

NO. COA14-90-2

NORTH CAROLINA COURT OF APPEALS

Filed:4 November 2014

SHIRLEY LIPE, Widow and Executrix
of the Estate of ROSS IDDINGS
LIPE, Deceased Employee,
Plaintiff

v.

North Carolina
Industrial Commission
I.C. No. 429068

STARR DAVIS COMPANY, INC.,
Employer, TRAVELERS CASUALTY &
SURETY (as Successor to AETNA
CASUALTY & SURETY COMPANY),
Carrier,
Defendants.

This opinion supersedes the opinion *Lipe v. Starr Davis Company*, No.COA14-90, 2014 N.C. App. LEXIS 729 (2014) (unpublished) filed on 1 July 2014. This appeal by Defendant is from an opinion and award entered 30 September 2013 by the North Carolina Industrial Commission and was originally heard in the Court of Appeals on 5 May 2014. This appeal was reheard in the Court on 20 October 2014, pursuant to the Order entered 27 August 2014 allowing Defendant's Petition for Rehearing.

Wallace and Graham, P.A., by Michael B. Pross, for Plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Hatcher Kincheloe, Sarah P. Cronin, and M. Duane Jones, for Defendant Travelers Casualty & Surety.

DILLON, Judge.

Travelers Casualty & Surety ("Defendant") appeals from an opinion and award of the Full Commission of the North Carolina Industrial Commission ("Full Commission" or "Commission") ordering that Defendant pay death benefits to Shirley Lipe ("Plaintiff"), widow of Ross Iddings Lipe ("Decedent"). For the following reasons, we affirm.

I. Factual & Procedural Background

Decedent was employed by Starr Davis Company, Inc. ("SDC")¹ in 10 March 1975. During his employment, he was exposed to asbestos. Decedent retired on 1 July 1991, at a time when his average weekly wage was \$606.36, when he became disabled due to multiple sclerosis, unrelated to his exposure to asbestos, and was no longer able to work.

In January 1994, Decedent was diagnosed with asbestosis. Decedent filed an occupational disease claim with the Commission. By opinion and award entered 24 August 1999, the Commission found that Decedent's asbestosis was caused by his exposure to asbestos during his period of employment with SDC. The Commission awarded Decedent benefits of \$404.24 per week,

¹ SDC is no longer in existence, and is thus only nominally a Defendant for purposes of this appeal.

which was based on 66 2/3% of what his average weekly wages were when he retired in 1991, rather than based on his average weekly wages at the time he was diagnosed with asbestosis in 1994 - which would have been zero, as Decedent had been out of work since July 1991. This Court affirmed the Full Commission's 24 August 1999 opinion and award in *Lipe v. Starr Davis Co.*, 142 N.C. App. 213, 543 S.E.2d 533, 2001 N.C. App. LEXIS 52 (unpublished), *disc. review denied*, 354 N.C. 363, 556 S.E.2d 303 (2001).

In February 2010, Decedent was diagnosed with lung cancer. He died less than two months later, as a result of his lung cancer, on 11 April 2010. Plaintiff thereafter filed a claim with the Commission seeking death benefits based on Decedent's development of lung cancer through his asbestos exposure while working at SDC. Defendant conceded the compensability of Plaintiff's claim, but agreed to payments of only \$30.00 per week, the statutory minimum under N.C. Gen. Stat. § 97-38, arguing that the statutory minimum payout is appropriate in this case.

The Full Commission found that Decedent's lung cancer was caused by the same exposure to asbestos that caused his asbestosis and awarded Plaintiff benefits equal to 66 2/3% of

Decedent's average weekly wages for 400 weeks. The Commission determined Decedent's average weekly wages to be \$606.36, articulating two alternative bases for its decision: (1) that the question concerning the manner of calculating Decedent's average weekly wages had been previously raised and addressed in its 24 August 1999 opinion and award, and Defendant was thus collaterally estopped from re-litigating the issue; and (2) that, even if collateral estoppel did not apply, the fifth of the five permissible methods of calculating average weekly wages under N.C. Gen. Stat. § 97-2(5) permitted the Full Commission to reach the same result - specifically, to calculate Decedent's average weekly wages based on his last full year of employment with SDC. From this opinion and award, Defendant appeals.

II. Standard of Review

In reviewing an opinion and award of the Full Commission, this Court must determine whether competent evidence supports the Commission's findings of fact and whether those findings so supported are sufficient, in turn, to support the Commission's conclusions of law. *Legette v. Scotland Mem'l Hosp.*, 181 N.C. App. 437, 442, 640 S.E.2d 744, 748 (2007), *appeal dismissed and disc. review denied*, 362 N.C. 177, 658 S.E.2d 273 (2008). Findings supported by competent evidence are binding on appeal,

"even if the evidence might also support contrary findings. The Commission's conclusions of law are reviewable *de novo*." *Id.* at 442-43, 640 S.E.2d at 748 (citations omitted).

