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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-767

Filed: 3 September 2019

North Carolina Industrial Commission, I.C. No. 891834

BOBBY JAMES NEWELL, 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, COA18-768, 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

Bobby James Newell ("Plaintiff") worked for Continental Tire the Americas ("Defendant") at Defendant's tire factory (the "factory") in Charlotte from 1967 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 25 March 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").

[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.

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. 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 and ultimate findings which, in turn, 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 52, 53, 54, 55, 56, 57, 58, and 59 support this conclusion. Plaintiff does not challenge findings 52, 53, 55, 56, 57, 58, and 59, which include determinations that Plaintiff "was never diagnosed with asbestosis by a treating physician"; two "B-read[s] of an 18 July 2007 x-ray" by Plaintiffs' experts resulted in "finding[s] of a 1/0 profusion"; this 18 July 2007 "x-ray was rated as 'quality 2' due to underexposure"; the "18 July 2007 [x-ray] was evaluated by Drs. Alexander, Ghio, and Goodman to have no evidence of asbestosis"; Plaintiff "never underwent a CT scan"; "Drs. Ohar and Schwartz found normal" results in Plaintiff's "pulmonology exams"; "Dr. Ghio concluded that [Plaintiff] exhibited nothing clinically,

radiologically, or by pulmonary function test to suggest asbestosis or significant asbestos exposure"; and Plaintiff had "a significant history of smoking cigarettes[.]"

Plaintiff's challenge to finding 54 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." Record evidence supports the finding, and it is binding on appeal. Finding 54 states:

> [Plaintiff] had an additional x-ray that was of high quality taken on 4 December 2009 and interpreted as normal by Dr. Edward Oke, an independent radiologist. Furthermore, Drs. Goodman, Ghio, Alexander, and Barrett reviewed this x-ray and found no evidence of asbestosis[.] Plaintiff's experts did not examine the 2009 x-ray.

Plaintiff challenges finding 61 as well. However, the opinion and award in Plaintiff's case does not include a finding 61. To the extent Plaintiff intended to challenge finding 54, in which the Commission gave greater weight to the medical testimony of "Drs. Alexander, Barrett, Ghio, and Goodman" than to Plaintiff's medical experts, Plaintiff's challenge, which is based upon the "entire record" and "air sampling" arguments this Court rejected in *Hinson*, fails. Plaintiff uses this same argument to challenge ultimate finding 60, and it is deemed binding on appeal as well. Finding 60 states that 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. 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).