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NO. COA12-824
NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2013

JAMES NORMAN RICHARDSON,
Employee,
Plaintiff,

v.

North Carolina Industrial
Commission
No. I.C. W28174

PCS PHOSPHATE COMPANY, INC.,
(fka ELF AQUITAINE, fka TEXAS
GULF), Employer,
ACE USA/ESIS, ZURICH NORTH AMERICA
INSURANCE CO., FEDERAL INSURANCE
COMPANY/CHUBB GROUP, RSK CO.,
(k/n/a CNA), SPECIALITY RISK
SERVICES and BROADSPIRE, Carriers,
Defendants.

Appeal by defendants from Opinion and Award of the Full
Commission entered 16 February 2012 by the North Carolina
Industrial Commission. Heard in the Court of Appeals 10 April
2013.

*Wallace and Graham, P.A., by Michael B. Pross, for
plaintiff-employee James Norman Richardson.*

*Cranfill Sumner & Hartzog LLP, by Sara B. Warf and J.
Gregory Newton, for defendant-appellants PCS Phosphate
Company, Inc., and ACE USA/ESIS.*

*Lewis & Roberts, P.L.L.C., by Winston L. Page, Jr. and J.
Timothy Wilson, for defendants-appellants Zurich North
America Insurance Co.*

Ward and Smith, P.A., by William A. Oden, III, for defendant-appellee PCS Phosphate Company, Inc., and Broadspire.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Harmony Whalen Taylor and M. Duane Jones, for defendant-appellee Federal Insurance Company/Chubb Group.

Teague Campbell Dennis & Gorham LLP, by Tracey L. Jones and Leslie P. Lasher, for defendant-appellee CNA Insurance Company.

McAngus, Goudelock & Courie, PLLC, by John F. Morris and Colin E. Cronin, for defendant-appellee Specialty Risk Services.

BRYANT, Judge.

Where the Full Commission erred by concluding that plaintiff's "last injurious exposure" to the hazards of mesothelioma required exposure "for a period of 30 days, or parts thereof, within seven consecutive calendar months," we reverse and remand the Opinion and Award entered by the Full Commission.

Facts and Procedural History

On 8 July 2009, plaintiff-employee James Norman Richardson filed a Form 18B Claim against defendant-employer PCS Phosphate Company, Inc., (fka Elf Aquitaine, fka Texas Gulf) alleging that, as a result of his employment with defendant-employer, he

sustained an occupational disease caused by exposure to asbestos. All the named defendant-carriers filed a Denial of Workers' Compensation Claim Form 61, denying liability for plaintiff's alleged occupational disease. Plaintiff filed a request for a hearing.

The parties reached a pre-trial agreement and stipulated to the fact that plaintiff was employed by defendant-employer from 15 March 1968 through 1 February 1995. The defendant-carriers stipulated to the following periods of coverage for defendant-employer: ACE USA/ESIS from 1 July 1960 to 1 July 1974; Zurich North American from 1 January 1974 to 1 January 1985; Federal Insurance Co./Chubb from 30 April 1985 to 17 June 1986; Continental/CNA Claims Plus from 12 June 1986 to 12 June 1987, 16 June 1988 to 16 June 1990, 2 January 1992 to 31 December 1992, and 1 January 1993 to 1 January 1994; Hartford Accident & Indemnity Co. c/o Specialty Risk Services from 16 June 1987 to 16 June 1988; and Broadspire from 1 January 1994 to the present.

Following a hearing held on 20 July 2010, an Opinion and Award was entered on 4 April 2010 by Deputy Commissioner Stephen T. Gheen of the Industrial Commission. The 20 July 2010 Opinion and Award made the following relevant conclusions of law:

1. The record is uncontroverted that [plaintiff's] mesothelioma resulted from

causes and conditions characteristic of and peculiar to his employment with PCS[.] . . . [Plaintiff's] malignancy is an occupational disease and constitutes an "accident" within the meaning of the [Worker's Compensation Act.]

2. Compensation is payable for an occupation[al] disease by the employer in whose employment [plaintiff] was "last injuriously exposed" to the hazards of asbestos exposure. . . .
3. . . . Having considered the whole record . . . , the credible and compelling testimony mandates a conclusion that [plaintiff's] date of last injurious exposure was May 1992 when he was promoted to Assistant Mine Manager at PCS.

Defendant-employer and defendant-carrier CNA were ordered to pay plaintiff a sum of \$40,000.00 and all medical expenses incurred or to be incurred by plaintiff in accordance with Industrial Commission procedures "for so long as such evaluations, treatments and examinations may be reasonably required to effect a cure, give relief and/or lessen [plaintiff's] period of disability without the limitation imposed by N.C. Gen. Stat. § 97-25.1." Plaintiff was ordered to pay his attorney 25% of the permanent partial disability benefits awarded. On 12 April 2011, defendant-employer and defendant-carriers appealed the Opinion and Award to the Full Commission.

Following a hearing, the Full Commission entered an Opinion and Award on 16 February 2012, affirming the 4 April 2010 Opinion and Award with modifications. The 16 February 2010 Opinion and Award concluded that "[p]laintiff's mesothelioma resulted from causes and conditions characteristic of and peculiar to his employment with [defendant-employer]." The Full Commission concluded that "[b]ased upon a preponderance of the evidence, [p]laintiff's last injurious exposure was January 1974" and that "[a]s a result ACE/USA/ESIS and Zurich North American were the insurance carriers liable in this case for Plaintiff's mesothelioma." Defendant-carriers ACE USA/ESIS and Zurich North American were ordered to pay plaintiff the sum of \$40,000.00 in one lump sum, to pay for medical expenses incurred or to be incurred by plaintiff, and to pay plaintiff's counsel a reasonable attorney's fee of 25% of the disability benefits awarded to plaintiff. Defendant-employer and defendant-carriers ACE USA/ESIS and Zurich North American were ordered to pay the costs of the action.

