

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA14-615
NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

JAMES NORMAN RICHARDSON, Employee,

Plaintiff,

v.

North Carolina Industrial
Commission
I.C. No. W28174

PCS PHOSPHATE COMPANY, INC. (fka
ELF AQUITAINE, fka TEXAS GULF),
Employer,

ACE USA/ESIS, ZURICH NORTH
AMERICAN INSURANCE CO., FEDERAL
INSURANCE COMPANY/CHUBB GROUP, RSK
CO., (k/n/a CAN), SPECIALTY RISK
SERVICES and BROADSPIRE, Carriers,

Defendants.

Appeal by defendant-employer and defendant-carrier from an Amended Opinion and Award entered 12 February 2014 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 October 2014.

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

Ward & Smith, P.A., by William A. Oden, III, for defendants-appellants PCS Phosphate Company, Inc. and Broadspire.

Lewis & Roberts, PLLC, by Winston L. Page, Jr. and J. Timothy Wilson, for defendant-appellee Zurich North America Insurance Co.

Teague, Campbell, Dennis & Gorham, LLP, by Tracey L. Jones and Leslie P. Lasher, for defendant-appellee CNA Insurance Company.

Cranfill Sumner & Hartzog, LLP, by Jaye E. Bingham-Hinch and J. Gregory Newton, for defendant-appellee ACE USA/ESIS.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Harmony Whalen Taylor and Lindsey L. Smith, for defendant-appellee Federal Insurance Company/Chubb Group.

McAngus, Goudelock & Courier, PLLC, by John F. Morris and Jordan A Benton, for defendant-appellee Specialty Risk Services.

HUNTER, Robert C., Judge.

Appeal by defendant-employer PCS Phosphate Company, Inc. and defendant-carrier Broadspire (collectively "appellants") from an Amended Opinion and Award concluding that plaintiff's "last injurious exposure" to asbestos occurred in 1995 while Broadspire was the carrier on the risk. On appeal, appellants contend that the Full Commission erred in concluding that plaintiff's "last injurious exposure" occurred in 1995 because "the only competent evidence of record supports a finding of fact, and corresponding conclusion of law that [plaintiff's] last exposure occurred in 1974" when he was working as a process engineer for PCS. In the alternative, appellants argue that

should the Court conclude that plaintiff's last exposure occurred in 1995, then the Full Commission erred in not finding that plaintiff's last exposure occurred when he was working for the East Group since plaintiff performed essentially the same work at the same jobsite.

After careful review, we affirm the Amended Opinion and Award.

Background

I. Plaintiff's Testimony

Plaintiff James Richardson began working for PCS Phosphate Company, Inc. ("PCS") in 1968. PCS manufactures phosphate products used to make food products, fertilizer, and toothpaste. Phosphate ore is mined onsite and transported to PCS's production facility where it is heated to 1,700 degrees for use in the production process. Although plaintiff started as a concentrator engineer, he became a process engineer beginning in December of 1968. As a process engineer, plaintiff worked throughout the mill department, but the majority of his time was spent working in close proximity to the steam pipes and operating equipment. Plaintiff claimed that he performed "hands-on" work on the plant equipment that contained asbestos.

In 1974, he was promoted to mill superintendent. As the superintendent, he also worked closely with operators and maintenance workers in the plant operation areas. Although this position was more office-oriented, he still visited the mill department often and would have contact with certain equipment, including the plant calciners, that were known to contain asbestos. Plaintiff recalled that, during this time period, he observed maintenance projects throughout the facility that involved the removal or disturbance of asbestos. In fact, plaintiff contended that he may have overseen projects involving the removal of asbestos-containing insulation or gaskets.

Plaintiff remained in the mill superintendent position until 1992 when he became the assistant to the mine manager. In this position, plaintiff was still required to visit the mill department where, up until the early 2000's, PCS performed asbestos abatement and maintenance projects. Plaintiff stayed in that position until he retired from the company in 1995.

