequently experienced a pulmonary embolism in his lungs.

In 2006, plaintiff had chest x-rays that were reviewed by Dr. Jill Ohar (Dr. Ohar), a board certified pulmonologist. She diagnosed plaintiff with asbestosis and silicosis stemming from his employment with FMC. Dr. Ohar's physical examination revealed audible "bibasilar crackles" that did not clear with coughing that were likely due to scarring from asbestos or silica exposure. A pulmonary function test also showed that he had a "moderate to severe" restrictive lung impairment.

Two other physicians reviewed plaintiff's case. Dr. Selwyn Spangenthal performed an independent medical evaluation, including a physical examination and pulmonary function test, and opined that plaintiff suffered from a breathing impairment due to asbestosis. Dr. Fred Dula, a board certified physician in diagnostic radiology, reviewed plaintiff's chest x-rays and opined that the results were consistent with exposure to asbestos.

On 27 November 2006, plaintiff filed a Form 18B, initiating a claim for workers' compensation against FMC and Broadspire, FMC's servicing agent (collectively, defendants). FMC filed a Form 19 and Form 33R, which denied compensability of the claim. On 10 November 2009, plaintiff's claim was heard by the Full Commission. On 29 December 2009, the Commission filed its Opinion and Award, and found that plaintiff suffers from asbestosis as a result of his employment with FMC and that he is permanently and totally disabled. The Commission awarded plaintiff permanent total disability benefits at the rate of $730.00 per week beginning 30 January 2006 and continuing for the remainder of his life. FMC was also ordered to pay for plaintiff's medical expenses and attorney's fees in the amount of twenty-five percent of the compensation approved. The Commission ordered that the attorney's fees "shall not be deducted from the compensation due plaintiff but paid as a part of the cost of this action."

Defendants appeal.

II. Standard of Review

> The applicable standard of appellate review in workers' compensation cases is well established. Appellate review of an opinion and award from the Industrial Commission is generally limited to determining: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact."

Hassell v. Onslow Cty. Bd. of Educ., 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (quotation and citation omitted). The failure to assign error to the Commission's findings of fact renders them

binding on appeal. *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 110-11, 590 S.E.2d 294, 297 (2004). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted).

III. Entitlement to Disability Benefits

In their first argument, defendants contend that the Commission erred by awarding plaintiff permanent and total disability benefits. We disagree.

Asbestosis is a compensable occupational disease under the Workers' Compensation Act. N.C. Gen. Stat. § 97-53(24) (2009). The term disability is defined as "the state of being incapacitated as the term is used in defining 'disablement' in G.S. 97-54." N.C. Gen. Stat. § 97-55 (2009). N.C. Gen. Stat. § 97-54 (2009) provides:

> The term "disablement" as used in this Article as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated because of asbestosis or silicosis to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis; but in all other cases of occupational disease "disablement" shall be equivalent to "disability" as defined in G.S. 97-2(9).

This Court has held that in order to support a conclusion that an employee is entitled to total and permanent disability benefits under N.C. Gen. Stat. § 97-29 based upon exposure to asbestos, the Commission must find that the employee "is totally unable, as a result of the injury arising out of and in the course of his

employment, to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis[.]" *Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) (internal citations and quotations omitted).

In the instant case, the Commission made the following findings of fact:

> 16. In 2006, plaintiff had chest x-rays performed and was diagnosed with asbestosis and silicosis. Plaintiff was seen by Dr. Jill Ohar as a result of his condition. Dr. Ohar is a board certified pulmonologist at Wake Forest Baptist Hospital. Dr. Ohar concluded that plaintiff was suffering from asbestosis and silicosis as a result of his employment with defendant-employer. She determined that he had a moderate restrictive lung impairment from the breathing tests to which she attributed to asbestosis and silicosis. *Dr. Ohar determined that plaintiff's asbestosis is disabling and that plaintiff is not capable of engaging in any physical activity or working.*
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> 18. In addition Dr. Selwyn Spangenthal, a board certified pulmonologist, performed an independent medical examination at the request of defendants. Dr. Spangenthal opined that plaintiff suffered from a breathing impairment due to asbestosis. Dr. Spangenthal also opined that plaintiff's employment with defendant-employer caused or contributed to his asbestos.
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> 20. Plaintiff was evaluated by Stephen Carpenter, a vocational specialist. Mr. Carpenter evaluated plaintiff in light of plaintiff's age, education, work history, and transferable skills and reviewed his medical records. Mr. Carpenter opined that plaintiff is not employable in any type of work due to the deficits found on testing and due to

