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NO. COA03-47

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

FRANCES S. LACKEY, EXECUTRIX
OF THE ESTATE OF PAUL G. LACKEY,
Deceased Employee,
Plaintiff,

v.

SEARS ROEBUCK & COMPANY,
Employer,

North Carolina
Industrial Commission
I.C. File No. 974960

and

ITT/SPECIALTY RISK SERVICES,
Carrier/Defendants.

Appeal by defendants from amended opinion and award entered 9 October 2002 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 November 2003.

Donaldson & Black, P.A., by Nichole P. McLaughlin; and Jay Gervasi, P.A., by Jay A. Gervasi, Jr., for plaintiff appellee.

Morris, York, Williams, Surles, & Barringer, LLP, by Amy Kushner, for defendant appellants.

McCULLOUGH, Judge.

Defendants appeal an amended opinion and award entered 9 October 2002 by the North Carolina Industrial Commission. The deceased employee, Paul Lackey (decedent), was the lead worker and supervisor in the shipping department of Sears Roebuck & Company's Mail Order Service Plant formerly located on Lawndale Avenue in

Greensboro, North Carolina. Decedent worked from 1962 until the spring of 1992, and his job involved packing materials for shipment to customers. Decedent's wife, Frances S. Lackey, qualified as executrix of decedent's estate and has been substituted as plaintiff in this action. ITT Specialty Risk Services provided the workers' compensation insurance coverage for defendant-employer from 1 September 1986 through 1 January 1993. Prior to that date, defendant-employer was self-insured.

Bruce Mosby worked as an industrial hygiene inspector for the State of North Carolina. Mosby visited defendant-employer's facility on two occasions pursuant to permits obtained by an asbestos removal contractor, Demolition & Asbestos Removal, Inc. (DARI). The asbestos removal permit indicated that a number of items in the facility contained asbestos and were to be removed. These items included floor tile, cementitious wallboard, pipe insulation, and boiler insulation.

Mosby prepared a report from his 17 September 1997 visit to the facility. Mosby testified, and the report indicated that the asbestos removal contractor prepared areas in which asbestos was to be removed. Mosby also observed asbestos containing materials including air cell, block insulation, floor tiles, and cementitious wallboard. Mosby also prepared a report detailing his 5 November 1997 visit to the building. At this time, asbestos removal work had been completed, the contractor was awaiting final inspection of the work, and the building was being prepared for demolition.

On 16 April 1999, decedent was diagnosed with mesothelioma by Dr. John D. Patrick. Because of his disease, decedent did not work in any capacity for any employer after 10 June 1999. A doctor at Duke University Medical Center, Dr. Thomas D'Amico, determined that decedent contracted mesothelioma as a result of being exposed to asbestos and that mesothelioma was the cause of decedent's death on 2 December 1999.

The Full Commission filed its first opinion and award on 12 August 2002. On 9 October 2002, the Full Commission granted plaintiff's motion for reconsideration and amended its opinion and award. It awarded plaintiff the following:

1. Defendant-carrier ITT Speciality Risk Services shall pay temporary total disability compensation to Mrs. Frances Lackey as plaintiff and executrix of decedent's estate from June 10, 1999 through December 2, 1999 at a rate to be determined following the submission of additional evidence to the Full Commission. Having accrued, this compensation shall be paid to plaintiff in a lump sum, subject to the attorney's fee approved herein.

2. Defendant-carrier ITT Specialty Risk Services shall pay to Mrs. Frances Lackey, as plaintiff and executrix of decedent's estate, burial expenses not to exceed \$2,000.00.

3. Defendant-carrier ITT Specialty Risk Services shall pay Mrs. Frances Lackey, as the widow and dependent of decedent, benefits for a period of four-hundred (400) weeks from the date of decedent's death at a rate to be determined following the submission of additional evidence to the Full Commission or such other calculation as the Full Commission shall render with respect to decedent's average weekly wage. Having accrued, this compensation shall be paid to plaintiff in a lump sum, subject to the attorney's fee approved herein.

4. Defendant-carrier ITT Specialty Risk Services shall pay plaintiff's medical expenses incurred related to treatment provided for his compensable occupational disease of mesothelioma when bills for the same have been approved pursuant to procedures established by the Commission.

