NO. COA07-1118

NORTH CAROLINA COURT OF APPEALS

Filed: 18 March 2008

JAMES M. CLONTZ,
Employee/Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 206828

HOLLAR & GREENE PRODUCE COMPANY,
Employer,

and

TRAVELERS INSURANCE COMPANY,
Carrier/Defendants.

Appeal by Plaintiff from Opinion and Award entered 24 May 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 20 February 2008.

Pinto Coates Kyre & Brown, P.L.L.C., by Martha P. Brown and David G. Harris, II, for Plaintiff-Appellant James Clontz.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Sharon E. Dent, for Defendant-Appellees Hollar & Greene Produce Company, and Travelers Insurance Company.

ARROWOOD, Judge.

James Clontz (Plaintiff) appeals from an Opinion and Award of the North Carolina Industrial Commission denying Plaintiff's claim for additional workers' compensation benefits. We affirm.

Plaintiff formerly worked as a truck driver for Hollar & Greene Produce Company (Defendant). On 19 November 2001 Plaintiff suffered a compensable injury to his back when he slipped on an oily spot at a gas station. Defendant and Travelers Indemnity Company (collectively Defendants) accepted Plaintiff's workers' compensation claim, and paid medical and wage compensation to Plaintiff. Between November 2001 and January 2003 Plaintiff received medical treatment for his back injury, including three surgical procedures performed by Dr. Henry Pool, a neurosurgeon. On 7 January 2003 Dr. Pool found that Plaintiff had reached maximum medical improvement, and assigned a twenty percent (20%) permanent partial impairment rating to his lumbar spine. Dr. Pool also released Plaintiff to return to work with certain restrictions.

By letter dated 28 January 2003, Defendants offered Plaintiff $75,000 to settle his case, which Plaintiff accepted. The offer was reduced to writing and signed by the parties on 5 February 2003. On 25 February 2003 the signed compromise settlement agreement was approved by the Industrial Commission After the settlement agreement was executed, Plaintiff returned to work as a truck driver. About ten months later, he started experiencing pain in his left hip. Plaintiff consulted Dr. Pool, and in January 2004 he was diagnosed with bilateral avascular necrosis of his hips.

Avascular necrosis is a condition that causes deterioration of the femoral head, resulting in pain in the hip area. Although its exact cause has not been determined, avascular necrosis is known to be a rare side effect of medical treatment with steroids. In the instant case, Defendants do not dispute the Commission's finding that Plaintiff's avascular necrosis was most likely caused by the administration of steroids during treatment for his compensable injury.

Plaintiff was treated for avascular necrosis by Dr. Frank Aluisio, an orthopedic surgeon. In 2004 Dr. Aluisio performed total hip replacement surgery on both of Plaintiff's hips, and a third surgical procedure to correct right hip dislocation that Plaintiff experienced after his right hip replacement. Dr. Aluisio assigned a forty-five percent (45%) permanent partial impairment rating to each of Plaintiff's hips and put restrictions on Plaintiff's employment that prevent him from returning to work as a long distance truck driver.

On 19 January 2006 Plaintiff filed an I.C. Form 33, asking the Commission to set aside the compromise settlement agreement and allow him to reopen his case. Defendants filed a Form 33R, denying that the settlement agreement should be set aside. A hearing was conducted in April 2006, and on 26 September 2006 Deputy Commissioner Morgan S. Chapman issued an Opinion concluding that the settlement could not be set aside. Plaintiff appealed to the Full Commission. On 24 March 2007 the Commission issued an opinion affirming the Deputy Commissioner with minor modifications, and concluding that the parties were bound by the compromise settlement agreement. From this Opinion Plaintiff appeals.

Standard of Review

"On appeal from an opinion and award of the North Carolina Industrial Commission, the standard of review is 'limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.' The Industrial Commission's findings of fact 'are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding.' . . . This Court reviews the Commission's conclusions of law de novo." *Roberts v. Century Contr'rs, Inc.*, 162 N.C. App. 688, 690-91, 592 S.E.2d 215, 218 (2004) (quoting *Deese v.*

Champion Int'l Corp., 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); and *Murray v. Associated Insurers, Inc*., 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995) (other citation omitted).

