NO. COA10-1288

NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

KATHERINE F. TYSON, Executrix of the Estate of CHARLES B. TYSON, Deceased,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. No. 646983

H. K. PORTER COMPANY,
Employer,
ACE USA,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 17 May 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 March 2011.

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

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by William A. Smith and M. Duane Jones, for defendants-appellants.

GEER, Judge.

Defendants H. K. Porter Company and ACE USA appeal from an opinion and award of the Industrial Commission determining that plaintiff Katherine F. Tyson, as executrix of the Estate of

Charles B. Tyson, is entitled to benefits because Mr. Tyson contracted asbestosis, asbestos-related pleural disease, and colon cancer as a result of exposure to asbestos while he was employed by H. K. Porter. Defendants first challenge the Commission's findings of fact regarding the credibility of two expert witnesses. It is well established, however, that the Commission's credibility determinations are not subject to appellate review. We agree, however, with defendants that the Commission erred in failing (1) to address whether the asbestosis claim was timely filed, an issue we cannot decide in the first instance on appeal; and (2) to make all the necessary findings of fact for calculating Mr. Tyson's average weekly wage. We, therefore, affirm in part and reverse and remand in part for further findings of fact and conclusions of law.

Facts

From 1964 to 1968, Mr. Tyson worked for H. K. Porter, an asbestos manufacturing facility that is no longer in business. Mr. Tyson worked as a "fixer" in the maintenance department, a position which required him to work throughout the facility fixing production machinery. Mr. Tyson was exposed to asbestos during his employment.

In August 2006, Mr. Tyson filed two Industrial Commission Form 18Bs, seeking benefits for the development of asbestos-

related colon cancer and asbestosis. In October 2006, ACE USA, H. K. Porter's insurance carrier from 1964 to 1969, filed a Form 61 denying Mr. Tyson's claim. Mr. Tyson later died as a result of colon cancer on 19 August 2007. On 21 September 2007, Mr. Tyson's wife, Ms. Tyson, in her capacity as executrix of Mr. Tyson's estate, filed an amended Form 18B.

On 2 September 2009, the Chief Deputy Commissioner entered an opinion and award denying Ms. Tyson's claim. The Chief Deputy Commissioner found that Mr. Tyson had contracted asbestosis as a result of his employment with H. K. Porter, but that the asbestosis claim was time-barred because Mr. Tyson had not filed a claim within two years of the date he was informed he had asbestosis that was related to his employment. The Chief Deputy Commissioner also found that Ms. Tyson had failed to prove by a greater weight of the evidence that Mr. Tyson's colon cancer was caused by or significantly contributed to by his employment with H. K. Porter. Both sides appealed to the Full Commission.

In an opinion and award entered 17 May 2010, the Full Commission found that Mr. Tyson contracted asbestosis as a direct and proximate result of his exposure to asbestos during his employment with H. K. Porter and that Mr. Tyson's colon cancer, which metastasized to his liver, was caused by or

significantly contributed to by his exposure to asbestos during his employment. The Commission concluded that Ms. Tyson was entitled to 400 weeks of compensation at the rate of $704.00 per week. Defendants timely appealed from the Commission's opinion and award to this Court.

Discussion

Appellate review of a decision of the Industrial Commission "is limited to determining whether there is any competent evidence to support the findings of fact, and whether the findings of fact justify the conclusions of law." *Cross v. Blue Cross/Blue Shield*, 104 N.C. App. 284, 285-86, 409 S.E.2d 103, 104 (1991). "The findings of the Commission are conclusive on appeal when such competent evidence exists, even if there is plenary evidence for contrary findings." *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 353, 524 S.E.2d 368, 371 (2000). This Court reviews the Commission's conclusions of law de novo. *Deseth v. LensCrafters, Inc.*, 160 N.C. App. 180, 184, 585 S.E.2d 264, 267 (2003).

I

Defendants first contend that the Commission "erred in this matter by concluding Mr. Tyson's exposure to asbestos while working for H.K. Porter caused his colon cancer because said conclusion is based on findings of fact not supported by

credible evidence." Defendants acknowledge that the Commission concluded that Dr. Arthur Frank's testimony -- that Mr. Tyson's exposure to asbestos was a "significant contributing cause to his developing his colon cancer" -- should be given greater weight than the testimony of defendants' expert witness, Dr. John Craighead. Dr. Craighead is a pathologist who testified that he did not believe Mr. Tyson's colon cancer was related to asbestos exposure because, in his opinion, there is no established relationship between asbestos exposure and colon cancer.

Defendants argue, for a number of reasons, that finding of fact 35 on which the Commission based its credibility determination is not supported by competent evidence. Finding of fact 35 states: "Dr. [John] Craighead's opinions are afforded little weight because he disagrees with several noted authorities on the subject of colon cancer and asbestos exposure. Dr. Craighead's testimony is in direct contradiction to the wide body of literature from well recognized institutions, including the National Cancer Institute, the U.S. Department of Labor, and OSHA, among others."

