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NO. COA09-383

NORTH CAROLINA COURT OF APPEALS

Filed: 2 March 2010

WILLIAM W. PEPPER
Employee-Plaintiff,

v.

NORANDAL, USA,
Employer-Defendant

From the North Carolina
Industrial Commission
File No. 014133

and

CIGNA/ACE USA/ESIS,
Carrier-Employer-
Defendant.

Appeal by Plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 4 December 2008. Heard in the Court of Appeals 30 September 2009.

Wallace and Graham, P.A., by Edward L. Pauley, for plaintiff-appellant.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Harmony Whalen Taylor and William A. Smith, for defendant-appellee.

ERVIN, Judge.

Plaintiff William W. Pepper appeals from a 4 December 2008 Opinion and Award of the Industrial Commission by Commissioner Christopher Scott denying his request for worker's compensation benefits based upon his contention that he had contracted asbestosis as a result of exposure to that substance in the course and scope of his employment with Norandal, USA. After careful

consideration of the record in light of the applicable law, we conclude that the Commission's decision should be affirmed.

I. Factual Background

A. Substantive Facts¹

The Norandal facility is located in Salisbury and was constructed in approximately 1965.² Plaintiff worked for Norandal and its predecessors from 17 August 1976 until 1 December 2004.

At the Salisbury facility, raw and scrap aluminum is converted to foils of various grades and thicknesses. In the course of the manufacturing process, aluminum is melted and the molten aluminum is extruded through heat resistant "tips" to form sheets. After the sheets are formed, they are transported to a rolling mill, reduced to a thinner gauge material, and then wound onto a core as either double or single sheets. The coils are then placed into annealing furnaces, where the aluminum is made stronger and more flexible and where oils and other residues from the production process are removed.

The "tips" used during the manufacturing process were made of machined Maranite, a substance that resembles sheet rock in appearance, but is much harder. The machining process used to make these "tips" involved drilling, sawing, and sanding Maranite sheets

¹ The statement of substantive facts contained in this opinion is drawn from the findings of fact contained in the Commission's order, none of which, with a single exception noted below, were challenged in Plaintiff's brief as lacking adequate evidentiary support.

² The Salisbury plant was originally constructed by Republic Foil. Subsequently, the facility was purchased by National Aluminum. Norandal bought the Salisbury plant in 1989.

in order to produce the desired shape. During the 1960s and 1970s, the Maranite used in the Salisbury plant contained 25% to 50% asbestos. The Maranite manufacturer stopped making the asbestos-based product in 1978, so a ceramic-based product came into use at the Salisbury plant after the asbestos-based product ceased being available.

In addition, the annealing furnaces used in the Norandal facility contained asbestos insulation in the walls, ceilings, and floors. Although there was no exposed asbestos insulation at the time that the furnaces were installed, insulation had begun to fall from the furnace walls by 1985. Testing performed upon the insulation revealed that it contained 5% to 8% asbestos. The insulation in the annealing furnaces was removed on a furnace by furnace basis from 1990 through 1998. Testing performed during the abatement of the first furnace revealed the presence of block insulation containing 15% to 30% asbestos and duct insulation containing 35% to 55% asbestos.

At the beginning of his career at the Norandal plant, Plaintiff worked as a utility person in the separator/slitter department. In 1978, Plaintiff was promoted to the position of separator/slitter operator in the finishing department. Although Plaintiff worked on a machine located near furnace No. 22 after 1987 or 1988, that furnace did not, contrary to Plaintiff's understanding, contain asbestos insulation. However, the machine that Plaintiff worked on prior to 1987 or 1988 was located near the exhaust from the cyclone system, through which asbestos fibers from

other parts of the plant could circulate, so that "there were multiple ways that dust containing asbestos fibers would spread within the plant." In addition, the brakes used on the slitter machines that Plaintiff operated "would accumulate dust." Plaintiff would blow the dust off of the brakes using compressed air once a week until a better cooling system was developed for the machines. For a substantial part of Plaintiff's employment with Norandal, the brake linings probably contained asbestos. However, metallic brake linings came into use at some unspecified point in time.

In approximately 2003, Plaintiff began working as a roller operator. Although he was out on disability by the time of the hearing before the Deputy Commissioner, Plaintiff still held that position. Plaintiff had smoked approximately one pack of cigarettes per day since 1963.