> medical findings showing significant loss of function. He further opined that plaintiff is not able to perform his previous job with defendant-employer and that it would be futile for plaintiff to see[k] other employment.
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> 21. The Full Commission finds based upon the greater weight of the credible evidence that Plaintiff suffers from asbestosis and silicosis as a result of his employment with defendant-employer. The Full Commission further finds that plaintiff is permanently and totally disabled as a result of his asbestosis.

(Emphasis added.) Defendants do not specifically challenge any of the above findings of fact. Instead, defendants argue that plaintiff is not entitled to disability benefits because he had no wage earning capacity as of 1998 when he retired from FMC because of his high blood pressure; and, therefore, had no loss of earning capacity in 2006. Defendants' argument is not supported by the evidence presented in this case.

In 1997, Dr. Robert Crummie (Dr. Crummie) and Dr. Merciditas Elizondo (Dr. Elizondo) evaluated plaintiff on behalf of UNUM, the disability carrier for FMC. Both Dr. Crummie and Dr. Elizondo opined that plaintiff could return to work with a different employer. On 17 October 1997, UNUM denied plaintiff's claims for long-term disability benefits: "While it is understood that you had some difficulties with your employer, you are not disabled from performing your occupation as a production supervisor for another employer." Plaintiff was also denied social security disability benefits based upon Dr. Elizondo's report. In a letter to plaintiff, the Social Security Administration stated: "The medical evidence shows that your condition is not severe enough to be

considered disabling. Based on the description of the job performed as a production supervisor in a chemical plant, we have concluded that you have the functional capacity to meet the functional demands of this type of work."

Concerning plaintiff's heart condition in 2002, defendants point to no medical evidence in the record tending to show that plaintiff was disabled due to his heart catheterization and coronary bypasses.

The Commission's unchallenged findings of fact establish that plaintiff was unable to work in any capacity due to asbestosis in 2006 as a result of his employment with FMC. The Commission's findings support its conclusion that plaintiff is entitled to permanent and total disability benefits under N.C. Gen. Stat. § 97-29. *Estate of Gainey*, 184 N.C. App. at 503, 646 S.E.2d at 608.

This argument is without merit.

IV. Appropriate Compensation Rate

In their second argument, defendants alternatively contend that the Commission erred in determining the appropriate compensation rate for disability benefits under N.C. Gen. Stat. § 97-29. We disagree.

In the Opinion and Award, the Commission found that defendants had failed to file a Form 22 to establish plaintiff's earnings. The Commission awarded plaintiff the maximum compensation rate for 2006, $730.00 per week. Defendants contend that the Commission failed to properly apply N.C. Gen. Stat. § 97-2 in determining plaintiff's average weekly wage.

N.C. Gen. Stat. § 97-2(5) (2009) provides that:

> "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
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> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. . . .

N.C. Gen. Stat. § 97-2(5) sets forth in "priority sequence five methods by which an injured employee's average weekly wages are to be computed . . . . [T]he primary method . . . is to calculate the total wages of the employee for the fifty-two weeks

of the year prior to the date of injury and to divide that sum by fifty-two." *McAninch v. Buncombe County Schools*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997) (citation omitted). If an unfair result would be produced by using methods one through four, the Commission may utilize the final method and compute a claimant's average weekly wage in any way that would most nearly approximate the amount which the injured employee would be earning were it not for the injury. *Id.* at 130, 489 S.E.2d at 377-78. However, in order to use the final method, the Commission must make "a finding that unjust results would occur by using the previously enumerated methods." *Id.* at 130, 489 S.E.2d at 378 (citation omitted).

