

NO. COA97-1094

NORTH CAROLINA COURT OF APPEALS

FILED

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IN THE OFFICE OF
CLERK COURT OF APPEALS
OF NORTH CAROLINA

JAMES ROSS SEAGLE,
Employee,
Plaintiff,

v.

N.C. Industrial Commission
I.C. No. 028828

KENT-COFFEY MANUFACTURING COMPANY;
and/or
CONSOLIDATED FURNITURE IND., INC.;
and/or
MAGNAVOX FURNITURE, INC.;
and/or
THE SINGER COMPANY;
and/or
SINGER SEWING MACHINE COMPANY;
and/or
SINGER FURNITURE COMPANY;
and/or
SINGER SEWING MACHINE COMPANY, LTD.,
a subsidiary of SINGER CO., N.V.;
and/or
SSMC, INC.;
Employers;

NORTH CAROLINA INSURANCE GUARANTY
ASSOCIATION, for now insolvent;
and/or
AMERICAN MUTUAL LIABILITY INS. CO.;
and/or
NORTHWESTERN NATIONAL INS. CO.;
and/or
NATIONAL UNION FIRE INS. CO. (CRAWFORD & COMPANY);
and/or
TRAVELERS INSURANCE COMPANY;
and/or
LIBERTY MUTUAL INSURANCE CO.;
and/or

CONSTITUTION STATE SERVICE COMPANY;
Carriers,
Defendants.

Appeal by plaintiff and defendants Singer Sewing Machine Company; The Singer Company; SSMC, Inc.; National Union Fire Insurance Company; and Singer Sewing Machine Co., Ltd. from opinion and award entered 30 April 1997 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 April 1998.

Daniel & LeCroy, P.A., by Stephen T. Daniel and M. Alan LeCroy, and Daniel Law Firm, P.A., by Stephen T. Daniel and James W. Kilbourne, Jr., for plaintiff.

Cranfill, Sumner & Hartzog, L.L.P., by Anthony T. Lathrop and Nicholas P. Valaoras, for defendants-appellees Kent-Coffey Manufacturing, Inc.; Consolidated Furniture Industries, Inc.; and North Carolina Guarantee Association for now insolvent American Liability Insurance Co.

Orbock Bowden Ruark & Dillard, PC, by Barbara E. Ruark, for defendants Magnavox Furniture Incorporated and Travelers Insurance Company.

Golding, Meekins, Holden, Cospers & Stiles, by Henry C. Byrum, Jr., for defendants Singer Sewing Machine Company; SSMC, Inc.; The Singer Company; and National Union Fire Insurance Company.

Brooks Stevens & Pope, P.A., by Robert H. Stevens, Jr. and Bambee N. Booher, for defendant Singer Sewing Machine Co., Ltd.

Alala Mullen Holland & Cooper, P.A., by H. Randolph Sumner and Jesse V. Bone, Jr., for defendant Liberty Mutual Insurance Co.

Morris, York, Williams, Surlis & Brearley, by G. Lee Martin,

for defendants The Singer Company and Northwestern National Life Insurance Company.

Roberts & Stevens, P.A., by Steven W. Sizemore, for defendant Constitution State Service Company.

LEWIS, Judge.

Plaintiff filed a worker's compensation claim against Singer Sewing Machine Company and National Union Fire Insurance Company alleging that he had contracted the occupational disease asbestosis. The additional defendants were later joined because plaintiff worked for each of the employers named, and each of the carriers were insurers, at some point during his career which began in 1945 and ended 14 March 1990.

From 1948 to 13 September 1987 plaintiff worked in the maintenance department of "Plant #1." Because ownership of the plant changed numerous times over the years, the identity of plaintiff's employer changed as well. In addition, plaintiff's job responsibilities changed. Production at the plant ceased in 1984. From 1984 until the winter of 1986-1987, plaintiff's job required him to maintain building security and to maintain the plant's furnace system. Plaintiff was required to work directly with the insulation of the furnace system, which, according to surveys conducted in 1994, contained asbestos.

