An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA17-1172

Filed: 19 June 2018

North Carolina Industrial Commission, I.C. No. 13-706566

KATHY D. CARROLL, Administratrix of the ESTATE OF EDMUND FULTON PRESLAR, Deceased-Employee, Plaintiff,

v.

JOHNS MANVILLE, Employer, TRAVELERS INDEMNITY CO., Carrier, Defendants.

Appeal by plaintiff from opinion and award entered 11 July 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 March 2018.

Wallace and Graham, P.A., by Michael B. Pross, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Jeff A. Kadis, for defendants-appellees.

DIETZ, Judge.

Plaintiff appeals an opinion and award from the Industrial Commission denying deceased employee Fulton Preslar's workers' compensation claim against Defendants Johns Manville and its insurer. As explained below, the Commission properly found that Preslar did not work at Johns Manville long enough to satisfy the statutory requirement for a compensable asbestosis claim. The Commission also

properly found that Preslar failed to meet his burden to show his pleural plaques were a compensable occupational disease. Accordingly, we affirm the Commission's opinion and award.

Facts and Procedural History

Edmund Preslar worked for Defendant-Employer Johns Manville at its Marshville facility, which produced asbestos textile material. His job was to take yarn made from asbestos and turn it into tape for the ship building industry. On 11 February 2013, Preslar filed a Form 18B claiming workers' compensation benefits for asbestosis based on his work at the Johns Manville facility from "1967 to 1968." A week later, Johns Manville filed a Form 61 denying Preslar's claim.

During discovery, Preslar produced evidence purporting to show how long he worked for Johns Manville, including a log describing his work history from 1958 to 2003. In the log, Preslar stated that he worked for Johns Manville as a doffer in 1965, where he encountered "[d]irect exposure [to asbestos] for approx. 6½ months; Fed asbestos thread into a machine; Worked 8 hours per day, 6 days per week." Additionally, Preslar provided patient visit notes from his doctors, one noting that he "worked in an asbestos plant for 6 months" and another stating that he "did work 3 months in an asbestos factory many years ago."

The parties also deposed one of Preslar's former coworkers, Horace Pope, who worked for Johns Manville until 1968. At his deposition, Pope recalled Preslar's time

at the Marshville facility, although they worked in different departments and were separated by a plywood wall during the day. When asked how long Preslar worked for Johns Manville, Pope stated "I believe he worked six months, as I remember," adding that Preslar would have worked five days per week, eight hours per day. When further asked what year Preslar worked those six months, Pope replied "I couldn't say that. Now, it would be along toward the 19— well, I would say in the '65 or somewhere, maybe a little before that." He also struggled to remember other co-workers who were at the Marshville plant at the same time as Preslar, ultimately remembering only four (three of whom were brothers).

Johns Manville's only evidence for the number of days Preslar worked at the company was an Itemized Statement of Earnings Report from the Social Security Administration. Because the Marshville plant is no longer in operation, this Social Security report is the only available wage documentation from Preslar's employment with Johns Manville. The only time the Social Security report shows Preslar worked for Johns Manville was during the first quarter of 1965, during which he earned $76.55 in total wages from Johns Manville and $825.59 in combined total wages from four other employers.

Johns Manville also produced research from the U.S. Department of Labor revealing that the federal minimum wage in the first quarter of 1965 was $1.15 per hour. Based on Preslar's Social Security report, Johns Manville calculated that if

Preslar worked at the company for eight hours per day, five days per week, as Preslar asserted, and even assuming he was paid no more than the minimum permissible hourly wage at the time, his total compensation indicated that Preslar could have worked at the company for only eight days.

The parties also produced evidence relating to Preslar's health, including medical records confirming that Preslar developed calcified pleural plaques in his lungs. Johns Manville's expert witness, Dr. Allen Hayes, studied these records. In the process, the only occupational history Dr. Hayes found was the doctor's note stating that Preslar worked for six months at an asbestos plant. At his deposition, Dr. Hayes opined that "multiple causes" likely contributed to Preslar's pleural plaques but that Preslar's remote asbestos exposure at Johns Manville "probably" caused them. Dr. Hayes based his opinion on the factual assumption that Preslar worked at Johns Manville for six months.

On 14 March 2014, Preslar died from non-work-related causes. His estate's administratrix, Kathy Carroll, substituted as the Plaintiff in this action in April 2016. After multiple hearings, the Deputy Commissioner entered an opinion and award on 13 October 2016 denying Preslar's claim. Plaintiff appealed to the Full Commission. On 11 July 2017, the Full Commission entered an opinion and award upholding the Deputy Commissioner's decision. Plaintiff timely appealed.