In the instant case, the Commission made the following finding: "Due to circumstances surrounding plaintiff's time since his employment with defendant-employer, methods one through four for determining the average weekly wage would not be fair. Therefore, considering all the evidence in the case, the most fair average weekly wage is the maximum average weekly wage for the year [2006] in which plaintiff was diagnosed with asbestosis. . . ."

Defendants argue that "the wage information to be used in the calculations prescribed by N.C. Gen. Stat. § 97-2(5) must be gleaned from wage information for Plaintiff's last full year of employment with Defendant-Employer pursuant to N.C. Gen. Stat. § 97-54, and not from his date of diagnosis eight years later."

This Court has recently addressed this precise issue in *Pope v. Johns Manville*, ___ N.C. App. ___, 700 S.E.2d 22 (2010), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (Dec 15, 2010) (No.

59P10-2). In *Pope*, the plaintiff had been exposed to asbestos during his employment with the defendant, which ended in 1968. *Id.* at ___, 700 S.E.2d at 24. The plaintiff retired from all employment in 2003. *Id.* In 2005, the plaintiff was diagnosed with asbestosis. *Id.* The Commission awarded the plaintiff disability benefits based upon the salary he earned in the last year he was employed before he retired.[1] *Id.* at ___, 700 S.E.2d at 29. The defendants argued, *inter alia*, that N.C. Gen. Stat. § 97-54 mandated that disability benefits for asbestosis be limited to the amount earned by the claimant at the time of his "last injurious exposure" even if that exposure occurred decades before the plaintiff's diagnosis. *Id.* at ___, 700 S.E.2d at 31. This Court disagreed and stated:

> Defendants have not . . . cited any authority that utilizes the phrase "wages which the employee was receiving at the time of his last injurious exposure to asbestosis" as it appears in the *definition* of disability set out in N.C. Gen. Stat. § 97-54 for the purpose of establishing the amount of disability benefits to which a claimant suffering from asbestosis is entitled. The absence of any indication in the relevant statutory language that the language that Defendants have taken from N.C. Gen. Stat. § 97-54 plays any role in calculating the level of disability benefits that should be awarded to a claimant who has been diagnosed as suffering from asbestosis militates strongly against the validity of Defendants' argument. Moreover, the General Assembly has demonstrated the ability to enact provisions

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[1] In *Pope*, we remanded the case for further proceedings because the Commission utilized the final method of N.C. Gen. Stat. § 97-2(5) to calculate the plaintiff's average weekly wage without making a finding that unjust results would occur by using the previously enumerated methods.

> that are specifically applicable to asbestosis and silicosis claims. Had the General Assembly wished to require the use of a specific method for calculating disability benefits for claimants suffering from asbestosis, it could and would have done so.

Id. This Court concluded that N.C. Gen. Stat. § 97-54 does not control the calculation of disability benefits for asbestosis. *Id.* Defendants' argument is without merit.

It is clear from the Opinion and Award, the Commission utilized the final method enumerated in N.C. Gen. Stat. § 97-2(5) in calculating plaintiff's average weekly wage and made the appropriate findings to do so. Plaintiff was earning no wages at the time of the hearing. Defendants were ordered to provide a Form 22 if the parties had not reached a stipulation regarding his average weekly wage. Defendants failed to submit a Form 22 and provide plaintiff's wage information to the Commission. In its discretion, the Commission used the maximum rate of compensation for 2006. *See id.* at ___, 700 S.E.2d at 30 ("[T]he literal language of the fifth approach authorized by N.C. Gen. Stat. § 97-2(5) would appear to allow the use of *any method* of computing average weekly wages that 'would most nearly approximate the amount which the injured employee would be earning were it not for the injury.'" (emphasis added)). The Commission did not err in calculating plaintiff's average weekly wage.