In September 1997, a chest x-ray taken of Plaintiff was reviewed by a Dr. Grauel, "who noted opacities in both middle to lower lungs with no pleural abnormalities." A chest x-ray taken at the time of Plaintiff's September 1998 physical showed "increased markings in his right mid lung and increased chronic markings in both lungs." At that point, Dr. Diloreto, Plaintiff's family physician, referred him to Dr. Stephen Duane Proctor, a local pulmonologist, "who also saw bilateral increased interstitial markings." In addition, pulmonary function tests indicated "a minimal obstructive ventilatory defect."

A high resolution CT scan was reviewed by Dr. Johnson, a radiologist, on 23 September 1999. Although Dr. Johnson "found some pleural parenchymal scarring," he did not observe any "definite interstitial abnormalities." A single "small noncalcified pleural plaque in the left chest and some areas of pleural thickening" also "appeared" in the CT scan. In spite of the absence of "interstitial abnormalities," Dr. Proctor concluded that Plaintiff had asbestosis "in part because of [P]laintiff's description of significant exposure to asbestos dust in his employment."

Although Plaintiff did not report shortness of breath to Dr. Diloretto in 2000 and 2001, he complained of "dyspnea on exertion" in October, 2002. A pulmonary function test "revealed a significant response to a nebulizer," which indicated an obstructive defect, leading Dr. Diloretto to advise him to stop smoking.

In 2003, Plaintiff developed bronchitis, which Dr. Diloretto believed to be "an acute exacerbation of his chronic obstructive pulmonary disease," and deep vein thrombosis. According to a Dr. Breyer, who read a chest x-ray taken of Plaintiff in 2003, there were "small opacities with a 1/10 profusion."

Dr. Phillip Goodman, a radiologist at Duke Medical Center, reviewed Plaintiff's chest x-rays and the 1999 CT scan at Defendants' request. Dr. Goodman "found no evidence of asbestosis or asbestos-related pleural disease." At that point, Defendants

sent Plaintiff to Dr. Selwyn Spangenthal, a Charlotte-based pulmonologist, who examined Plaintiff on 5 February 2004.³

At the time that he examined Plaintiff, Dr. Spangenthal "heard mild expiratory wheezes with a few scattered rhonchi but no rales." Upon reviewing the 1999 CT scan and x-ray, he "found no evidence of pleural plaques or asbestosis." The pulmonary testing performed in Dr. Spangenthal's office "revealed findings of obstructive lung disease with no evidence of restriction, which would be associated with asbestosis." In Dr. Spangenthal's opinion, Plaintiff's symptoms were mostly due to chronic bronchitis or emphysema secondary to smoking; even so, he ordered a current high resolution CT scan "to see if there was any evidence of asbestos-related disease." Dr. Johnson, who read the CT scan, found "no pleural or interstitial abnormalities."⁴ "Since a high resolution CT scan was the best test, absent a pathological examination of lung tissue," Dr. Spangenthal determined that Plaintiff "had no evidence of asbestosis."

Dr. Andrew Gray Bullard, a pulmonologist practicing in Concord, examined Plaintiff at the request of his counsel on 10

³ Plaintiff disputes the accuracy of the Commission's findings concerning Dr. Spangenthal's testimony. More particularly, Plaintiff contends that the Commission failed to accurately consider Dr. Spangenthal's testimony concerning the existence of scarring in Plaintiff's lungs. However, as will be discussed in more detail below, we conclude that the Commission has not committed any error in its findings with respect to and its consideration of Dr. Spangenthal's testimony.

⁴ In addition, another chest x-ray taken on 3 March 2004 showed "no pleural abnormality or chronic abnormalities of the lungs."

August 2004. Pulmonary function tests performed by Dr. Bullard "were indicative of moderate obstructive lung disease, not restriction." Although Dr. Bullard would not completely rule out "the possibility of a restrictive component which would have been masked by air trapping due to emphysema," he "could not say that there was probably a restrictive component to [P]laintiff's breathing problem."

