NO. COA07-1187

NORTH CAROLINA COURT OF APPEALS

Filed: 20 May 2008

EVELYN B. MONGER,
Employee,
Plaintiff-Appellant,

v.

North Carolina Industrial Commission
I.C. File No. 366828

DURHAM HOUSING AUTHORITY,
Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants-Appellees,

Appeal by plaintiff from an Opinion and Award of the Full Commission of the North Carolina Industrial Commission entered 22 June 2007 by Commissioner Laura Kranfield Mavretic. Heard in the Court of Appeals 18 March 2008.

*Perry, Perry & Perry, P.A., by Robert T. Perry, for plaintiff-appellant.*

*Cranfill Sumner & Hartzog LLP, by Roy G. Pettigrew, for defendants-appellees.*

JACKSON, Judge.

Evelyn B. Monger ("plaintiff") appeals the Opinion and Award of the full Industrial Commission which approved a mediated settlement agreement entered into between herself and Durham Housing Authority ("defendant"). For the reasons stated below, we affirm.

On 29 September 2003, plaintiff was employed by defendant as a work order clerk, performing primarily clerical duties. Plaintiff was diagnosed with carpal tunnel syndrome in both hands in October 2003. She notified both her employer and the Industrial Commission of her injury via Form 19 on or about 6 October 2003. On 9 December 2003, defendant filed a Form 60, admitting plaintiff's right to workers' compensation benefits, and began paying her temporary total compensation at a weekly rate of $295.37.

Plaintiff's work restrictions included: (1) no lifting more than fifteen pounds; (2) no typing more than thirty minutes per hour; and eventually, (3) no working more than four hours per day. Plaintiff ultimately was issued a permanent partial disability rating of ten percent for each hand.

Defendant was unable to accommodate plaintiff's work restrictions, and offered her vocational rehabilitation services. Plaintiff received no offers of work as a result of these services.

On 21 June 2005, plaintiff and defendant entered into voluntary mediation of plaintiff's workers' compensation claim. Prior to the mediation conference, plaintiff's attorney had prepared a settlement proposal, seeking $90,000.00 to settle plaintiff's claim. Plaintiff and her attorney attended the mediation conference. At the conference, plaintiff, her attorney, and defendant's attorney signed a Mediated Settlement Agreement pursuant to which defendant agreed to pay plaintiff the sum of $37,000.00, as well as mediation fees and disputed medical expenses pre-dating plaintiff's date of injury, in exchange for plaintiff's execution of a "resignation and general release of other claims" in favor of defendant.

Plaintiff understood that the document she signed was a contract. However, either later that day or the next day, plaintiff decided she did not want to go through with the settlement.

Because plaintiff had withdrawn her consent to the mediated settlement agreement, her counsel moved to withdraw from representing her on 1 August 2005. Counsel's motion was allowed by order entered 10 August 2005.

Plaintiff retained new counsel and filed a motion to deny approval of the mediated settlement agreement on 16 September 2005. On 26 September 2005, defendant filed a request for hearing to enforce the mediated settlement agreement. A hearing was held before Deputy Commissioner Myra L. Griffin on 11 January 2006. The resulting Opinion and Award filed 21 September 2006 approved the mediated settlement agreement. Plaintiff appealed to the Full Commission on 28 September 2006.

The Full Commission reviewed the matter on 22 May 2007 and filed its Opinion and Award, approving the mediated settlement agreement, on 22 June 2007. Plaintiff filed a notice of appeal to this Court on 25 July 2007.

By three assignments of error, plaintiff challenges the Full Commission's findings of fact numbers 12, 13, and 15. She argues that the Full Commission's finding that the settlement agreement was fair, just, and in plaintiff's best interest is not supported by competent evidence in the record. We disagree.

When this Court reviews an Opinion and Award from the Industrial Commission we generally consider two issues: "(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) (citing *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986)). 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.'"

*Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Findings may be set aside on appeal only "'when there is a complete lack of competent evidence to support them.'" *Rhodes v. Price Bros., Inc.*, 175 N.C. App. 219, 221, 622 S.E.2d 710, 712 (2005) (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000)). However, the Full Commission's conclusions of law are reviewed *de novo*. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483, 581 S.E.2d 138, 141 (2003).