After the winter of 1986-1987, the plant's furnace system was no longer operational. From that time until 13 September 1987, plaintiff continued to work in the plant as a security guard. The ongoing deterioration of the building's steam pipes caused insulation dust to fall on the floor. As part of his duties as a security guard, plaintiff was required to walk through the building each day. After 13 September 1987 and until 14 March 1990, plaintiff worked in a different building known as "Plant #53."

On 23 January 1995 plaintiff moved to amend his Form 18 to include a claim for industrial bronchitis/chronic obstructive pulmonary disease (COPD). The deputy commissioner denied plaintiff's motion on 11 April 1995.

In an opinion and award filed 31 May 1995, the deputy commissioner found that plaintiff had contracted the occupational disease asbestosis and that his last injurious exposure to the hazards of asbestosis occurred on 13 September 1987. Plaintiff was ordered to undergo additional examinations pursuant to General Statutes section 97-61.1 *et seq.*; defendants Singer Furniture Company, Constitution State Services Company, and SSMC, Inc. were found liable; and all other defendants were dismissed from the action. Plaintiff and those defendants who were found liable appealed to the Full Commission.

The opinion and award of the Full Commission, filed 30 April 1997, modified the deputy commissioner's decision. The Commission found that plaintiff was last injuriously exposed to the hazards of asbestosis between 1 December 1986 and 1 June 1987 and, therefore, the "Singer defendants" (The Singer Company; Singer Sewing Machine Company; The Singer Furniture Company; Singer Furniture, a division of SSMC, Inc.; and SSMC, Inc.) were jointly and severally liable for plaintiff's worker's compensation benefits. The Commission stated in an opening paragraph that while the deputy commissioner properly denied plaintiff's motion to amend his Form 18 on 11 April 1995, the filing of the amended Form 18 on 23 January 1995 was nonetheless proper, and the claim therein to recover for COPD remained pending. The Commission thus ordered plaintiff to undergo additional medical evaluations to determine the percentage of his disability attributable to asbestosis and the percentage attributable to COPD. In a letter dated 9 June 1997, in response to an inquiry by Singer Sewing Machine Company, Ltd., the Commission clarified that no defendants had been dismissed by the Full Commission. Plaintiff and defendants Singer Sewing Machine Company; The Singer Company; SSMC, Inc.; National Union Fire Insurance Company; and Singer Sewing Machine Company, Ltd. appeal.

We first address the argument of defendants-appellants Singer

Sewing Machine Company; The Singer Company; SSMC, Inc.; and National Union Fire Insurance Company that the Full Commission erred in finding that plaintiff was last injuriously exposed to the hazards of asbestosis between 1 December 1986 and 1 June 1986.

To receive benefits under G.S. 97-57 for an occupational disease, an employee must show that he "was 'last injuriously exposed to the hazards of such disease' in defendant's employment." *Rutledge v. Tultex Corp.*, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983) (quoting N.C. Gen. Stat. § 97-57). A particular exposure need not "cause" or "significantly contribute" to the employee's disease to be injurious. An exposure is injurious if it "'proximately augment[s] the disease to any extent, however slight.'" *Id.* (quoting *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 169, 22 S.E.2d 275, 277, 278 (1942)). The substance to which the employee is exposed, however, must be "a substance peculiar to the workplace," meaning that the employee "has a greater exposure [to the substance] on the job than does the public generally." *Caulder v. Waverly Mills*, 314 N.C. 70, 75, 331 S.E.2d 646, 649 (1985).

Recognizing the inherent complexity of asbestosis cases, the Worker's Compensation Act provides, "For the purpose of this section when an employee has been exposed to the hazards of

asbestosis . . . for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious but any less exposure shall not be deemed injurious." N.C. Gen. Stat. § 97-57 (1991). Section 97-57 thus creates an irrebuttable presumption that the last thirty days of an employee's exposure within seven months is the last injurious exposure. See *Fetner v. Granite Works*, 251 N.C. 296, 300-01, 111 S.E.2d 324, 327 (1959). "The Commission may not arbitrarily select any 30 days of employment, other than the last 30 days, within the seven months period for convenience or protection of any of the parties, even if there is some evidence which may be construed to support such election." *Id.* at 301, 111 S.E.2d at 328.