At the outset, we note that defendants' argument focuses on the Commission's decision as to the weight and credibility to be given the witnesses' testimony. It is well established that the

Commission "'is the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). As defendants acknowledge, finding of fact 35 is simply the Commission's explanation for its credibility decision. Our Supreme Court held in *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000) (emphasis added), that "[r]equiring the Commission to explain its credibility determinations and *allowing the Court of Appeals to review the Commission's explanation of those credibility determinations* would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another."

Similarly, in *Biggerstaff v. Petsmart, Inc.*, 196 N.C. App. 261, 268, 674 S.E.2d 757, 762 (2009), the defendants challenged the Commission's determination to give greater weight to one doctor's opinion over another's by arguing -- like defendants here -- that the Commission's explanation for that decision was not supported by the evidence. This Court overruled the defendants' argument because it was within the Commission's

province, not the Court's, to decide witness credibility and the weight to be given witness testimony. *Id.*

Deese and *Biggerstaff* would appear to hold that we are not permitted to review finding of fact 35's explanation for why the Commission did not find Dr. Craighead's opinions credible. We note, in any event, that finding of fact 35 is supported by Dr. Frank's testimony that a causal connection between asbestos and colon cancer has been recognized in scientific literature and by various national and international agencies, including those noted in the finding of fact. Accordingly, even if we were permitted to review the Commission's explanation for its credibility determination, we would be required to uphold the explanation as supported by the record.[1]

II

Defendants next contend that the Commission erred in awarding compensation for Mr. Tyson's asbestosis without addressing whether his claim for asbestosis was time-barred.[2] N.C. Gen. Stat. § 97-58(b) (2009) provides that "[t]he time of notice of an occupational disease shall run from the date that

---

[1]Because Dr. Frank's testimony in this case supported the Commission's finding of fact, we need not address defendants' argument that the finding was copied from another earlier Commission decision.

[2]Defendants make this argument only as to the asbestosis claim and not in connection with the asbestos-related pleural disease and colon cancer claims.

the employee has been advised by competent medical authority that he has same." Under N.C. Gen. Stat. § 97-58(c), "[t]he right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be."

The Supreme Court has explained that N.C. Gen. Stat. § 97-58(b) and (c) "must be construed *in pari materia*" and further:

> [W]hen these sections are read *in pari materia*, they establish the factors which commence the running of the two year period within which claims must be filed in cases of occupational disease. The two year period within which claims for benefits for an occupational disease must be filed under G.S. 97-58(c) begins running when an employee has suffered injury from an occupational disease which renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by such injury, and the employee is informed by competent medical authority of the nature and work related cause of the disease. The two year period for filing claims for an occupational disease does not begin to run until all of these factors exist.

Dowdy v. Fieldcrest Mills, Inc., 308 N.C. 701, 706, 304 S.E.2d 215, 218 (1983) (internal citation omitted).

Here, the Chief Deputy Commissioner found that Mr. Tyson was informed no later than 3 December 2002 that he had asbestosis and that it was related to his employment with the

defendant employer. Because Mr. Tyson did not file a claim for workers' compensation benefits for asbestosis within two years of 3 December 2002, the Chief Deputy Commissioner concluded that "[p]laintiff's claim for asbestosis is, thus, time barred."

On appeal, however, the Full Commission did not address this issue. Its opinion and award contains no findings as to when Mr. Tyson learned of his asbestosis diagnosis or that the asbestosis was connected with his employment. "'While the [Full] [C]ommission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends.'" *Perry v. CKE Rests., Inc.*, 187 N.C. App. 759, 763, 654 S.E.2d 33, 35-36 (2007) (quoting *Gaines v. L.D. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977)).

"If the Full Commission's findings of fact are insufficient to allow this Court to determine the parties' rights upon the matters in controversy, the proceeding must be remanded to the Full Commission for proper findings of fact." *Id.*, 654 S.E.2d at 36. Because the Commission failed to address the timeliness of plaintiff's claim based on asbestosis, we must reverse the portion of the opinion and award awarding compensation for asbestosis and remand to the Commission to make findings of fact

and conclusions of law regarding the timeliness of the asbestosis claim.