III. Analysis

Defendant contends that the Commission erred in its computation of Decedent's average weekly wages for purposes of Plaintiff's death benefits claim and should have based Decedent's average weekly wages on the statutory minimum of \$30.00 per week.

N.C. Gen. Stat. § 97-38 (2013) provides, in pertinent part, that death benefits are payable in weekly payments to a person "wholly dependent for support upon the earnings of the deceased employee²" with each payment equal to 66 2/3% of "the average weekly wages of the deceased employee at the time of the accident, but not . . . less than thirty dollars (\$30.00), per week[.]" (Emphasis added.) The employee's "average weekly wages" may be calculated using one of the five methods described under N.C. Gen. Stat. § 97-2(5). Our Supreme Court has stated

² Defendant makes an argument in its brief that Plaintiff failed to show that she was "wholly dependent" and therefore not eligible for death benefits. However, the Commission's order reflects that Defendant stipulated that Plaintiff was married to Decedent at the time of his death. As Decedent's widow, Plaintiff is "conclusively presumed to be wholly dependent" on the Decedent at the time of his death, pursuant to N.C. Gen. Stat. § 97-39 (2013). Accordingly, this argument is overruled.

that "[t]his statute sets forth in priority sequence five methods by which an injured employee's average weekly wages are to be computed" and that it "establishes an order of preference for the calculation method to be used[.]" *McAninch v. Buncombe Co. Sch.*, 347 N.C. 126, 129, 489 S.E.2d 375, 377 (1997).

In the present case, the Commission applied the fifth method provided for under N.C. Gen. Stat. § 97-2(5), which provides as follows:

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) (2013). Our Supreme Court has provided the following guidance regarding the application of this fifth method:

The final method, as set forth in the last sentence [of N.C. Gen. Stat. § 97-2(5)], clearly may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods. Ultimately, the primary intent of this statute is that results are reached which are fair and just to both parties. "Ordinarily, whether such results will be obtained . . . is a question of fact; and in such case a finding of fact by the Commission controls decision."

McAninch, 347 N.C. at 130, 489 S.E.2d at 378 (citations omitted)

(ellipsis in original).

Defendant essentially contends that the Full Commission should have determined that Decedent's average weekly wages were zero because this is the amount he "would be earning were it not for" his diagnosis for lung cancer and that it is not "fair and just" to Defendant to require it to pay benefits based on Decedent's final wages when Decedent had been retired for 19 years and had no earning capacity at the time of his 2010 diagnosis. Defendant argues that this case is controlled by our decision in *Larramore v. Richardson Sports*, 141 N.C. App. 250, 540 S.E.2d 768 (2000), a decision which was affirmed *per curiam* by our Supreme Court at 353 N.C. 520, 546 S.E.2d 87 (2001).

In *Larrimore*, the Full Commission applied the fifth method found in N.C. Gen. Stat. § 97-2(5) in calculating the average weekly wages of a professional football player who had signed a contract with the Carolina Panthers but who never played a down for them due to an injury he suffered during tryouts which caused him not to make the roster. 141 N.C. App. at 252, 255, 540 S.E.2d at 769, 771. Specifically, the Commission calculated the injured player's average weekly wages to be \$1,653.85 - the amount he would have made had he made the final roster - finding that this amount represents what the player "would be earning

were it not for the injury." *Id.* at 255, 540 S.E.2d at 771.

Defendant argues that, applying *Larramore*, the Full Commission here should have calculated Decedent's average weekly wages to be the statutory minimum because Decedent was earning zero at the time he was diagnosed with lung cancer and he would have continued to earn zero if he had never contracted lung cancer. Defendant further argues that *Larramore* is controlling over any other Court of Appeals decisions that appear to conflict with it because it was affirmed by our Supreme Court.

We believe *Larramore* is distinguishable from the present case and that the present case is controlled by this Court's holdings in *Abernathy v. Sandoz Chemicals*, 151 N.C. App. 252, 565 S.E.2d 218, *disc. review denied*, 356 N.C. 432, 572 S.E.2d 421 (2002) and *Pope v. Manville*, 207 N.C. App. 157, 700 S.E.2d 22, *disc. review denied*, 365 N.C. 71, 705 S.E.2d 375 (2010). Unlike the present case, *Larramore* involved an employee who suffered an injury while "on the job." The issue of whether an individual was entitled to benefits for an injury which did not manifest until after retirement was not before our Court or the Supreme Court in *Larramore*.

In contrast to *Larramore*, but similar to the present case, *Abernathy* involved an individual who sought benefits for an

occupational disease rather than an injury, which did not manifest until after the individual had retired. We affirmed the Commission's application of the fifth method, calculating the average weekly wage based on the individual's last year of employment, stating that "it would be obviously unfair to calculate plaintiff's benefits based on his income upon the date of diagnosis because he was no longer employed and was not earning an income." *Abernathy*, 151 N.C. App. at 258, 565 S.E.2d at 222.