B. Procedural Facts

On 14 February 2000, Plaintiff filed a Form 18B seeking workers' compensation benefits for asbestosis. On 17 October 2001, Plaintiff requested that his claim be assigned for hearing. On 22 October 2001, Norandal and ACE USA filed a Response to Request that Claim be Assigned for Hearing in which they denied that Plaintiff's claim was compensable. On 28 December 2003, Plaintiff, Norandal, and CIGNA/ACE entered into a stipulation which recited, among other things, that Defendants "deny that [Plaintiff] was exposed to the hazards of asbestos during his employment with Norandal" and that, in the event that Plaintiff "was injuriously exposed to the hazards of asbestos during his employment with Norandal," then "CIGNA/ACE and Norandal shall be responsible for any benefits awarded to [Plaintiff] for any occupational disease or other compensable condition under the Workers' Compensation Act."⁵ On 23 February

⁵ The Commission found that Global Indemnity, Royal and SunAlliance, Argonaut Insurance Company, Argonaut Midwest Insurance Company, National Union and CIGNA/ACE USA/ESIS "provided workers' compensation coverage during [Plaintiff's] employment with" Norandal. Norandal and Argonaut Insurance Company submitted a Form 61 denying the compensability of Plaintiff's claim on 24 August 2000. Norandal and AIG Claims Services submitted a Form 61 denying

2004, Norandal and ACE USA/ESIS filed a Form 61 denying the compensability of Plaintiff's claim.

Plaintiff's claim was consolidated for hearing with similar claims advanced against Norandal by five other claimants.⁶ Plaintiff's claim came on for hearing before Deputy Commissioner George T. Glenn, II, on 1 March 2004. Prior to the hearing, Deputy Commissioner Glenn ruled that, since Defendants "had not filed a Form 61 within 90 days of the initiation of Plaintiff's claim," they were "barred . . . from disputing the compensability of [Plaintiff's] claim." On 8 March 2005, Deputy Commissioner Glenn entered an Opinion and Award in which he found that neither Norandal nor its workers compensation carrier had filed a Form 61 denying compensability and setting out a detailed justification for denying compensability in a timely manner. In addition, Deputy Commissioner Glenn found that Norandal and its carrier had failed to properly respond to discovery. As a result, Deputy Commissioner Glenn awarded Plaintiff compensation for injury to each of his lungs and each of his pleura, increased the award by 10% based on

the compensability of Plaintiff's claims on 16 October 2000. Norandal and Royal Insurance Company of America submitted a Form 61 denying the compensability of Plaintiff's claim on 26 October 2000. In light of the parties' stipulation, the Commission concluded that "Cigna/ACE USA/ESIS shall be responsible for any worker's compensation benefits awarded to [Plaintiff] as a result of his employment with" Norandal.

⁶ The other proceedings consolidated with Plaintiff's claim were brought by Charles R. Bowles, Administrator of the Estate of Arnold Dean Bowles; Rondall O. Everhardt; Bobby Lee Plummer; Derwood Sink Puckett; and Alfred Thomas Daywalt. Commission orders entered in two of these cases have been appealed to this Court and are decided contemporaneously with this case in *Bowles v. Norandal, USA* (No. COA09-384) and *Plummer v. Norandal* (No. COA09-382).

a finding that Plaintiff's injury "was caused by the wilful failure of the employer to comply with statutory requirements," and ordered the payment of attorneys fees to Plaintiff's counsel on the grounds that the "defense of this matter was not based upon reasonable grounds but was based upon stubborn and unfounded litigiousness for which [P]laintiff should recover attorneys fees as a part of the costs of this action." Defendants appealed to the Commission from Deputy Commissioner Glenn's order.

On 12 September 2005, after hearing the arguments of counsel and studying the parties' briefs, the Commission, in an Order by Commissioner Christopher Scott, concluded that "[t]he appealing party has shown good ground to reconsider the evidence in this matter;" reversed "the verbal Order by Deputy Commissioner Glenn made on or about February 25, 2004;" vacated "the March 8, 2005, Opinion and Award of Deputy Commissioner Glenn;" and remanded "the matter to a deputy commissioner for a full evidentiary hearing on all the issues in this matter." Although Plaintiff noted an appeal to this Court from the Commission's order, we dismissed Plaintiff's appeal on the grounds that it had been taken from an unappealable interlocutory order on 10 January 2006.