In 1995, plaintiff began working for the East Group at the same site he worked at while assistant to the mine manager at PCS. Plaintiff described his work at the East Group as "[m]ore of a think-tank position." He worked mainly in problem areas such as the water treatment projects. In these projects,

plaintiff would be tasked with adding certain nonasbestos materials to well water being discharged from the facility to clean up the algae. Plaintiff alleged that he had little involvement in the calciner section of the mill department. Plaintiff testified that he did not believe that he was exposed to any asbestos during his work at the East Group. Plaintiff alleged that he believed that his last exposure to asbestos would probably have occurred when he was working "hands-on" in the production area of the mill department before he was promoted in 1975.

In 2009, plaintiff was diagnosed with mesothelioma. He has undergone extensive medical treatment including a lung removal, radiation, and chemotherapy.

II. Gerald Seighman's Expert Testimony

According to Gerald Seighman ("Seighman"), an industrial hygienist for PCS, because asbestos was used throughout the mill department and, especially, as insulation around the piping, PCS began alerting and educating its employees about asbestos and its dangers starting in 1986. In 1988, PCS implemented its official Asbestos Safety Program (the "Program"). The Program, essentially, mandated that any damaged insulation be inspected and safely removed by trained PCS employees. Although Seighman

testified that he did not believe plaintiff was exposed to asbestos after he left his job as a process engineer in 1974, he admitted that a person may be exposed to asbestos simply by working in the vicinity of someone disturbing asbestos.

III. Dr. Arthur Frank's Expert Testimony

Dr. Arthur Frank, a board certified doctor in occupational medicine and internal medicine, testified as an expert on plaintiff's behalf. Dr. Frank claimed that there is no threshold of asbestos exposure to develop mesothelioma; all exposures up until the day of diagnosis would have been "causally related" to the development of mesothelioma. Although Dr. Frank testified that "the bulk of [plaintiff's] exposures had come prior to 1974," plaintiff had "documented exposures to asbestos . . . while he was working for PCS." Furthermore, even an exposure to asbestos once a week could contribute to mesothelioma.

IV. Pretrial Stipulations

Prior to the hearing on plaintiff's Form 33, the parties reached a pretrial agreement and stipulated to the fact that plaintiff was employed by PCS from 1968 to 1995. Moreover, the parties stipulated the following periods of coverage for PCS: ACE USA/ESIS from 1 July 1960 to 1 July 1974 and 16 June 1990 to

1 January 1992; Zurich North American from 1 January 1974 to 1 January 1985; Federal Insurance Co./Chubb from 30 April 1985 to 17 June 1986; Continental/CNA Claims Plus from 12 June 1986 to 12 June 1987, 16 June 1988 to 16 June 1990, and 1 January 1993 to 1 January 1994; Hartford Accident & Indemnity Co. c/o Specialty Risk Services from 16 June 1987 to 16 June 1988; and Broadspire from 1 January 1994 to the present.

V. The 2012 Opinion and Award

On 16 February 2012, the Full Commission entered an Opinion and Award concluding that plaintiff's mesothelioma resulted from "causes and conditions characteristic of and peculiar to his employment with PCS." After determining that plaintiff's "last injurious exposure" pursuant to N.C. Gen. Stat. § 97-57 occurred in January 1974, the Full Commission found that only ACE USA/ESIS and Zurich were the insurance carriers liable in the case. The Full Commission's Opinion and Award was appealed to this Court.

On 21 May 2013, this Court issued an unpublished opinion reversing the Opinion and Award and remanding the matter back to the Industrial Commission. *Richardson v. PCS Phosphate Co.*, COA12-824, 2013 WL 2190069, at *4 (May 21, 2013). Specifically, this Court held that, under the plain language of section 97-57,

"the Full Commission erred by concluding that a last injurious exposure for mesothelioma required exposure for a period of 30 days, or parts thereof, within seven consecutive calendar months." *Id.* Instead, this Court noted that:

the plain language of N.C.G.S. § 97-57 also provides that in determining when an employee was "last injuriously exposed" to the hazards of asbestosis or silicosis, the employee must have had exposure for as much as 30 working days, or parts thereof, within seven consecutive calendar months[.] Because in the instant case, plaintiff's occupational disease was mesothelioma and not asbestosis or silicosis, the date on which he was last injuriously exposed to the hazards of mesothelioma is calculated by determining the exposure that proximately augmented the disease to any extent, however slight. It is clear that exposures to substances which can cause an occupational disease can be a last injurious exposure to the hazards . . . even if the exposure in question is so slight quantitatively that it could not in itself have produced the disease.