This argument is without merit.

V. Attorney's Fees

In their third argument, defendants contend the Commission erred by awarding plaintiff attorney's fees under N.C. Gen. Stat.

§ 97-88. We remand this issue for additional findings of fact and conclusions of law.

Two statutory provisions give the Commission authority to award a party attorney's fees in workers' compensation cases, N.C. Gen. Stat. §§ 97-88 and 97-88.1. N.C. Gen. Stat. § 97-88 "allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee." *Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 53, 464 S.E.2d 481, 485 (1995) (citation omitted), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). However, the Commission may only award the plaintiff attorney's fees for the portion of the case attributable to the insurer's appeal. *Id.* By contrast, N.C. Gen. Stat. § 97-88.1 allows the Commission to award attorney's fees based upon the appeal being "brought, prosecuted, or defended without reasonable ground." *Id.* at 53–54, 464 S.E.2d at 485. Under section 97-88.1, the Commission can assess the whole costs of the litigation against the party who prosecutes or defends a hearing without reasonable grounds. *Id.* at 54, 464 S.E.2d at 485.

In the instant case, the Commission concluded that "Plaintiff is entitled to have defendants pay for the cost of this action including reasonable attorney's fees. N.C. Gen. Stat. § 97-88. The Full Commission finds 25% of the amount due plaintiff to be a reasonable attorney's fee." Although the Commission cited N.C. Gen. Stat. § 97-88, this appears to be a typographical error.

Under the portion of the Opinion and Award that lists the stipulations, an issue to be determined was "[w]hether plaintiff is entitled to any attorney fees for the unreasonable defense of this matter?" Further, the Commission stated that defendants were responsible for paying the costs for the entire action.

The Opinion and Award is devoid of any findings of fact or conclusions of law regarding whether defendants brought, prosecuted, or defended this action without reasonable grounds. The only reference to attorney's fees in the Opinion and Award is the conclusion that plaintiff was entitled to attorney's fees in the amount of 25 percent of the compensation. This issue must be remanded to the Commission for further findings of fact and conclusions of law. *Swift v. Richardson Sports, Ltd.*, 173 N.C. App. 134, 143, 620 S.E.2d 533, 539 (2005), *disc. review denied*, 360 N.C. 545, 635 S.E.2d 60 (2006). Upon remand, the Commission should make certain that it cites the statutory provision upon which any award of attorney's fees is based.

VI. Date of Injury

In their fourth argument, defendants contend that the Commission erred by awarding disability benefits for the remainder of plaintiff's life beginning on 30 January 2006. We agree.

The Commission awarded plaintiff disability benefits beginning on 30 January 2006 based upon a radiologist's reading of plaintiff's chest x-ray, which indicated there were abnormalities in his lungs. However, it is undisputed that no diagnosis was made at that time.

It is well-established that the date of diagnosis is dispositive for purposes of determining the "date of injury" for asbestosis. *Pope*, ___ N.C. App. at ___, 700 S.E.2d at 29; *see also Wilder v. Amatax Corp.*, 314 N.C. 550, 557, 336 S.E.2d 66, 70 (1985) ("Diseases such as asbestosis, silicosis, and chronic obstructive lung disease normally develop over long periods of time after multiple exposures to offending substances which are thought to be causative agents. . . . *The first identifiable injury occurs when the disease is diagnosed as such, and at that time it is no longer latent*." (citation omitted) (emphasis added)). In the instant case, plaintiff was not diagnosed with asbestosis until 18 June 2006 by Dr. Ohar. Therefore, the Commission erred by ordering disability benefits to begin on 30 January 2006. This ruling is reversed and remanded to the Commission with instructions to order disability benefits to begin as of 18 June 2006.

AFFIRMED IN PART; REVERSED and REMANDED IN PART.

Judges STEPHENS and HUNTER, JR. concur.

Report per rule 30(e).