A consolidated hearing involving this and four other cases⁷ took place before Chief Deputy Commissioner Stephen T. Gheen beginning 1 May 2006. In an Opinion and Award filed 4 March 2008, Chief Deputy Commissioner Gheen denied Plaintiff's claim for

⁷ The record does not reflect which of the five cases listed in Footnote No. 6 above was not considered at the 1-2 May 2006 hearing held before Chief Deputy Commissioner Gheen.

workers' compensation benefits. Plaintiff appealed Chief Deputy Commissioner Gheen's decision to the Commission. By means of an Opinion and Award by Commissioner Christopher Scott filed 4 December 2008, the Commission affirmed Chief Deputy Commissioner Gheen's order "with minor modifications." In reaching this conclusion, the Commission found that:

28. Plaintiff did not have as extensive an exposure to asbestos dust in his position with [Norandal] as the employees who regularly worked with the annealing furnaces. He was of the mistaken impression that furnace No. 22 was insulated with asbestos containing material. The history he gave to the doctors, insofar as his exposure to asbestos in the plant was concerned, was not accurate. Although he was exposed to asbestos fibers at work, his exposure was not to high levels of the fibers.

29. Pleural and interstitial changes caused by asbestos fibers do not improve or disappear with time. Consequently, if such changes are present, subsequent x-rays or CT scans should show them at least as well as earlier films. High resolution CT scans have been the best non-invasive means of identifying pleural and interstitial changes due to asbestos exposure. Neither of the high resolution CT scans performed on plaintiff revealed any evidence of asbestos-related changes. Although there was evidence of pleural scarring and thickening at the upper levels of the lungs, those findings would be due to some other process not associated with exposure to asbestos fibers.

30. As of the date of this hearing before the Deputy Commissioner, [P]laintiff had not developed asbestosis. Although he was placed at an increased risk of developing asbestos-related pleural disease by virtue of his employment with [Norandal], he did not prove that he developed any pleural disease which would be related to asbestos exposure. Consequently, he did not establish that he developed an occupational disease which was

due to causes and conditions characteristic of and peculiar to his employment with [Norandal] and which excluded all other disease to which the general public was equally exposed.

Thus, the Commission concluded that, "[a]s of the date of hearing before the Deputy Commissioner, [P]laintiff had not developed asbestosis, the characteristic fibrotic condition of the lungs caused by inhalation of asbestos dust," and denied Plaintiff's claim for workers' compensation benefits. Plaintiff noted an appeal to this Court from the Commission's order.

II. Substantive Legal Analysis

A. Failure to Make Findings and Conclusions

First, Plaintiff contends that the 12 September 2005 order should be remanded to the Commission because it lacked the necessary findings of fact and conclusions of law. For the reasons set forth in our opinion in *Plummer*, we conclude that the Commission did not err by failing to include findings of fact or conclusions of law in its order reversing Deputy Commissioner Glenn's oral order of approximately 25 February 2004, vacating Deputy Commissioner Glenn's order of 8 March 2005, and remanding this case for a full hearing on all issues that were in dispute between the parties.

B. Failure to File a Statement of Denial Within 14 Days of Receiving Notice of Plaintiff's Claim

Secondly, Plaintiff contends that the Commission erred by failing to uphold the decision of Deputy Commissioner Glenn to the effect that Defendants waived the right to contest the compensability of his claim for workers' compensation benefits by

failing to notify the Commission and Plaintiff that they denied his right to receive workers' compensation benefits within 14 days of receiving notice of Plaintiff's claim as required by N.C. Gen. Stat. § 97-18(c). For the reasons set forth in our opinion in *Plummer*, we conclude that the Commission did not err by reversing the oral order entered by Deputy Commissioner Glenn on approximately 25 February 2004, vacating the order entered by Deputy Commissioner Glenn on 8 March 2005, and remanding this case to a deputy commissioner for a full hearing on the merits.