Plaintiff herein sought to set aside a compromise settlement agreement, on the grounds that it was based on a mutual mistake of fact. "A 'clincher' or compromise agreement is a form of voluntary settlement used in contested or disputed cases." *Ledford v. Asheville Housing Authority*, 125 N.C. App. 597, 599, 482 S.E.2d 544, 546 (1997). "Compromise settlement agreements, including mediated settlement agreements, 'are governed by general principles of contract law.'" *Lemly v. Colvard Oil Co*., 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) (quoting *Chappell v. Roth*, 353 N.C. 690, 692, 548 S.E.2d 499, 500 (2001)). Accordingly, a compromise settlement agreement can be set aside if a party can "show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Commission may set aside the agreement." N.C. Gen. Stat. §97-17(a) (2007).

"[A] valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement." *Northington v. Michelotti*, 121 N.C. App. 180, 184, 464 S.E.2d 711,714 (1995) (citations omitted). "Therefore, where a mistake is common to both parties and concerns a material past or presently existing fact, such that there is no meeting of the minds, a contract may be avoided. To afford relief, the . . . fact about which the parties are mistaken must be 'an existing or past fact.'" *Roberts*, 162 N.C. App. at 691-92, 592 S.E.2d at 219 (quoting *Howell v. Waters*, 82 N.C. App. 481, 486, 347 S.E.2d 65, 69 (1986)) (internal citation omitted).

Plaintiff argues that certain of the Commission's findings of fact are unsupported by competent evidence. He asserts that the evidence required the Commission to find and conclude that the settlement agreement was based on a mutual mistake of fact about whether he was at maximum medical improvement when the agreement was executed. We disagree.

Preliminarily, we note that Plaintiff has not fully complied with the North Carolina Rules of Appellate Procedure. Under N.C. R. App. P. 28(b)(6), an appellate brief must state the questions presented, and "following each question shall be a reference to the assignments of error pertinent to the question[.]" Although Plaintiff lists assignments of error numbers one through eight (challenging the Commission's findings of fact sixteen through twenty-two (16 _ 22) and finding number twenty-four (24)), he summarizes his concerns without reference to specific findings, making a generalized argument that the Industrial Commission found certain facts "that are contrary to the competent evidence in the record[.]"

Plaintiff first challenges a purported "finding" by the Commission that "the avascular necrosis did not exist or was not present in Mr. Clontz's hips when the compromise settlement agreement was entered into by the parties." However, the Commission did not find, as Plaintiff asserts, that at the time the parties entered into a settlement agreement, avascular necrosis "did not exist or was not present in Mr. Clontz's hips." The Commission's actual findings on this issue, as excerpted from the findings challenged by Plaintiff, were that:

> 16. . . . there was no way to know whether the avascular necrosis actually existed in plaintiff's left hip in February 2003 when the compromise settlement agreement was entered into in this case.
>
> 17. The parties were unaware of plaintiff having avascular necrosis in February 2003. . . .
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> . . . .

> 20. As of January 16, 2004 plaintiff . . . became unable to work due to symptoms from avascular necrosis . . . which had not manifested itself until late in 2003. At the time the compromise settlement agreement was executed . . . [the avascular necrosis] was unknown and may well not have been present. . . .
>
> . . . .
>
> 22. The evidence did not establish that plaintiff actually had avascular necrosis in February 2003 when the compromise settlement agreement was approved.

Thus, the Commission did not find as a fact that in February 2003 Plaintiff did not have avascular necrosis. Rather, the Commission made the significantly different finding that the evidence failed to establish that Plaintiff did have the disease in February 2003.

The finding actually made by the Commission, that the evidence failed to show that Plaintiff suffered from avascular necrosis in February 2003, is amply supported by the evidence before the Commission. It is undisputed that Plaintiff was not diagnosed with the condition until January 2004, and Plaintiff presented no evidence that he showed symptoms of avascular necrosis in February 2003. Expert medical testimony also supports the Commission's finding. Dr. Aluisio testified that the interval between steroid treatment and development of avascular necrosis was "different for everyone" and that it was "hard to say" when a patient might start showing symptoms of the condition:

> DEFENSE COUNSEL: Doctor, was there any way, from your examination of Mr. Clontz, that you were able to determine exactly when the condition arose?
>
> DR. ALUISIO: No, there's really no way of determining that, but . . . it would most likely have been within six months to two years of the time that I saw him[.]

