NO. COA11-1406
NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2012

DARRYL BROWN, Employee,
Plaintiff

v.

N.C. Industrial Commission
I.C. Nos. 151055
151364
207006

CITY OF BURLINGTON, Employer,
COMPENSATION CLAIMS SOLUTIONS,
Carrier,
Defendants

Appeal by Plaintiff from Opinion and Award entered 12 July 2011 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 April 2012.

The Law Offices of Martin J Horn, PLLC, by Martin J. Horn, for the plaintiff.

Smith Law Firm, PC, by John Brem Smith, and Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by M. Duane Jones, for the defendants.

THIGPEN, Judge.

Darryl Brown ("Plaintiff") appeals from an Opinion and Award entered by the North Carolina Industrial Commission ("the Commission") denying his request to set aside the Consent Order

entered into on 4 August 2006. For the reasons stated herein, we affirm.

While employed by the City of Burlington ("Defendant"), Plaintiff was injured on three separate occasions: 25 January 2000, 7 August 2000, and 14 December 2001. Beginning in 2002, Plaintiff began to receive regular temporary total disability (TTD) checks from Defendant for the injuries suffered during 2000 and 2001. In 2006, Defendant's Human Resources Director, Aaron Noble ("Noble"), signed three Forms 60, which acknowledged the injuries the Plaintiff suffered, and stipulated what the benefit payment would be to Plaintiff. The agreed benefit payment for Plaintiff was $287.48 per week, which was derived using Plaintiff's hourly wage. A Consent Order was entered into by the parties on 4 August 2006 based on the benefit calculations in the Forms 60.

Plaintiff's case was heard by Deputy Commissioner Chrystal Redding Stanback ("Deputy Commissioner Stanback") on 27 April 2010. By Opinion and Award filed 18 January 2011, Deputy Commissioner Stanback found that when the Consent Order was entered into the parties were mutually mistaken as to Plaintiff's average weekly wage, and thus ordered the Consent Order to be set aside. Defendant appealed to the Full

Commission on 24 January 2011. The Commission reversed Deputy Commissioner Stanback on 12 July 2011, finding that the mutual mistake of the parties was one of law and without evidence of fraud, undue influence, or abuse of a confidential relationship the Consent Order should not be set aside. From this Opinion and Award, Plaintiff filed notice of appeal dated 27 July 2011.

Plaintiff contends that the Commission erred because it "should have found[] there was a mutual mistake and/or misrepresentation as to the earning amount as listed on the stipulated Order establishing the Average Weekly Wage and Comp. Rate." Although Plaintiff refers to a misrepresentation on the part of Defendant, he fails to support that allegation with any evidence or case law. Accordingly, we will only address the issue of mutual mistake. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) ("It is not the role of the appellate courts, however, to create an appeal for an appellant.")

Appellate review of the Commission's decisions is limited to "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005) (citation omitted).

> [T]he Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary. Thus, on appeal, this Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.

Hassell v. Onslow Cty. Bd. of Educ., 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (internal citations and quotations omitted). Further, "[t]he Workers' Compensation Act and the decisions of this Court clearly state that the Commission is the sole judge of the credibility of the witnesses and the weight of the evidence." *Id.* (citations omitted).

In order to avoid the enforcement of a Consent Order, a party must be "able to show . . . that there has been error due to fraud, misrepresentation, undue influence or mutual mistake." N.C. Gen. Stat. § 97-17(a) (2012). Mutual mistake is defined as a mistake "common to both parties and by reason of it each [party] has done what neither intended." *Financial Services v. Capitol Funds,* 288 N.C. 122, 135, 217 S.E.2d 551, 560 (1975). (citations omitted)

Swain v. C & N Evans Trucking Co., 126 N.C. App. 332, 484 S.E.2d 845 (1997) guides our review of this matter. In *Swain* our Supreme Court stated that "[t]he determination of the

plaintiff's average weekly wages requires application of the definition set forth in the Workers' Compensation Act, [N.C. Gen. Stat.] § 97-2(5) (1991), and the case law construing that statute and thus raises an *issue of law*, not fact." 126 N.C. App. at 335-336, 484 S.E.2d at 848 (quotations and citations omitted) (emphasis added). Plaintiff relies on *Metropolitan Property & Cas. Ins. Co. v. Dillard,* 126 N.C. App. 795, 487 S.E.2d 157 (1997) to support his argument that mutual mistake alone should allow for reformation of the contract. *See id.* at 798, 487 S.E.2d at 159 (holding that defendant was entitled to reformation of an insurance contract where both parties were mistaken as to the address of the specific property to be insured under the contract). However Plaintiff's reliance on this case is misplaced because it addressed a mistake of fact rather than a mistake of law.

When a mistake of law is present, it does not on its own, render a contract voidable. *See Greene v. Spivey*, 236 N.C. 435, 444, 73 S.E.2d 488, 495 (1952). When "the mistake of law is attended by fraud, misrepresentation, undue influence, or abuse of a confidential relationship the mistake can support rescission of the agreement." *Swain,* 126 N.C. App. at 335, 484 S.E.2d at 848 (citation omitted).

Here, Plaintiff argues that the mutual mistake allows for rescission of the contract because misrepresentation is also present. While Plaintiff states that misrepresentation was present, he does not provide any support for this contention. Therefore, we uphold the Commission's conclusion that there was no misrepresentation in this case; the only issue present being one of mutual mistake of law, which by itself does not give the Plaintiff grounds to render the Consent Order void. Therefore, we conclude that the Commission properly enforced the Consent Order.

AFFIRMED.

Judges ELMORE and GEER concur.

Report per Rule 30(e).