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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-769

Filed: 3 September 2019

North Carolina Industrial Commission, I.C. No. 886704

FRANKIE LEE WELCH, 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, COA18-768, 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

Frank Lee Welch ("Plaintiff") worked for Continental Tire the Americas ("Defendant") at Defendant's tire factory (the "factory") in Charlotte from 1970 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 26 February 2008, alleging he had been "exposed to the hazards of asbestos containing products while employed" at the factory, and that he had thereby developed asbestosis. 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

[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.

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. 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. 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, nor Defendant's liability for any alleged asbestosis by establishing "last injurious exposure" to the "hazards of asbestosis" occurred at the factory.

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, which support the Commission's relevant conclusions of law. *Id.*

In conclusion of law 3 the Commission determined that Plaintiff did not meet his burden of proving that he "contracted asbestosis[.]" Relevant findings from the common issues section of the opinion and award, as set forth in *Hinson*, along with findings of fact 53, 54, 55, 56, 57, 59, 60, and 61 support this conclusion.

Plaintiff challenges findings 58, 63, 64, and 65. The Commission's opinion and award does not contain findings of fact 63, 64, or 65. Finding 58 does not correspond with the argument Plaintiff makes on appeal. Based upon Plaintiff's arguments, he appears to have intended to challenge findings 56, 61, and 62. Plaintiff does not challenge findings 53, 54, 55, 57, and 59, which include determinations that Plaintiff "was never diagnosed with asbestosis by a treating physician"; "B-reader Dr. Glen Baker rated" a "19 April 2010 x-ray as having a 1/0 profusion[,]" but this "x-ray was designated as a 'quality 2' image due to underexposure"; Plaintiff "never underwent a CT scan"; Plaintiff had "a prior medical history for serious lung issues" including

diagnoses of "pleurisy" in the 1980s and again in 1991, and "bronchial pneumonia in 2001 for which he was hospitalized"; Dr. Selwyn Spangenthal opined that Plaintiff's "pleural thickening" was "most likely residual scarring from his acute lower respiratory tract infection that occurred in April 1991[,]" and it was Dr. Spangenthal's "opinion that [Plaintiff] ha[d] no evidence of asbestosis"; and Plaintiff had "a significant history of smoking cigarettes[.]"

Assuming Plaintiff challenged findings 56, 61, and 62, his challenge to finding 56 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." Evidence supports the finding, and it is binding on appeal. Finding 56 states:

> B-readers Dr. Philip Goodman, Dr. Andrew Ghio, Dr. Michael Alexander, and Dr. Peter Barrett reviewed [Plaintiff's] x-rays dated 20 July 2007 and 23 December 2009. Upon review of these x-rays, taken with their review of [Plaintiff's] 1991 x-rays and medical records, all concluded that [Plaintiff] did not have asbestosis and further that the blunted right costophrenic angle was due to pneumonia and pleural effusion from 1991.

In finding 61 the Commission gives greater weight to the medical testimony of "Drs. Goodman, Ghio, Alexander, and Barrett" than to Plaintiff's medical experts. Finding 62 is an ultimate finding in which the Commission determined "by the greater weight of the evidence" that Plaintiff did not show a causal connection between his employment at the factory and his alleged asbestosis, and further did not

demonstrate he was "exposed to the hazards of asbestosis through his employment for 30 days or parts thereof within a seven month consecutive period which proximately augmented the disease process of asbestosis to the slightest degree." "Conclusions of law" 2 and 4 include similar ultimate findings. Plaintiff's challenge, which is based upon the "entire record" and "air sampling" arguments this Court rejected in *Hinson*, fails. We hold that the findings support the conclusion that Plaintiff did not have asbestosis, and the ultimate findings related to causation and liability are supported by record evidence. *Culpepper*, 93 N.C. App. at 247, 377 S.E.2d at 780 (citation omitted) ("Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and the Industrial Commission's findings in this regard are conclusive on appeal if supported by competent evidence.").

AFFIRMED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).