An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-768

Filed: 3 September 2019

North Carolina Industrial Commission, I.C. No. 885634

DOUGLAS MARTIN EPPS, Employee-Plaintiff-Appellant,

v.

CONTINENTAL TIRE THE AMERICAS, SELF-INSURED, Employer-Defendant-Appellee.

PART OF THE CONTINENTAL TIRE THE AMERICAS CONSOLIDATED ASBESTOS MATTERS.

Appeal by Plaintiff from opinion and award entered 25 January 2018 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 March 2019.

Wallace and Graham, PA, by Edward L. Pauley, for Plaintiff-Appellant.

Fox Rothschild LLP, by Jeri L. Whitfield and Lisa K. Shortt, for Defendant-Appellee.

McGEE, Chief Judge.

This appeal is companion to four additional appeals, COA18-766, COA18-767, COA18-769, and COA18-770 (the "bellwether cases"), consolidated for hearing by

order of this Court entered 8 June 2018. The factual and procedural history of this case can be found in the companion opinion COA18-770, *Hinson v. Cont'l Tire The Ams*. ("*Hinson*"), filed concurrently with this opinion. Our opinion in *Hinson* should be read first in order to understand the disposition in this opinion.

I. Facts

Douglas Martin Epps ("Plaintiff") worked for Continental Tire the Americas ("Defendant") at Defendant's tire factory (the "factory") in Charlotte from 1974 until 2005. This case and the other bellwether cases involve workers' compensation claims based on allegations that Plaintiff, along with the other four Plaintiffs in the bellwether cases ("Bellwether Plaintiffs"), were exposed to levels of harmful asbestos sufficient to cause asbestos-related diseases, including asbestosis. The bellwether cases constitute a small percentage of a much larger number of related claims that were consolidated by the Industrial Commission (the "consolidated cases").[1] Plaintiff filed a Form 18B with the Industrial Commission, completed 15 February 2008, alleging he had been exposed to asbestos while working at the factory, and had developed asbestosis therefrom. Plaintiff filed an amended Form 18B, completed 10 March 2009, alleging asbestos exposure at the factory also caused or contributed to "the development of Plaintiff's squamous cell carcinoma of the tonsil." Therefore, Plaintiff claimed his exposure to asbestos at the factory was a causal factor in him

[1] The Commission's 25 January 2018 opinion and award in this matter states that there were "currently" 144 consolidated cases. However, the number of consolidated cases has fluctuated.

developing two compensable occupational diseases—asbestosis and tonsil cancer. Determination of the bellwether cases will impact not only the Bellwether Plaintiffs, but also the remaining plaintiffs from the consolidated cases (together with the Bellwether Plaintiffs, "Plaintiffs" or the "Consolidated Plaintiffs").

II. Analysis

A. *Common Issues*

Concerning the common issues, in *Hinson* this Court held that the Commission did not err in determining (1) that Plaintiffs failed to prove a causal connection between employment at the factory and asbestosis, *see James v. Perdue Farms, Inc.*, 160 N.C. App. 560, 562, 586 S.E.2d 557, 560 (2003), and (2) that Plaintiffs failed to prove that either colon cancer or tonsil cancer were occupational diseases pursuant to N.C.G.S. § 97-53(13) (2017). We further held (3) that Plaintiffs had failed to challenge the Commission's determination that Plaintiffs were not "last injuriously exposed" "to the hazards of asbestosis" while working at the factory, as required by N.C.G.S. § 97-57 (2017) and, therefore, Defendant could not be held liable for Consolidated Plaintiffs' alleged asbestosis.[2] Finally, we held (4) that the Commission's findings of fact and ultimate findings were supported by competent evidence, and its conclusions of law were supported by the findings. *Penegar v.*

[2] The Commission did not indicate in its opinions and awards that it conducted a "last injurious exposure" analysis for the claims based on colon and tonsil cancers.

United Parcel Serv., __ N.C. App. __, __, 815 S.E.2d 391, 394 (2018); *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 247, 377 S.E.2d 777, 780 (1989).

Because of our holdings in *Hinson*, we affirm the Commission's denial of Plaintiff's claim. This Court agrees that Plaintiffs, including Plaintiff, did not prove: A causal connection between any alleged asbestosis and employment at the factory; Defendant's liability for any alleged asbestosis by establishing "last injurious exposure" to the "hazards of asbestosis" occurred at the factory; nor meet their burden of proving tonsil cancer due to asbestos exposure at the factory constituted an occupational disease pursuant to N.C.G.S. § 87-53(13).