Id. Thus, the matter was remanded back to the Industrial Commission to apply the proper standard of determining when plaintiff's "last injurious exposure" to asbestos occurred, defined as "an exposure that proximately augmented the disease to any extent, however slight." *Id.*

On 12 February 2014, the Full Commission entered an Amended Opinion and Award and concluded that because plaintiff continued

to visit areas with asbestos up until the time of his retirement from PCS in 1995, his "last injurious exposure" occurred in 1995 when Broadspire was the carrier on the risk. Thus, Broadspire was liable for plaintiff's disability benefits and ongoing medical expenses. Appellants appeal.

Standard of Review

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation omitted) (*quoting Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "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).

Arguments

Appellants sole argument on appeal is that the Full Commission erred in concluding that plaintiff's "last injurious

exposure" occurred at the end of his employment with PCS in 1995. In contrast, citing plaintiff's own testimony in addition to the testimony of Dr. Frank and Seighman, appellants claim that the evidence shows that plaintiff's "last injurious exposure" occurred in 1974 when plaintiff was still working in a "hands-on" position as a process engineer. However, in the alternative, appellants contend that even if plaintiff continued to be exposed to asbestos through 1995, then he necessarily would have continued to be exposed in his position with East Group since that work entailed the same jobs and the same worksites as plaintiff's work with PCS.

After noting that asbestos products were used "extensively" throughout the mill department and in some amount in other areas of the facility, including the mine service building and office buildings, the Full Commission made the following, pertinent, findings of fact:

9. In his position as a Process Engineer, Plaintiff was exposed to asbestos. Specifically, he was frequently exposed to asbestos (1) while working with maintenance employees and operators who actually used the reagents and actually performed work on the plant equipment which was insulated with asbestos; (2) during removal of asbestos from the pipes surrounding the equipment; (3) during conveyor operations that released asbestos from braking material; and (4) in the mill office conference room and the

reagent building, all of which contained asbestos.

10. Although Plaintiff's job duties as Mill Superintendent were more office oriented, he continued to visit the mill area and be exposed to some asbestos.

. . . .

15. In May 1992, Plaintiff became Assistant to the Mine Manager and remained in that position until his retirement in 1995. In this role, Plaintiff was assigned projects including configuring the addition of chemicals to water being charged from the plant to remove algae, a pilot plant project that was conducted outside and preparation of a study to document PCS's efforts over the years to improve recoveries from their mine and a coarse recovery project. The pilot plant project and coarse recovery project were conducted in areas where no insulated-piping was present and exposure to asbestos would not have occurred. Plaintiff never entered the Fabrication Shop, Heavy Equipment Shop, or the NCPC Warehouse, and he did not work in proximity to drag lines or the ore pumps. All of these areas would have potentially exposed Plaintiff to friable asbestos.

16. Although Plaintiff never entered the Fabrication Shop, Heavy Equipment Shop, or the NCPA Warehouse in his position as Assistant to the Mine Manager, he testified that he did occasionally visit the mill area and the mine service office, but that he rarely visited the calciner building and reagent building. Although he could not specifically recall a time that he visited the calciner building, Plaintiff indicated that it was possible that he had. All of these areas contained some asbestos.

. . . .

19. Sampling records from PCS Phosphate indicate that asbestos was present in most of the Mill Department up until the time of his retirement in 1995.

20. Based upon a preponderance of the evidence of record, the Full Commission finds that Plaintiff continued to be exposed to asbestos up through the time of his retirement from Defendant-Employer.

21. After retiring from PCS, Plaintiff began working for the East Group in 1995 on the same PCS job site. Plaintiff testified that in this position, he performed the same job duties as he had while employed as the Assistant to the Mine Manager. Plaintiff does not believe that he was injuriously exposed to the hazards of asbestos while working for the East Group.