III

Finally, defendants challenge the Commission's determination of Mr. Tyson's average weekly wage for purposes of the colon cancer claim. On this issue, the Commission found: "Defendants have failed to file a Form 22. The maximum compensation rate for 2005, the year of Decedent-Employee's diagnosis of colon cancer, is $704.00 per week." Based on this finding, the Commission concluded:

> N.C. Gen. Stat. §97-2(5) provides five possible methods of determining average weekly wages. The Commission has not been provided with sufficient earnings information from which to calculate Decedent's average weekly wage according to the first three methods set forth in N.C. Gen. Stat. §97-2(5). Using "method four" would be the most fair and just result to both parties for determining Decedent-Employee's average weekly wage. Where for exceptional reasons the first three methods would be unfair, either to the employer or employee, the Commission may employ such other method as will most nearly approximate the amount which the injured employee would be earning were it not for the injury. N.C. Gen. Stat. §97-2(5). Defendant did not produce a Form 22 or other evidence from which an average weekly wage can be calculated. Therefore, the Commission imputes to Decedent-Employee the maximum compensation rate for 2005, $704.00, for purposes of this Opinion and Award. N.C. Gen. Stat. §97-2(5); [s]ee *Shibli v. Miller*

Metals, I.C. File No. 926505, Scott, McDonald, Sellers (November 30, 2007).

As the Commission noted, N.C. Gen. Stat. § 97-2(5) (2009) sets out five methods for calculating an employee's average weekly wage:

> [1] "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52; [2] but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. [3] Where the employment prior to the injury extended over a period of fewer than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. [4] Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> [5] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be

> resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5).

"When the first method of compensation *can* be used, it *must* be used." *Hensley v. Caswell Action Comm., Inc.*, 296 N.C. 527, 533, 251 S.E.2d 399, 402 (1979). The final "exceptional reasons" method "*may not be used* unless there has been a finding that unjust results would occur by using the previously enumerated methods." *McAninch v. Buncombe Cnty. Schs.*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997) (emphasis added).

Here, while the Commission stated that it was using "method four," it is apparent that it was employing the final "exceptional reasons" method. The Commission's finding that the "exceptional reasons" method "would be the *most fair* and just result to both parties" is not adequate under *McAninch*. (Emphasis added.) *McAninch* requires that the Commission determine first that the other four methods would lead to "unjust results." *Id.* The Commission's determination in this case (contained in its conclusion of law) does not necessarily mean that the other four methods were "unjust" -- perhaps, those other methods would just be less favorable.

In addition, the sole finding of fact relating to the Commission's decision to use the "exceptional reasons" method

recites only that "[d]efendants have failed to file a Form 22," while the conclusion of law states further that "[t]he Commission has not been provided with sufficient earnings information from which to calculate Decedent's average weekly wage according to the" prior four methods. As defendants point out, however, the record contains an Itemized Statement of Earnings from the Social Security Administration setting out Mr. Tyson's earnings during his last full year of employment with H. K. Porter in 1967, as well as tax records showing Mr. Tyson's wages from 1992 through 2001.

While the Commission may have had a reason for concluding that this additional information was not sufficient to calculate Mr. Tyson's average weekly wage, it has not provided any explanation of its reasoning or, indeed, any indication that it considered that evidence. *See Weaver v. Am. Nat'l Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) ("Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it.").

Defendants also assert that the Commission's decision to award the maximum compensation rate for 2005 was an impermissible "penalty or sanction" against defendants for their

"failure" to provide a Form 22. Because of the lack of findings of fact to support the average weekly wage determination, we cannot tell whether the Commission was, in fact, sanctioning defendants. While the words "penalty" and "sanction" do not appear in the opinion and award, the only finding of fact supporting the conclusion of law mentions solely the failure of defendants to submit a Form 22. We cannot tell from the opinion and award what the Commission's intention was.

Consequently, without further findings of fact explaining the basis for the Commission's average weekly wage determination, we cannot effectively review that determination on appeal. We, therefore, reverse as to the Commission's average weekly wage determination and remand for further findings of fact. *See Pope v. Manville*, ___ N.C. App. ___, ___, 700 S.E.2d 22, 33 ("[W]e conclude that the Commission erred by failing to adopt one of the first four methods for calculating claimant's average weekly wage set out in N.C. Gen. Stat. § 97-2(5) without making sufficient findings and conclusions to allow use of the fifth method for calculating a claimant's average weekly wage set out in that statutory provision. As a result, we remand this case to the Commission for reconsideration of the amount of weekly disability benefits to which Plaintiff is entitled . . . ."), *disc. review denied*, 365 N.C. 71, 705 S.E.2d

375 (2010). Nothing in this opinion is intended to express any view regarding what would be the proper average weekly wage under the circumstances of this case.

Conclusion

We affirm the Commission's opinion and award to the extent that it awards compensation based on Mr. Tyson's colon cancer and asbestos-related pleural disease. With respect to Mr. Tyson's asbestosis claim only, we reverse and remand for further findings of fact and conclusions of law regarding the timeliness of that claim. Finally, we remand for further findings of fact and conclusions of law regarding the proper average weekly wage.

Affirmed in part; reversed and remanded in part.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).