C. Sufficiency of the Commission's
Consideration of the Evidence

Finally, Plaintiff contends that the Commission failed to heed our admonition not to "ignore, discount, disregard or fail to properly weigh and evaluate any of the competent evidence before it," *Ward v. Beaunit Corp.*, 56 N.C. App. 128, 134, 287 S.E.2d 464, 467 (1982) (citing *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980), *disc. review denied*, 305 N.C. 152, 289 S.E.2d 379 (1982)), in determining that he did not suffer from asbestosis. More particularly, Plaintiff argues that the Commission failed to give appropriate consideration to certain aspects of the testimony of Dr. Spangenthal, who served as an expert witness for Defendants. After careful consideration of Plaintiff's arguments in light of the relevant legal principles, we conclude that the Commission did not commit any error in its consideration of Dr. Spangenthal's testimony.

"On appeal, we review decisions from the Industrial Commission to determine whether any competent evidence supports the findings

of fact and whether the findings of fact support the conclusions of law." *Silva v. Lowe's Home Improvement*, __ N.C. App. __, __, 676 S.E.2d 604, 609 (2009) (citing *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004)). The Commission's findings of fact are conclusive for purposes of appellate review if they are supported by competent evidence, even if the evidentiary record might also support a contrary finding. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh'g. denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). On the other hand, the Commission's conclusions of law are subject to *de novo* review. *Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 86, 361 S.E.2d 575, 577 (1987). Although the Commission "may not wholly disregard competent evidence," *Harrell*, 45 N.C. App. at 205, 262 S.E.2d at 835, it "is not required to find facts as to all credible evidence" since such a "requirement would place an unreasonable burden on the Commission." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000) (citing *Woolard v. N.C. Dept. Of Transp.*, 93 N.C. App. 214, 218, 377 S.E.2d 267, 269 (1989), *cert. denied*, 325 N.C. 230, 381 S.E.2d 792 (1989)).

In Finding of Fact No. 24⁸, the Commission stated that:

⁸ Although Plaintiff has assigned error to Finding of Fact No. 25, the argument advanced in his brief focuses on Finding of Fact No. 24. Despite the fact that Plaintiff's assignment of error and the argument in Plaintiff's brief focus on different findings of fact so as to result in a technical abandonment of the relevant assignment of error, we elect to invoke Rule 2 of the North Carolina Rules of Appellate Procedure in order to consider Plaintiff's argument given that "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of [the issue]." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008).

24. By that time, plaintiff had filed this asbestos claim. Defendants had previously had chest x-rays and the 1999 CT scan reviewed by Dr. Goodman, a radiologist at Duke Medical Center, who had found no evidence of asbestosis or asbestos-related pleural disease. They then sent plaintiff to Dr. Spangenthal, a practicing pulmonologist in Charlotte, who examined him on February 5, 2004. Plaintiff advised the doctor that he had previously been diagnosed with asbestosis, that he had had shortness of breath since 1998, that he had a productive cough and that he got winded even when walking slowly. He had reduced the number of cigarettes he smoked per day but had not been able to quit smoking altogether. On examination, the doctor heard mild expiratory wheezes with a few scattered rhonchi but no rales. He reviewed the 1999 CT scan and x-ray and found no evidence of pleural plaques or asbestosis. Pulmonary function testing performed in his office revealed findings of obstructive lung disease with no evidence of restriction, which would be associated with asbestosis.

In addition, the Commission found in Finding of Fact No. 25 that:

25. Dr. Spangenthal was of the opinion that much of plaintiff's symptoms were due to chronic bronchitis and/or emphysema secondary to his smoking history, but he ordered a current high resolution CT scan to see if there was any evidence of asbestos-related disease. The test was performed February 13, 2004 and revealed no pleural or interstitial abnormalities according to the radiologist, Dr. Johnson. Since a high resolution CT scan was the best test, absent a pathological examination of lung tissue, Dr. Spangenthal concluded that plaintiff had no evidence of asbestosis. Rather, he had obstructive lung disease due to cigarette abuse.

Based on these and other findings, the Commission concluded that Plaintiff had not developed asbestosis as of the date of the hearing before Deputy Commissioner Gheen.