5. A reasonable attorney's fee of twenty-five (25%) of the compensation awarded herein is approved for plaintiff's counsel. From the amounts having accrued, this fee shall be deducted from the amounts owed to plaintiff and paid directly to plaintiff's counsel; thereafter, plaintiff's counsel shall receive every fourth check.

6. Defendant-carrier ITT Specialty Risk Services shall pay the costs.

Defendants appeal.

On appeal, defendants argue that the Full Commission erred by finding that the deceased was exposed to respirable asbestos during his employment at Sears and that the decedent contracted mesothelioma as a result of occupational exposure to asbestos. We disagree with defendants' arguments and affirm the amended opinion and award of the Full Commission.

The standard of review in this case is limited to "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Full Commission is the "sole judge of the weight and credibility of the evidence[.]" *Id.* An appellate court reviewing a workers' compensation claim "does not have the right to weigh the evidence and decide the issue on the basis of its weight." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144

S.E.2d 272, 274 (1965). "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Id.* If there is any evidence at all, taken in the light most favorable to the plaintiff to support it, the finding of fact stands, even if there is substantial evidence going the other way. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). With these principles in mind, we consider the case before us.

Defendants contend that there is not sufficient evidence that decedent was exposed to asbestos at work or that decedent contracted mesothelioma as a result of such exposure. In particular, defendants assign error to the following findings of fact of the Full Commission:

14. Decedent was last injuriously exposed to the hazards of asbestos which resulted in mesothelioma while employed by defendant-employer.

15. Decedent contracted mesothelioma, an occupational disease, as a result of his occupational exposure to asbestos.

16. Decedent's development of mesothelioma was due to causes and conditions characteristic of and peculiar to his particular employment with defendant-employer. Mesothelioma is not an ordinary diseases [sic] of life to which the general public is equally exposed outside of decedent's employment.

We conclude that there is sufficient evidence in the record to support findings of fact 14 and 15. An industrial hygiene inspector, B. Allen Mosby, is responsible for enforcing the safety regulations for asbestos. Mosby has conducted over six hundred

inspections dealing with asbestos removal, including two inspections at the Sears Mail Order Service Center in Greensboro. Mosby testified that he monitored the removal of asbestos-containing materials from the Greensboro facility on 17 September 1999. When he arrived that day, he learned that DARI was there to remove asbestos containing products including: floor tile, cementitious wallboard, pipe insulation, boiler insulation, and other materials. Mosby was also present for a second inspection on 5 November 1997. On that occasion, he indicated that "they [the workers from DARI] had already did the removal."

In addition to the presence and removal of asbestos, there is evidence that decedent was exposed at work. Dr. Thomas D'Amico examined the decedent on 10 June 1999 after the decedent had been diagnosed with mesothelioma, a rare type of lung cancer. Dr. D'Amico testified that exposure to asbestos led to mesothelioma. Dr. D'Amico further opined that working in an environment that contained asbestos was a substantial contributing factor in this decedent's acquisition of the disease. We conclude that there is competent evidence to support findings of fact 14 and 15.

There is also competent evidence in the record to support finding of fact 16. Dr. D'Amico agreed that decedent's development of mesothelioma was caused by conditions peculiar to decedent's employment and that mesothelioma was not a disease to which the general public is equally exposed:

Q. Would it [working in a building that contained asbestos] also place him at a greater risk of developing mesothelioma than

the general working public would be who weren't involved in those sorts of environment[s]?

A. Yes.

We conclude that this is competent evidence which supports the Full Commission's finding. Therefore, this assignment of error is overruled.

Finally, we note that throughout their brief, defendants encourage us to reconsider evidence that was before the Full Commission. For instance, defendants ask this Court to reevaluate other medical evidence, including excerpts from a book written by another expert. However, reweighing the evidence is not within the scope of this Court's standard of review. *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274. Our responsibility is simply to determine whether there is any evidence tending to support the Commission's finding. *Id.* If so, the finding stands even if there is evidence going the other way. *Adams*, 349 N.C. at 681, 509 S.E.2d at 414. While we acknowledge that there was some evidence going the other way in this case, we believe that it was adequate to support the Full Commission's findings.

After careful consideration of the record and the arguments presented by the parties, we conclude that the Full Commission acted properly in all respects. Therefore, the opinion and award of the Full Commission is

Affirmed.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).