23. Mr. Seighman, former Industrial Hygienist at PCS, testified in this matter and opined that plaintiff's mesothelioma was "absolutely" caused by his exposure to asbestos. Notwithstanding Defendant-Employer's notification to Plaintiff in 1988 that his area was "heavily laden with asbestos," Defendant-Employer's sampling records regarding the Mill Department, and the testimony of Plaintiff and Mr. Jackson that Plaintiff continued to visit the Mill Department up through the time of his retirement with Defendant-Employer, Mr. Seighman opined that Plaintiffs last injurious exposure occurred in January 1974, and testified that he could not "see how he would have been exposed as part of his job" after 1974. Mr. Seighman admitted that Plaintiff would have been in contact with workers in the areas containing asbestos,

and acknowledged that simply being in close proximity to people exposed to asbestos can cause ill effects. As the Full Commission has found that Plaintiff continued to be exposed up through his retirement from Defendant-Employer, Mr. Seighman's testimony regarding when Plaintiff was last injuriously exposed, is given little weight.

. . . .

26. Dr. Frank testified at his deposition that there was no threshold of asbestos exposure required to develop mesothelioma and that "[t]he only safe level of exposure [to asbestos] is zero." Dr. Frank further testified that if Plaintiff went out into the field at least once a week in the performance of his job duties where asbestos was present, that type of exposure would be sufficient to augment the disease process of mesothelioma. He further indicated that any exposure to asbestos, up to and including the day prior to diagnosis, could be causally related to the development of mesothelioma and stated that "as little as one day of exposure can lead to the development of mesothelioma."

27. Plaintiff testified that he believed that he was last injuriously exposed to asbestos in 1974 before being promoted by PCS; however, the Full Commission accords little weight to Plaintiff's testimony in this regard given Dr. Frank's testimony, as well as the fact that Plaintiff was clearly exposed to some asbestos in his employment as the Assistant to the Mine Manager.

All of these findings are supported by competent evidence. In 1988, the Program conducted a survey and found that significant amounts of asbestos were present in various areas of

the PCS facility. The Full Commission acknowledged plaintiff's testimony that he believed that he was last exposed to asbestos in 1974; however, it accorded little weight to it given that plaintiff continued to visit the mill area and other areas where asbestos was present in all of his positions with PCS until his retirement in 1995. As Dr. Frank noted, any exposure to asbestos could contribute to mesothelioma; thus, since plaintiff continued to enter into areas where asbestos was present and where abatement projects were going on up until 1995, the evidence supports a finding that plaintiff continued to be exposed to asbestos throughout his employment with PCS. Furthermore, the Full Commission gave little weight to Seighman's testimony that he did not see how plaintiff was exposed to asbestos after 1974 because even he admitted that exposure to asbestos can occur through contact with workers or even being in areas where asbestos is disturbed. While appellants contend that the Full Commission "ignored" credible evidence that plaintiff's last exposure occurred in 1974, it is clear that the Full Commission did not disregard this evidence but simply accorded it little weight. "As the fact-finding body, the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Tinajero*

v. Balfour Beatty Infrastructure, Inc., __ N.C. App. __, __, 758 S.E.2d 169, 175 (2014). Therefore, appellants' argument is without merit.

Next, we must determine whether those findings support the Full Commission's conclusion that plaintiff's "last injurious exposure" occurred in 1995.

On remand after the 2012 Opinion and Award, this Court instructed the Commission to apply the *Rutledge* standard: "The term 'last injuriously exposed' is defined as 'an exposure that proximately augmented the disease to any extent, however slight. Exposure at work to elements 'which can cause an occupational disease can be so slight quantitatively that it could not in itself have produced the disease.'" *Richardson v. PCS Phosphate Co.*, COA12-824, 2013 WL 2190069, at *3 (May 21, 2013). On remand, the Full Commission applied this standard and made the following conclusions of law:

2. Pursuant to N.C. Gen. Stat. § 97-57, where an occupational disease is compensable, "the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was last exposed under such employer, shall be liable." Last injurious exposure is defined as an exposure that proximately augmented the disease to any extent, however slight." *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 88,301

S.E.2d. 359, 362 (1985) (citing *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 169, 22 S.E.2d 275, 277, 278 (1942)); See also *Caulder v. Waverly Mills*, 314 N.C. 70, 331 S.E.2d 646 (1985). In the present case, Dr. Franks testified that even one day of exposure to asbestos could be causally related to the development of mesothelioma.