In the present case, the Commission made the following pertinent findings of fact:

7. . . . The insulation [of the boilers and steam lines in Plant #1] contained asbestos. . . .

. . . .

9. . . . [After 1984] plaintiff's duties consisted mainly of providing building security. During the period of time from the date production ceased until the sale of the plant, insulation on the steam pipes was deteriorating, breaking off of the pipes and falling on the floor. Plaintiff was exposed to insulation dust on a regular basis throughout this period.

10. During the winter of 1986-87, the insulated pipes froze, and thereafter, the heat was not turned on. Plaintiff ceased the insulation maintenance tasks, but continued to walk through the plant daily as a watchman.

. . . .

27. Expert medical testimony elicited from Dr. Donohue verifies that plaintiff was injuriously exposed to asbestos, resulting in the physical conditions diagnosed by Dr. Rostand, through the period he performed the maintenance job . . . which concluded in the winter of 1986-87. . . . There is insufficient expert medical evidence to conclude that plaintiff was so exposed after the winter of 1986-87.

The Commission also stated in an introductory paragraph of its opinion and award, "In light of the lack of expert medical causation testimony that plaintiff was last injuriously exposed after he ceased maintenance duties at Plant #1 [during the winter of 1986-87], the Deputy Commissioner's opinion and award is modified."

We cannot determine from this statement and from the findings of fact whether the Commission correctly applied the law discussed above. This case is remanded to the Industrial Commission for a finding regarding whether plaintiff's exposure to insulation dust after the winter of 1986-87 and until 13 September 1987 "proximately augmented the disease to any extent, however slight."

Rutledge, 308 N.C. at 89, 301 S.E.2d at 362 (quoting *Haynes*, 222 N.C. at 166, 22 S.E.2d at 277).

Defendants-appellants Singer Sewing Machine Company; The Singer Company; SSMC, Inc.; and National Union Fire Insurance Company next argue that the Full Commission erred in finding that plaintiff's amended Form 18 was timely filed. This determination is interlocutory in nature as it "does not dispose of the case, but leaves it for further action by the trial court in order to settle or determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Interlocutory orders are appealable only as provided by N.C. Gen. Stat. § 1A-1 Rule 54(b) (1990), N.C. Gen. Stat. § 1-277 (1996), and N.C. Gen. Stat. § 7A-27(d) (1995), none of which apply here. We therefore do not address this issue.

Plaintiff argues that the trial court erred in requiring him to undergo additional medical evaluations to pursuant to General Statutes sections 97-61.1 through 97-61.6 (1991). These statutes are intended to allow an employee exposed to asbestosis to leave that employment, immediately receive benefits, and undergo three medical examinations over three years to determine the extent of disability due to such exposure. There is no express provision in these sections for the factual circumstances presented by this

case. Plaintiff was last employed more than eight years ago and has been determined by medical experts to suffer total, permanent disability of which asbestosis was a significant cause. We believe that the Full Commission's requirement that plaintiff submit to further examination pursuant to G.S. 97-61.1 *et seq.* is not in accordance with the legislative intent of the statute. However, the Commission also stated that further examination was necessary to determine what portion of his disability was due to asbestosis and what portion was due to COPD. We interpret this to mean that the Full Commission required additional evidence to determine the apportionability of plaintiff's occupational diseases. Therefore, while we reverse Paragraph 4 of the Commission's Award, which refers to G.S. 97-61.6, we affirm Paragraph 5 which requires plaintiff to undergo an additional examination regarding his COPD claim. We also overrule plaintiff's other assignment of error in which he contends the Commission erred in not considering his COPD claim.

Finally, defendant-appellant Singer Sewing Machine, Ltd. contends that the Commission erred in not dismissing it from this action. We agree. Singer Sewing Machine, Ltd. is not listed in the Commission's finding of facts regarding liable members of the "Singer family," and there is no evidence in the record which would

support a finding of this defendant-appellant's liability to plaintiff.

Affirmed in part, reversed in part, and remanded.

Judges GREENE and HORTON concur.

Report per Rule 30(e).