B. *Plaintiff's Specific Issues*

Although we affirm the Commission's opinion and award based on our holdings set forth above, we address the findings and conclusions specific to Plaintiff. Initially, Plaintiff does not appear to make any argument that the findings of fact fail to support the conclusions of law; therefore, the conclusions of law stand. *Penegar*, __ N.C. App. at __, 815 S.E.2d at 394. Assuming, *arguendo*, Plaintiff has preserved challenge to the findings and conclusions specific to him, we hold that competent evidence supports the relevant findings of fact and ultimate findings which, in turn, support the Commission's relevant conclusions of law. *Id.*

1. Asbestosis

In conclusion of law 3, the Commission determined that Plaintiff did not meet his burden of proving that he "contracted asbestosis or any asbestos-related

condition." Relevant findings from the common issues section of the opinion and award, as set forth in *Hinson*, along with findings of fact 54, 55, 56, and 63 support this conclusion.

Plaintiff does not challenge findings 54 or 56, which include determinations that "Dr. Spangenthal concluded that [Plaintiff] had no asbestosis, asbestos-related lung disease, or pleural disease"; "[a] radiograph taken on 8 December 2009 was read by Dr. Roemer and evaluated by him to be normal"; and that "[n]one of [Plaintiff's] treating physicians diagnosed him with asbestosis, and none noted any symptoms indicative of asbestosis."

Plaintiff purports to challenge finding 55:

> Dr. Ghio reviewed [Plaintiff's] 11 July 2008 CT scan and found no evidence of any interstitial lung disease and no pleural plaques. Dr. Reuter interpreted the CT scan as normal, having no infiltrate, no consolidation, and no discrete pulmonary nodules. Dr. Philip Goodman reviewed [Plaintiff's] 27 July 2007 and 23 August 2010 chest x-rays and found no evidence of asbestosis or asbestos-related pleural disease. The x-rays were also viewed by Dr. Michael Alexander and Dr. Peter Barrett. Both agreed that there was no evidence of asbestos-related pulmonary disease or asbestosis.

Plaintiff's challenge to finding 55 is that "the Commission identified the findings of the radiologists in the claim. The Commission ignored the fact that their opinions as to what they actually saw all differed." Record evidence supports the finding, and it is binding on appeal. Plaintiff challenges finding 63 as well, in which the Commission gave greater weight to the medical testimony of Defendant's experts than to the

testimony of Plaintiff's medical experts. Plaintiff's challenge, which is based upon the "entire record" and "air sampling" arguments this Court rejected in *Hinson*, fails. Plaintiff uses this same argument to challenge findings 64 and 65—which we will discuss below, and they are deemed binding on appeal as well. We hold that the findings support the conclusion that Plaintiff did not have asbestosis.

2. Tonsil Cancer

Concerning Plaintiff's claim based on tonsil cancer, ultimate finding 47 from the common issues portion of the opinion and award is sufficient to defeat this claim, stating in part:

> Plaintiff Epps . . . alleges that he also contracted tonsil cancer as a result of exposure to asbestos at the . . . factory. However, the greater weight of the evidence in view of the entire record shows that tonsil cancer is an ordinary disease of life to which the public is equally exposed. The greater weight of the evidence in view of the entire record does not show that tonsil cancer is characteristic of persons engaged in the tire manufacturing industry or that working at the . . . factory placed those who worked there at an increased risk of developing tonsil cancer.

In addition, the other relevant findings from the common issues section of the opinion and award, as set forth in *Hinson*, along with findings of fact 59, 60, 61, and 63, support conclusion of law 3, in which the Commission determined that Plaintiff did not meet his burden of proving that he "contracted asbestosis or any *asbestos-related condition*." (Emphasis added). Plaintiff alleged that his tonsil cancer was an asbestos-related condition. Plaintiff's alleged exposure to asbestos at the factory was

the only allegation supporting Plaintiff's claim that his cancer was a compensable occupational disease.

Plaintiff does not challenge findings 59, 60, and 61, and we have already addressed Plaintiff's challenge to finding 63. In these findings, the Commission gives greater weight to Defendant's medical experts who opined that exposure to asbestos could not cause or contribute to tonsil cancer. In finding 59, the Commission cites Plaintiff's own treating physician as testifying "that he did not know tonsil cancer to be related to asbestos." Our review of the record evidence also finds support for ultimate finding 64 and conclusion 6—which is actually an ultimate finding.

The Commission found and concluded that Plaintiff failed to prove tonsil cancer was an occupational disease pursuant to N.C.G.S. § 97-53(13), and also found that there was no causal relationship between Plaintiff's tonsil cancer and work in the factory, *Booker v. Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979). Because there is evidence to support the Commission's findings, which in turn support its conclusions, we also affirm the denial of Plaintiff's tonsil cancer claim.

AFFIRMED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).