Dr. Pool offered the same opinion:

> DEFENSE COUNSEL: Doctor, it's not possible, is it, to determine when the condition developed?

DR. POOL: Correct.

We conclude that the Commission's finding, that the evidence did not show that Plaintiff suffered from avascular necrosis at the time the compromise settlement agreement was executed, is supported by competent evidence. This assignment of error is overruled.

Plaintiff next contends that the Commission erred by making a finding "that the parties could not have known that Mr. Clontz would have developed avascular necrosis when they executed the settlement agreement." Plaintiff again fails to identify the finding from which this is taken. However, finding number twenty (20) states in part that "[a]t the time the compromise settlement agreement was executed, the parties could not have known that plaintiff would have developed this condition[.]"

Dr. Pool testified that if Plaintiff was developing avascular necrosis when the settlement was entered, "he would have no way of being aware of the condition" because symptoms "would not have been apparent for many months or sometimes a year or two." Dr. Pool testified further that "there is no type of test that we could have done" that would have diagnosed the condition while it was asymptomatic. This testimony supports the Commission's finding that there was no way for the parties to have known that Plaintiff would develop avascular necrosis. This assignment of error is overruled.

Plaintiff also asserts that the Commission made findings of fact "that Mr. Clontz did reach maximum medical improvement with respect to the injury giving rise to his workers' compensation claim in January 7, 2003; and that when the settlement agreement was signed and approved, there was no mistake as to whether Mr. Clontz had reached maximum medical improvement." Plaintiff again fails to identify the numbered finding associated with this contention; however, we note the following findings:

> 19. Plaintiff did reach maximum medical improvement with respect to the injury giving rise to the claim as of January 7,2003, as of the date Dr. Pool released him and plaintiff had experienced no further back problems which required medical treatment after that date through the date of hearing before the Deputy Commissioner. When the settlement agreement was signed and approved, there was no mistake as to whether plaintiff had reached maximum medical improvement.
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> . . . .
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> 21. Although Dr. Pool's testimony indicated that he was mistaken with regard to his opinion that plaintiff was at maximum medical improvement, the greater weight of the evidence shows that plaintiff's compensable injury had resolved at that time. . . .
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> . . . .
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> 24. The compromise settlement agreement approved in this case was not entered into due to the parties' mutual mistake regarding an existing fact.

"Maximum medical improvement is reached when the impaired bodily condition is stabilized or determined to be permanent." *Royce v. Rushco Food Stores, Inc*., 139 N.C. App. 322, 330, 533 S.E.2d 284, 289 (2000) (citing *Carpenter v. Industrial Piping Co*., 73 N.C. App. 309, 326 S.E.2d 328 (1985)). Plaintiff argues that the evidence shows that he was suffering from avascular necrosis when the parties executed the settlement agreement. This is the sole basis for Plaintiff's argument that the Commission erred by finding that he had reached maximum medical improvement at the time the agreement was signed.

Plaintiff directs our attention Dr. Pool's testimony that, if Plaintiff had avascular necrosis when he executed the compromise settlement agreement, then Plaintiff would not have yet reached maximum medical improvement. However, Dr. Pool <u>did not</u> testify that Plaintiff in fact suffered from avascular necrosis in February 2003. Additionally, as discussed above, the Commission's finding, that the date of onset of Plaintiff's avascular necrosis was <u>not established</u>

by the evidence, was supported by competent evidence, including Dr. Pool's testimony that it was not possible to identify the date of onset. Accordingly, the Commission's finding that Plaintiff was at maximum medical improvement was not error.

Because we conclude that the Commission did not err by finding that Plaintiff was at maximum medical improvement when the parties executed the compromise settlement agreement, we necessarily also conclude that the Commission did not err by finding that there was no mistake of fact regarding Plaintiff's being at maximum medical improvement. This assignment of error is overruled.

For the reasons discussed above, we conclude that the Industrial Commission did not err by concluding that the parties were bound by the compromise settlement agreement executed in February 2003, and that the Commission's Opinion should be

Affirmed.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).