On appeal, Plaintiff contends that the Commission's finding that Dr. Spangenthal "reviewed the 1999 CT scan and x[-]ray and found no evidence of pleural plaques or asbestosis" "is completely inaccurate." According to Plaintiff, Dr. Spangenthal "examined the Plaintiff and took a work history;" "found that the Plaintiff had a 'good history for asbestos exposure;'" that, as a matter of fact, "Dr. Spangenthal testified that the plaintiff had 'a very significant history of exposure to asbestos for 25 years;'" and that Plaintiff's exposure "would put him at risk" for the development of asbestos-related disease. Furthermore, Plaintiff contends that "Dr. Spangenthal found pleural scarring on the CT scan," which Plaintiff contends to be "directly contrary to the findings of the Full Commission." As a result, given his belief that the Commission's order misstated a critical aspect of Dr. Spangenthal's testimony, Plaintiff contends that the Commission failed to properly weigh and evaluate his testimony.

In his deposition, Dr. Spangenthal testified that:

- A. What I usually do is take the interpretation of the radiologist who is specifically trained in reading x-rays. And the CT scan was done in Salisbury and usually I take the interpretation as an expert interpretation of the tests.

- Q. What were [the radiologist's] findings of the February 13, 2004 high-resolution CT?

- A. He wrote here that he compared this with September of 1999 and the findings were very similar to that CT scan. He saw no masses, no infiltrates, no pleural plaquing or calcification and no interstitial lung disease in the lower parts of the lungs. There was some what

we call apical pleural and parenchymal scarring in the top parts of the lungs.

Q. What findings on a high-resolution CT would you expect to see in an individual with asbestosis?

A. Well, pleural plaquing pathognomonic of exposure to asbestos and is a hallmark of exposure and then a person who has asbestosis would also [be] expected to have some interstitial lung disease, some evidence of scarring or fibrosis within the lungs.

Q. Do you believe it is essential to look at a chest x-ray for an individual as compared to a high-resolution CT of the chest in making a determination as to whether or not the individual has asbestos[is]?

A. No, I don't. I think the high-resolution CT scan is the gold standard of interpretation.

. . .

Q. Based upon your examination of Mr. Pepper and your review of the high-resolution CT did you come to a conclusion as to whether or not he suffers from asbestosis?

A. My feeling was that he did not have any evidence of asbestosis, that his main disease process was obstructive lung disease and that this was as a result of cigarette abuse.

Dr. Spangenthal described Plaintiff's "apical pleural scarring and thickening" as idiopathic and stated that it is "[o]ften see[n] in people as they get older, they develop some scarring in the upper parts of the lung, right at the apices of the lungs. . . so you would follow it for a couple of years to make sure that there's no changes and it's not something that is indicative of any specific underlying disease."

Although Dr. Spangenthal did testify that Plaintiff "definitely had the exposure of 25 years" and that "he [was] at high risk of developing asbestos-related disease," the Commission's failure to find that Dr. Spangenthal testified to this effect did not result in a violation of the prohibition against disregarding competent evidence since the Commission's order contained extensive findings relating to the history of Plaintiff's exposure to asbestos during his career as a Norandal employee. Furthermore, contrary to Plaintiff's contention on appeal, the record does not contradict the Commission's findings that Dr. Spangenthal "found no evidence of pleural plaques or asbestosis" since Dr. Spangenthal explicitly testified that he saw no evidence that Plaintiff had asbestosis on the CT scan and since he described the apical pleural and parenchymal scarring that he saw in the upper lobes of Plaintiff's lungs as idiopathic rather than asbestos-related in nature. Finally, the record contains a plethora of competent evidence that supports the Commission's conclusion that, "[a]s of the date of hearing before the Deputy Commissioner, plaintiff had not developed asbestosis." Therefore, we conclude that Plaintiff has not established that the Commission failed to consider all competent evidence relating to Dr. Spangenthal's testimony in concluding that Plaintiff did not suffer from asbestosis as of the date of the hearing before Deputy Commissioner Gheen.

III. Conclusion

As a result, for the reasons set forth above, we conclude that the Commission did not err by failing to make findings and

conclusions in its 12 September 2005 order; by reversing Deputy Commissioner Glenn's oral order of approximately 25 February 2004, vacating Deputy Commissioner Glenn's order of 8 March 2005, and remanding this case to a deputy commissioner for a full hearing on the merits; or by failing to consider all competent evidence in the record bearing on the issue of whether Plaintiff suffered from asbestosis as of the date of the hearing before Deputy Commissioner Gheen. Thus, the Commission's order is affirmed.

AFFIRMED.

Judges GEER and STROUD concur.

Report per Rule 30(e).