Analysis

Plaintiff asserts three arguments on appeal: that the Commission improperly accepted the Social Security report as evidence of how long Preslar worked at Johns Manville; that the Commission improperly applied the thirty-day requirement in N.C. Gen. Stat. § 97-57 to Preslar's pleural plaques disease; and that Preslar is entitled to reimbursement for medical expenses. We address these arguments in turn.

I. Findings concerning Preslar's employment at Johns Manville

This Court reviews an award from the Commission to determine: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by these findings. *Myres v. Strom Aviation, Inc.*, __ N.C. App. __, __, 804 S.E.2d 785, 788–89 (2017). Under the competent evidence standard, if the Commission's factual findings are supported by *any* competent evidence in the record, those findings are binding on appeal. *Adams v. Frit Car, Inc.*, 185 N.C. App. 714, 717, 649 S.E.2d 651, 653 (2007) (emphasis added).

To have a compensable workers' compensation claim, Preslar had to prove that he was "exposed to the hazards of asbestosis" at Johns Manville "for as much as 30 working days, or parts thereof, within seven consecutive calendar months." N.C. Gen. Stat. § 97-57.

In its opinion and award, the Commission found that Preslar had not been employed at Johns Manville for enough time to satisfy this statutory requirement.

The Commission based this finding on the Social Security report indicating that Johns Manville employed Preslar only during the first quarter of 1965, and paid him only $76.55 total for his work at the company. Based on Preslar's description of the hours he worked, the Commission found that, even if he were paid only the federal minimum wage applicable at the time, he could not have been employed for thirty working days within seven consecutive months.

This Social Security report is competent evidence supporting the Commission's finding. To be sure, Preslar presented other, competing evidence indicating that he worked at Johns Manville for longer—including the testimony of a co-worker, Horace Pope, and work logs and notes from his doctors documenting his description of the work he performed for the company.

But this Court has no authority to reject findings supported by competent evidence simply because there is other evidence in the record contradicting those findings. "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34, 144 S.E.2d 272, 274 (1965). Here, the Commission found that "if Deceased-Employee were to have worked for Defendant-Employer on 30 working days that period, he would have been earning only $2.55 per day, which the Full Commission does not find to be tenable, especially in light of the interrogatory response stating he worked eight hours per day, six days per week for Defendant-Employer." Thus, the

Commission accorded "more weight to the [Social Security report] than to Pope's recollection, some 50 years after the fact" and the other, competing evidence offered by Preslar.

Simply put, under the narrow standard of review applicable to findings by the Commission, we must accept the Commission's finding and reject Plaintiff's argument.

II. Findings concerning pleural plaques

Plaintiff next argues that Preslar's pleural plaques were a separate occupational disease not covered by the N.C. Gen. Stat. § 97-57 time requirements, which apply only to "asbestosis or silicosis." N.C. Gen. Stat. § 97-57. Even assuming Plaintiff is correct, this has no bearing on the Commission's rejection of this claim, which was based on Plaintiff's failure to satisfy the burden of proof for this occupational disease claim. *Watts v. Borg Warner Auto., Inc.*, 171 N.C. App. 1, 6, 613 S.E.2d 715, 719 (2005).

To prove an occupational disease claim, the employee must establish that he was "last injuriously exposed to the hazards of such disease in defendant's employment." *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983). "Last injurious exposure" means the most recent exposure "which proximately augmented the disease to any extent, however slight." *Id.* at 89, 301 S.E.2d at 362–63 (citation omitted).

Plaintiff relied on Dr. Hayes's expert opinion to satisfy this burden of proof. Dr. Hayes testified that asbestos exposure likely caused Preslar's pleural plaques and that his job at the Johns Manville facility increased his risk of developing pleural plaques. But Dr. Hayes based his opinion on the assumption that Preslar worked at Johns Manville for six months. The Commission found as fact that Preslar did not work at Johns Manville for six months, but instead for a little over a week at most. Because the Commission found that Dr. Hayes based his testimony on assumptions not supported by the record, it properly determined that his testimony was insufficient to establish last injurious exposure. *See Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980). Accordingly, the Commission did not err in rejecting Plaintiff's pleural plaques claim.

Because we find that the Commission properly rejected all of Plaintiff's claims, we likewise reject Plaintiff's arguments concerning medical reimbursements, which would apply only if Plaintiff proved a compensable claim.

Conclusion

We affirm the Industrial Commission's opinion and award.

AFFIRMED.

Judges HUNTER, JR. and ZACHARY concur.

Report per Rule 30(e).