3. "Exposures to substances which can cause an occupational disease can be a last injurious exposure to the hazards, even if the exposure in question is so slight quantitatively that it could not in itself have produced the disease," *Caulder v. Waverly Mills*, 314 N.C. 70, 72, 331 S.E.2d 646, 647 (1985) (citations omitted). Based upon a preponderance of the evidence of record, and in light of the testimony of Dr. Franks, the Full Commission finds that Plaintiff's last injurious exposure occurred in his role as Assistant to the Mine Manager while Broadspire was the carrier on the risk as Plaintiff continued to visit areas with asbestos up until the time of his retirement in 1995. *Id.*

4. Based upon a preponderance of the evidence of record, the Full Commission finds that Plaintiff's last injurious exposure to the conditions of his job with Defendant-Employer that caused or augmented his occupational disease of mesothelioma occurred while Broadspire was the carrier on the risk. N.C. Gen Stat. § 97-57.

Here, as noted above, there was competent evidence to support the findings that: (1) asbestos was present in various areas of the PCS facility during all periods of plaintiff's employment; (2) while plaintiff's jobs after 1974 did not

require as much "hands-on" work in the mill department, he still visited those areas regularly and had contact with workers who had been exposed to asbestos; (3) even though plaintiff and Seighman testified that they did not think plaintiff was exposed to asbestos after 1974, Dr. Frank's expert testimony established that any exposure to asbestos, even one fiber, could causally contribute to plaintiff's mesothelioma; and (4) since plaintiff was still exposed to asbestos after 1974, those exposures, even small exposures, could contribute to his disease. In turn, these findings support the conclusion that plaintiff's "last injurious exposure" occurred after 1974 because plaintiff continued to be exposed to asbestos in his positions as mill superintendent and assistant to the mine manager. In fact, this conclusion mirrors Dr. Frank's testimony that although the bulk of plaintiff's exposure occurred before 1974, plaintiff's "documented exposures to asbestos occurred while he was working for PCS" based on the presence of asbestos throughout the facility and plaintiff's contact with areas containing asbestos until 1995. Furthermore, Dr. Frank opined that if plaintiff went into the areas where work with asbestos-containing materials was occurring just once a week, these exposures could have contributed to plaintiff's disease. Therefore, these

findings support the conclusion that all of plaintiff's job activities for PCS, even those jobs which were less "hands-on," exposed him to asbestos, and the exposures could have causally contributed to plaintiff's mesothelioma. Accordingly, appellants' contention that the Full Commission erred by not concluding that his last exposure was in 1974 is without merit.

As to appellants' alternative argument that the Full Commission's findings "necessarily" lead to a conclusion that plaintiff's exposure to asbestos continued after he retired from PCS but worked for the East Group doing essentially the same work at the same jobsites, we also disagree. Defendants are correct that the only finding addressing plaintiff's possible exposure to asbestos while employed by the East Group was finding no. 21 which stated that:

After retiring from PCS, Plaintiff began working for the East Group in 1995 on the same PCS job site. Plaintiff testified that in this position, he performed the same job duties as he had while employed as the Assistant to the Mine Manager. Plaintiff does not believe that he was injuriously exposed to the hazards of asbestos while working for the East Group.

However, we do not agree that this finding necessitates a conclusion that plaintiff's exposure to asbestos must have continued after 1995. Besides plaintiff's own testimony that he

performed essentially the same work at the same locations, there was no evidence presented as to whether asbestos was still present in the areas that plaintiff visited while working for the East Group, whether there was asbestos maintenance or abatement projects going on after 1995, whether plaintiff's activities in those same areas could have exposed him to asbestos after 1995, and no expert medical evidence linking plaintiff's work at the East Group with his mesothelioma. In short, there was no evidence presented establishing the nexus between plaintiff's continuing work at the PCS facility for the East Group and exposure to asbestos. Therefore, in the absence of this evidence, we are unable to conclude that the Full Commission erred in failing to find that plaintiff's "last injurious exposure" occurred while he was working for the East Group.

Conclusion

Based on the foregoing reasons, we affirm the Amended Opinion and Award.

AFFIRMED.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).