

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-316

NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2006

JAMES LEROY WALLACE,
Employee,
Plaintiff-Appellee,

v.

North Carolina Industrial Commission
I.C. File No. 815708

BECON CONSTRUCTION COMPANY,
Employer,

and

THE SOUTH CAROLINA INSURANCE
GUARANTY ASSOCIATION (formerly
RELIANCE NATIONAL INSURANCE
COMPANY)

Carrier,
Defendant-Appellants,

and

HARBERT YEARGIN,
Employer,
Defendant-Appellees

and

LIBERTY MUTUAL INSURANCE
COMPANY,
Carrier,
Defendant-Appellees

Appeal by defendants Becon Construction Company and the South Carolina Insurance Guaranty Association (formerly Reliance National Insurance Company) from the opinion and

award entered 28 October 2004 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 2 November 2005.

Wallace & Graham, by Edward L. Pauley and Cathy A. Williams, for plaintiff-appellee.

Hedrick Eatman Gardner & Kincheloe, L.L.P., by C. J. Childers, for Becon Construction Company and the South Carolina Insurance Company (formerly Reliance National Insurance Company), defendant-appellants.

Morris York Williams Surlis & Barringer, L.L.P., by John F. Morris and Christopher B. Rawls, for Harbert Yeargin and Liberty Mutual Insurance Company, defendant-appellees.

JACKSON, Judge.

James L. Wallace (“plaintiff”) worked in the construction and maintenance field as a welder and pipe fitter for most of his adult life. For the last twenty-two years of his career, he worked with Harbert Yeargin (“defendant-appellee”), which became Becon Construction Company in 1997 (“Becon”). Plaintiff worked for Becon from 31 March until 11 August 1997. At all times while plaintiff was employed with both Harbert Yeargin and Becon, his work included removing and replacing insulation around pipes, removing asbestos, and working during plant shutdowns when he and others performed maintenance at the plant. Plaintiff and other employees of Becon testified that they knew what asbestos looked like, and that they were exposed to it on a regular basis during their employment with both employers.

In July 1997, plaintiff began coughing up blood and consulted a pulmonologist. A bronchoscopy was performed and the biopsy revealed plaintiff had lung cancer. On 12 August 1997, plaintiff underwent a right thoracotomy and right pneumonectomy. The lung tissue removed from plaintiff’s lungs was examined and he was diagnosed as having large cell carcinoma of the lung with the presence of asbestos bodies. Following his surgery, plaintiff returned home, where he has remained under the constant care of his wife and adult daughter.

Since his diagnosis, he has been unable to work due to his medical condition. During the years after his initial surgery in 1997, plaintiff had a recurrence of his cancer and was diagnosed with herpes zoster, or “shingles.”

On 27 February 1998, plaintiff filed a Form 18B with the North Carolina Industrial Commission, alleging asbestos exposure resulting in lung cancer and asbestosis. His claim was heard before a Deputy Commissioner, and in an Opinion and Award filed 31 March 2003, the Deputy Commissioner denied plaintiff’s claim. Plaintiff appealed the decision to the full Commission.

The full Commission’s Opinion and Award, filed 28 October 2004, reversed the decision of the Deputy Commissioner. The full Commission found that plaintiff had acquired asbestos-linked lung cancer, which “was due to causes and conditions characteristic of and peculiar to his employment,” and at the time of his “last exposure to the conditions that significantly contributed to his development of his compensable occupational disease,” he was employed by Becon. Plaintiff was awarded temporary total disability compensation. In addition, Becon’s insurance company was ordered to pay all of plaintiff’s medical expenses incurred as a result of his compensable occupational disease, plaintiff’s wife was to be compensated for her attendant care services, and Becon was ordered to pay reasonable attorney’s fees to plaintiff’s counsel. From this order, Becon and its insurance company, the South Carolina Insurance Guaranty Association, (collectively “defendant-appellants”) appeal.

Defendant-appellants raise two arguments on appeal: (1) the Industrial Commission erred in finding that plaintiff suffers from a compensable occupational disease; and (2) the Industrial Commission erred in finding that plaintiff was last injuriously exposed during his employment with Becon. We do not reach the merits of defendant-appellants’ arguments. Defendant-

appellants failed to comply with the North Carolina Rules of Appellate Procedure, therefore we dismiss defendant-appellants' appeal. The Rules of Appellate Procedure are mandatory, and "must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). "[F]ailure to follow these rules will subject an appeal to dismissal." *Consol. Elec. Distribs., Inc. v. Dorsey*, ___ N.C. App. ___, ___, 613 S.E.2d 518, 520 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999)).

