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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-766

Filed: 3 September 2019

N.C. Industrial Commission, I.C. No. 887719

CHARLES EDWARD WILSON, Employee, Plaintiff,

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, COA18-767, COA18-768, 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

Charles Edward Wilson ("Plaintiff") worked for Continental Tire the Americas ("Defendant") at Defendant's tire factory (the "factory") in Charlotte from 1968 until 1999. 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 29 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 2 June 2008, alleging asbestos exposure at the factory also caused or contributed to the development of colon cancer. Therefore, Plaintiff claimed his exposure to asbestos at the factory was a causal factor in him developing two compensable occupational diseases—asbestosis and colon cancer. Determination of the bellwether cases will

[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.

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. 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).

[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.

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 colon 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 will 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

Relevant findings from the common issues section of the opinion and award, as set forth in *Hinson*, along with findings of fact 54, 55, 57, 58, 59, and 60—which Plaintiff does not challenge—support the Commission's asbestosis-related conclusions of law. In these findings the Commission found, *inter alia*, that Plaintiff's

"most recent CT scans show progression of his metastatic lung disease, but nothing indicative of asbestosis"; that Plaintiff has had over thirty "chest x-rays and CT scans," but "no radiologist diagnosed asbestosis or made findings consistent with asbestosis as a result of these scans"; that Dr. Andrew Ghio determined "there was no evidence of asbestosis, no evidence of diffuse interstitial lung disease, and no evidence of significant exposure to asbestos"; that Dr. Philip Goodman "found no evidence of asbestosis or asbestos-related disease" upon review of Plaintiff's "radiology"; that Dr. Peter Barrett reviewed Plaintiff's x-rays, CT scans and PET scans, concluding "[t]here is nothing, by any modality, to suggest asbestosis or significant prior exposure to asbestos fiber"; and that "Dr. Julie Webster, one of [P]laintiff's treating doctors and a board-certified radiologist, interpreted the CT scans and found nothing consistent with asbestosis and no interstitial fibrosis." Plaintiff challenges finding 64, which states: "Given the preponderance of the evidence in view of the entire record, the opinions of Drs. Barrett, Ghio, Roggli, Webster, Karb, and Oury are given greater weight than those of" Plaintiff's medical expert witnesses. Plaintiff's challenge, which is based upon the "entire record" and "air sampling" arguments this Court rejected in *Hinson*, fails. Plaintiff challenges ultimate finding 66 on the same basis, and this challenge also fails. Finding 66 states in relevant part:

> The greater weight of the evidence in view of the entire record does not show that [Plaintiff] . . ., through his employment at [the] factory, was exposed to asbestos in

> such form and quantity and used with such frequency as to cause or significantly contribute to the development of asbestosis, and does not show that [Plaintiff] was exposed to the hazards of asbestosis through this 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.

These same determinations are also set forth in "conclusions of law" 2 and 4. We hold that record evidence supports these ultimate findings. 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." The findings of fact support the conclusion that Plaintiff failed to meet his burden of proving he had asbestosis. The Commission did not err in rejecting Plaintiff's asbestosis claim based on its ultimate findings and conclusions of law.

2. Colon Cancer

Concerning Plaintiff's claim based on colon cancer, ultimate finding 46 from the common issues portion of the opinion and award is sufficient to defeat this claim, stating in part:

> Plaintiff . . . alleges that he also contracted colon 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 colon 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 colon 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 colon cancer.

Ultimate finding 65—which Plaintiff challenges solely based upon the rejected "air sampling" argument—states in relevant part that "the preponderance of the evidence" "does not establish that [Plaintiff's] colon cancer . . . was causally related to his employment . . . or that his employment with [D]efendant placed him at greater risk of developing colon cancer . . . [than] the general public[.]" These determinations are also included in "conclusion of law" 6. We hold that record evidence supports these determinations.

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 57, 58, 59, 61, 63, and 64 support conclusion of law 3, in which the Commission determined that Plaintiff did not meet his burden of proving that he "contracted . . . any asbestos-related condition." Plaintiff alleged that his colon 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 57, 58, 59, 61, and 63, and we have already addressed Plaintiff's challenge to finding 64. In these findings, the Commission gives greater weight to Defendant's medical experts who opined, *inter alia*, "that there was no causal link between asbestos and [Plaintiff's] colon cancer[,]" and "that colon cancer is not caused by asbestos exposure."

The Commission found and concluded that Plaintiff failed to prove colon 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 colon 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 colon cancer claim.

AFFIRMED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).