Here, the Full Commission made the following relevant findings of fact:

> 12. By the written terms of the agreement, plaintiff was aware of the final terms of the settlement. By executing the agreement of her own free will, plaintiff consented to the terms of the agreement including the amount of the settlement, the payment of outstanding medical expenses, and that the agreement ["]is fair and in the best interest of the parties and consent to the Industrial Commission reviewing this CSA and entering an order approving it based on above terms and conditions." The Commission finds that the agreement entered into by plaintiff with defendants was not the result of fraud, misrepresentation, undue influence, or mutual mistake.
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> 13. Subsequent to the June 21, 2005 mediation, plaintiff had a vocational assessment prepared by a certified vocational evaluator, Patrick Clifford. After reviewing the vocational assessment and other additional evidence submitted by plaintiff, the Commission finds that this evidence does not support setting aside the agreement on the basis that the agreement was not fair and just and in the best interests of all parties involved in the claim.
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> 14. Plaintiff, of her own free will, entered into an agreement with defendants in which she would receive $37,000.00 in settlement of her workers' compensation claim.
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> 15. The Agreement of Final Settlement and Released [sic] tendered as a Stipulated Exhibit in the Deputy Commissioner's hearing contained all the terms of the agreement of the parties as indicated in the Mediated Settlement Agreement

> and met all the requirements of Rule 502 of the North Carolina Workers' Compensation Rules. A review of the medical evidence submitted with the Agreement for Final Compromise Settlement and Release that was available at the time of [the] Mediated Settlement Conference, and the medical and other competent evidence before the Commission, reveals that the agreement was fair and just at the time it was entered into by the parties on June 21, 2005, and it is reasonable to conclude that plaintiff willingly entered into the agreement to obtain the benefit of immediate payment.

Finding of fact number 12 is supported by competent evidence in the record. The written mediated settlement agreement, as well as the testimony of plaintiff and her attorney support this finding of fact. The agreement states that "[t]he parties and their respective counsel acknowledge that all material terms are included in this agreement, that it is fair and in the best interest of the parties and consent to the Industrial Commission reviewing this CSA and entering an order approving it based on the above terms and conditions." Plaintiff testified at the hearing before the Deputy Commissioner that she understood the terms of the agreement, that it was a contract, that by signing a contract "you're agreeing to whatever is in the contract," and that she signed it voluntarily. The attorney who represented plaintiff at the mediation conference testified that there was no evidence of fraud, misrepresentation, undue influence, or mutual mistake.

Finding of fact number 13 also is supported by competent evidence in the record. The deposition testimony, as well as the vocational assessment prepared by Patrick Clifford ("Clifford") supports this finding of fact. Plaintiff's primary complaint is that Clifford's report indicates that she cannot find suitable employment due to her work restrictions, and therefore the agreement was not fair. Clifford's report and testimony could support a finding of fact that plaintiff could not find suitable employment; however, pursuant to our standard of review, it is not the job of this Court to find what the facts *could* have been.

Further, pursuant to North Carolina General Statutes, section 97-17, a settlement agreement may be set aside by the Industrial Commission only if a party "is able to show to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence, or mutual mistake[.]" N.C. Gen. Stat. §97-17(a) (2005). In finding of fact number 12, the Industrial Commission found that there was no error due to fraud, misrepresentation, undue influence, or mutual mistake. In addition, whether the agreement is "fair and just and in the best interests of all parties" is not a basis upon which the Industrial Commission can set aside a settlement agreement. Although the Industrial Commission "shall not approve a settlement agreement . . . unless . . . the settlement agreement is deemed by the Commission to be fair and just, and that the interests of all of the parties . . . have been considered," N.C. Gen. Stat. §97-17(b)(1) (2005), this finding of fact relates to the setting aside of the agreement, not the approval of the agreement.

We note that finding of fact number 14 was not challenged by plaintiff's assignments of error. Because this finding of fact has not been challenged, it is deemed binding upon this Court. *See Strezinski v. City of Greensboro*, ___ N.C. App. ___, ___, 654 S.E.2d 263, 266 (2007) ("Those [findings of fact] not challenged or in support of which no argument is made in the brief are binding on appeal.")

Finally, finding of fact number 15 is supported by competent evidence in the record. In addition to the evidence stated in this finding of fact, the record contains the testimony of plaintiff's counsel who recounted his conversations with plaintiff during the mediation conference. He testified that the settlement amount was based upon two years' worth of compensation. Rather than paying her benefits over two years' time, it made more sense to resolve the claim if she believed she could return to work in some fashion within a year to a year

and one half. He had estimated that defendant would be willing to settle between $25,000.00 and $40,000.00, so $37,000.00 was at the high end of that range. On 15 July 2005, more than three weeks after signing the agreement, plaintiff met with her attorney; although she voiced some concerns over the settlement, she did not state that she was not willing to proceed with it.

As these findings of fact are supported by competent evidence in the record, they are binding on appeal. These findings justify the Full Commission's conclusions of law. Therefore, these assignments of error, as well as the two challenging the Full Commission's conclusions of law are overruled. There are four additional assignments of error set forth in the record on appeal that have not been brought forward in plaintiff's brief. Pursuant to the North Carolina Rules of Appellate Procedure, these assignments of error are deemed abandoned. *See* N.C. R. App. P. 28(b)(6) (2007) ("Assignments of error not set out in the appellant's brief . . . will be taken as abandoned."). Accordingly, we affirm.

Affirmed.

Judges WYNN and BRYANT concur.

Report per Rule 30(e).