Rule 28(b)(6) of our Rules of Appellate Procedure, as written at the time defendant-appellants submitted their brief to this court, required an appellant's brief to contain an argument section that included:

the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. *Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.*

The body of the argument shall contain citations of the authorities upon which the appellant relies.

N.C. R. App. P. 28(b)(6), 2005 Ann. R. (N.C.) 175, 303 (emphasis added). In the argument section of defendant-appellants' brief, they properly set out two questions for our review, followed by the appropriate assignments of error and references to pages in the record. However, the body of each of defendant-appellants' arguments fails to "contain citations of the authorities upon which the appellant relies." N.C. R. App. P. 28(b)(6).

Defendant-appellants' first argument states the Commission erred in finding that plaintiff suffered from a compensable occupational disease. Defendant-appellants do cite to two cases regarding the Commission's obligation to make "definitive findings to determine the critical issues raised by the evidence," *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980), and the Commission's obligation to indicate that it has "consider[ed] and evaluate[d] all of the evidence", *Lineback v. Wake County Bd. of Comm'rs*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997), however neither of these cases support defendant-appellants' argument. The body of defendant-appellants' argument regarding this question consists of nothing more than a recitation of the testimony and evidence presented by the various medical experts. The cases cited do not point this Court to any specific case or statute supporting defendant-appellants' argument that the Commission erred in finding that plaintiff suffered from a compensable occupational disease.

In fact, the first argument presented by defendant-appellants asks this Court to weigh the evidence and determine the credibility of the medical experts. In reviewing a case 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." *McGee v. N.C. Dep't of Revenue*, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87 (1999) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)); *see also*, *Vaughn v. Insulating Servs.*, 165 N.C. App. 469, 472, 598 S.E.2d 629, 631, *disc. review denied*, 359 N.C. 75, 605 S.E.2d 150 (2004). In addition, this Court is not to judge the credibility of a witness or the weight to be given to his testimony, as this is a duty of the Commission alone. *Vaughn*, 165 N.C. App. at 472, 598 S.E.2d at 631. Therefore, it is not our place to weigh the credibility of the experts who presented evidence in plaintiff's case,

nor may we rely on the testimony of one expert over that of another. Our role is simply to determine whether there is competent evidence in the record on appeal to support the Commission's findings of fact. As defendant-appellants have failed to cite to legal authority which supports their argument, this assignment of error is dismissed.

Defendant-appellants' second argument, without citation to any supporting authority, states that the Commission erred in finding that plaintiff was last injuriously exposed to harmful asbestos during the four months he was employed by Becon. Defendant-appellants reference regulations of the Federal Occupational Safety and Health Administration ("OSHA") and recommendations of the National Institute of Occupational Safety and Health ("NIOSH"), however defendant-appellants failed to provide any citation to these regulations and recommendations, and they failed to direct this Court to the applicable sections of the regulations. In their brief, defendant-appellants mention the words "OSHA threshold limit value," but fail to cite to the specific OSHA regulation and fail to inform this Court what the actual OSHA permissible exposure limits are. Defendant-appellants also state that "[t]he National Institute of Occupational Safety and Health set the standard for exposure at .1 fiber per milliliter of air[.]" however again, defendant-appellants have failed to cite to the specific NIOSH recommendations upon which defendant-appellants rely in making this statement. In addition, defendant-appellants have failed to show how these referenced regulations and recommendations are made applicable to North Carolina employers.

Defendant-appellants argue that air sampling surveys done from 1989 through 1998 in the facility in which plaintiff worked show the asbestos exposure levels were not above those permitted by OSHA regulations, and thus plaintiff could not have been exposed to asbestos during his employment with Becon. Defendant-appellants also argue that even if plaintiff had

been exposed to asbestos during this time, his exposure could not have aggravated his lung cancer or alleged asbestosis.

Defendant-appellants' arguments do not present this Court with new issues, for which no authority exists. Therefore, defendant-appellants' brief should have included citations to relevant legal authorities upon which their arguments are based. As defendant-appellants have failed to cite to any legal authority upon which their arguments rely, these assignments of error are deemed abandoned, and defendant-appellants' appeal is dismissed. N.C. R. App. P. 28(b)(6); *Consol. Elec. Distribs.*, __ N.C. App. at __, 613 S.E.2d at 520.

Appeal dismissed.

Judges TYSON and SMITH concur.

Report per Rule 30 (e).