Likewise, in *Pope*, this Court considered a situation where an individual sought benefits for asbestosis for which he was diagnosed well after he retired. This Court followed its prior holding in *Abernathy* and concluded that the Commission did not err in calculating the individual's average weekly wage based on what he earned during his work life rather than awarding the statutory minimum simply because he had retired before the diagnosis. *Pope*, 207 N.C. App. at 160-61, 700 S.E.2d at 25.

In the present case, based on the Full Commission findings and the stipulation by Defendant, Decedent's lung cancer, diagnosed in 2010, was an occupational disease. See *Hatcher v. Daniel Int'l Corp.*, 153 N.C. App. 776, 781, 571 S.E.2d 20, 22 (2002) (holding that lung cancer may qualify as an occupational

disease). Specifically, the Commission found as follows:

12. With respect to [Decedent's] lung cancer, the facts are analogous to his prior asbestos claim, with the exception that the lung cancer took a longer period to develop. [Decedent] was last injuriously exposed to the hazards of asbestos while employed by [SDC]. [Decedent's] lung cancer was caused by the same period of asbestos exposure that caused his compensable occupational disease of asbestosis. [Decedent] was not diagnosed with lung cancer until after his retirement from [SDC]. At the time of his diagnosis, [Decedent] had already been disabled by unrelated multiple sclerosis that forced him to retire from [SDC] in 1991. [Decedent] amended the Form 18B originally filed on April 18, 1994 to include a claim for lung cancer due to asbestos exposure and Defendants accepted the lung cancer claim as compensable.

We further believe that the findings are adequate to reflect that the Full Commission considered the first four methods of calculating average weekly wages before deciding to apply the fifth method. Specifically, the Full Commission stated as follows:

15. Based upon the preponderance of evidence in view of the entire record, the Full Commission finds that the first three methods of determining average weekly wage pursuant to N.C. Gen. Stat. § 97-2(5) are not applicable because they are based on the earnings of an injured employee during the fifty-two weeks preceding the date of injury or disability and [Decedent] had been retired for many years prior to his diagnosis of lung cancer and his death. The

Full Commission further finds no evidence was presented by the parties regarding the average weekly wage earned by a similarly-situated employee; therefore, the fourth method of calculating average weekly wage cannot be used. Additionally, the Full Commission finds that it would be unfair and unjust to calculate [Decedent's] average weekly wage based upon his date of diagnosis or date of death as he was no longer employed and was not earning any income at either of those times. Therefore, using the first four methods to determine [Decedent's] average weekly wage would result in [Decedent's] dependents receiving no benefits (except the \$30.00 weekly statutory minimum) and the Full Commission finds that such a result would be unfair and unjust.

16. Since the utilization of the first four methods for determining average weekly wages enunciated in N.C. Gen. Stat. § 97-2(5) are not applicable, the Full Commission finds that the fifth method under the statute, which allows "any other method of calculation," is the most appropriate method to calculate [Decedent's] average weekly wage. Due to the exceptional reasons and circumstances of this claim, [Decedent's] average weekly wage should be calculated based upon the earnings of [Decedent] during his last year of employment with [SDC], divided by fifty-two weeks, as it would most nearly approximate the amount which [Decedent] would have earned if not for his injury while working for [SDC] and is fair and just. During the last full year of his employment with [SDC], [Decedent] earned \$31,530.89 resulting in an average weekly wage of \$606.36 and a weekly compensation rate of \$404.24.

We, therefore, hold that the findings by the Full Commission are

sufficient to support the Commission's calculation method and, moreover, that the Commission correctly determined Decedent's average weekly wages to be \$606.36, yielding a corresponding weekly compensation rate of \$404.24. Based on our holdings in *Abernathy* and *Pope*, we believe that based on the facts of this case - where (1) Decedent was exposed to asbestos during his career at SDC, (2) he retired from SDC for a reason unrelated to any injury suffered at work, (3) after retirement he was diagnosed with lung cancer directly caused by his exposure to asbestos during his career at SDC, and (4) where he dies as a result of the lung cancer - the Full Commission did not err in calculating Decedent's average weekly wages based on the wages during the last year of employment at SDC rather than based on the statutory minimum. Defendant's contentions are accordingly overruled.³

III. Conclusion

³ We note the Commission's alternative basis for its calculation of Decedent's wages, namely, that it had employed the same method in deriving Decedent's wages in connection with his asbestos claim; that this Court had affirmed the Commission's opinion and award pertaining to that claim; and that Defendant here is essentially re-litigating the same calculation issue. We do not reject this alternative basis as meritless, but instead decline to reach the issue in light of our holding, which we believe rests firmly upon *Pope*, a case decided subsequent to the 2001 decision in which we upheld Decedent's asbestos claim.

In light of the foregoing, we affirm the Commission's 30 September 2013 opinion and award.

AFFIRMED.

Chief Judge McGEE and Judge STEELMAN concur.