Defendant-carriers ACE USA/ESIS (hereinafter "Ace") and Zurich North American (hereinafter "Zurich") (collectively "appellants") appeal.

Appellants present the following two issues on appeal: whether the Full Commission erred by (I) concluding that plaintiff's last injurious exposure was January 1974 and (II) by assessing attorney's fees against appellants.

Standard of Review

On appeal of cases from the Industrial Commission, our review is limited to two issues: Whether the Commission's findings of fact are supported by competent evidence and whether the Commission's conclusions of law are justified by its findings of fact. . . . The Commission's findings of fact are conclusive on appeal if they are supported by any competent evidence.

Shaw v. US Airways, Inc., __ N.C. App. __, __, 720 S.E.2d 688, 690 (2011) (citation omitted). "[F]indings of fact which are left unchallenged by the parties on appeal are presumed to be supported by competent evidence and are, thus conclusively established on appeal. Only [t]he Commission's conclusions of law are reviewed *de novo*." *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (citations and quotation marks omitted).

I

The first issue before us is whether the Full Commission applied the wrong legal standard in assessing the date of last injurious exposure and employer liability under section 9-57 of

the North Carolina General Statutes. Zurich and Ace argue that the Full Commission erred when it concluded that "last injurious exposure requires exposure to asbestos for a period of 30 days, or parts thereof, within seven consecutive calendar months." We agree.

An occupational disease is compensable under the Workers' Compensation Act if it is "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C. Gen. Stat. § 97-53(13) (2011).

Section 97-57 of the North Carolina General Statutes provides that:

[i]n any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

For the purpose of this section when an employee has been exposed to the hazards of *asbestosis* or *silicosis* for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious . . .

N.C. Gen. Stat. § 97-57 (2011) (emphasis added). "The term 'last injuriously exposed' is defined as 'an exposure that proximately augmented the disease to any extent, however slight. Exposure at work to elements 'which can cause an occupational disease can be so slight quantitatively that it could not in itself have produced the disease.'" *Evans v. Conwood, LLC*, 199 N.C. App. 480, 488-89, 681 S.E.2d 833, 839 (2009) (citations omitted).

Here, the Full Commission concluded that plaintiff's mesothelioma

resulted from causes and conditions characteristic of and peculiar to his employment with PCS, and mesothelioma is not an ordinary disease of life to which members of the general public not so employed are equally exposed. Therefore, [p]laintiff has shown that his mesothelioma is an occupational disease which constitutes an "accident" within the meaning of the [Workers' Compensation Act].

2. Compensation is payable for an occupational disease by the employer in whose employment [p]laintiff was last injuriously exposed to the hazards of asbestos exposure. N.C. Gen. Stat. § 97-57. Last injurious exposure requires exposure to asbestos for a period of 30 days, or parts thereof, within seven consecutive calendar months. *Id.* A lesser exposure is deemed not injurious. *Id.*

3. Last injurious exposure means an exposure which proximately augmented the disease to any extent, however slight, even if the exposure is so slight that it could not in itself have produced the disease. *Rutledge v. Tultex, Corp./Kings Yarn*, 308 N.C. 85, 301 S.E.2d 359 (1983). Based upon a preponderance of the evidence, [p]laintiff's date of last injurious exposure was in January 1974. N.C. Gen. Stat. § 97-57. As a result [Ace . . . and Zurich . . .] are the insurance carriers liable in this case for [p]laintiff's mesothelioma.

Our review indicates that once the Full Commission concluded plaintiff's mesothelioma was an occupational disease within the meaning of the Workers' Compensation Act and that compensation was payable by the employer in whose employment plaintiff had been last injuriously exposed to the hazards of asbestos exposure, as well as the insurance carrier which was on the risk when plaintiff was last exposed, it erroneously determined that "[l]ast injurious exposure requires exposure to asbestos for a period of 30 days, or parts thereof, within seven consecutive calendar months."

Under the plain language of N.C.G.S. § 97-57, in a case where compensation is deemed to be payable for an occupational disease, the employer or employer and carrier on the risk when the employee "was last injuriously exposed to the hazards of such disease" must bear the liability. However, the plain

language of N.C.G.S. § 97-57 also provides that in determining when an employee was "last injuriously exposed" to the hazards of *asbestosis* or *silicosis*, the employee must have had exposure for "as much as 30 working days, or parts thereof, within seven consecutive calendar months[.]" Because in the instant case, plaintiff's occupational disease was mesothelioma and not asbestosis or silicosis, the date on which he was last injuriously exposed to the hazards of mesothelioma is calculated by determining the "exposure that proximately augmented the disease to any extent, *however slight.*" *Evans*, 199 N.C. App. at 488-89, 681 S.E.2d at 839 (emphasis added). It is clear that "exposures to substances which can cause an occupational disease can be a last injurious exposure to the hazards . . . even if the exposure in question is so slight quantitatively that it could not in itself have produced the disease." *Caulder v. Waverly Mills*, 314 N.C. 70, 72, 331 S.E.2d 646, 647 (1985) (citations omitted).

Therefore, the Full Commission erred by concluding that last injurious exposure for mesothelioma required exposure "for a period of 30 days, or parts thereof, within seven consecutive calendar months." Based on the foregoing, the 16 February 2012

Opinion and Award made by the Full Commission is reversed and remanded for entry of a new order consistent with this opinion.

II

Due to our disposition in issue *I*, we do not reach plaintiff's second argument.

Reversed and remanded.

Judge HUNTER, JR., ROBERT N., and MCCULLOUGH concur.

Report per Rule 30(e).