NO. COA12-588
NORTH CAROLINA COURT OF APPEALS

Filed: 2 April 2013

MARK RAINEY,
Employee,
Plaintiff,

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Employer,
LIBERTY MUTUAL INSURANCE COMPANY,
Carrier,
Defendants.

North Carolina Industrial Commission
I.C. No. 468408

Appeal by plaintiff from Opinion and Award entered 4 January 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 25 October 2012.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Matthew J. Ledwith, M. Duane Jones, and Lindsey L. Smith, for defendants-appellees.

GEER, Judge.

Plaintiff Mark Rainey appeals from an opinion and award of the North Carolina Industrial Commission declining to enforce a

purported settlement agreement between Mr. Rainey and defendants Goodyear Tire & Rubber Company and Liberty Mutual Insurance Company. Because the Full Commission's findings of fact are supported by competent evidence and those findings in turn support the conclusions of law, we affirm.

Facts

Mr. Rainey began work with Goodyear in 1988 as a tire builder. On 4 August 2004, Mr. Rainey injured his back while working for Goodyear, and defendants paid for all of his medical treatment. On 18 November 2008, a consultant prepared a Medicare Set-Aside ("MSA") Summary for defendants calculating that Mr. Rainey would need $65,948.00 to cover future compensable medical expenses that would not be paid by Medicare.

Beginning in February 2009, the parties exchanged a series of emails exploring the possibility of settling Mr. Rainey's claim. On 31 March 2009, defendants' counsel sent an email to Mr. Rainey's counsel:

> My client has authorized me to put my authority on the table since we have not been able to exchange numbers. This is a final number and represents what we believe our exposure is for this claim.
>
> $285K plus the MSA ($65K) is our formal offer. If I do not hear back I will assume he does not want the offer but we will have to take it off the table and will not be able to negotiate at this time. Look forward to hearing from you.

Immediately following that email, Mr. Rainey's counsel responded with a series of questions regarding the proposed settlement. Defendants' counsel answered in relevant part that defendants would not assume the risk on the MSA but would have the amount of the MSA agreed upon by the parties approved by the Centers for Medicaid and Medicare Services ("CMS").

After another series of email exchanges, defendants' counsel sent the following email on 4 May 2009:

> I received your voicemail. I asked for $315 plus the MSA to settle. I do not think I will get over $300K but I did ask for what I believe is a reasonable settlement amount. If you can indicate a number that he will take I will let them know but they don't even want to give me the $300 I've asked for. If I can tell them what you will take, it will go along [sic] way. Asking for $315K and then you not taking it will just make them believe they are wasting time putting money on this file. My honest opinion is $300K . . . maybe $310K but I don't see $325K or anything above that.

Plaintiff's counsel replied on the same day: "If you can get 315K plus msa, all new money, we have a deal."

Defendants submitted the proposed MSA amount ($65,948.00) to CMS for approval. CMS rejected the $65,948.00 figure, approving only an MSA in the amount of $381,385.00. On 16 July 2009, defendants withdrew their offer of settlement until they were "able to determine medical retirement and MSA issues."

On 25 August 2010, Mr. Rainey filed a Form 33 with the Industrial Commission requesting enforcement of an alleged settlement agreement between the parties pursuant to the Commission's authority under N.C. Gen. Stat. § 97-84 (2011). On 27 April 2011, the deputy commissioner issued an opinion and award denying plaintiff's request. Mr. Rainey appealed to the Full Commission, which also concluded that no enforceable agreement existed between the parties. Mr. Rainey timely appealed to this Court.

Discussion

Review of an opinion and award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This 'court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (internal citation omitted) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433-34, 144 S.E.2d at 274.

Mr. Rainey first contends that the Commission erred in determining that the parties had not reached a meeting of the minds as to any settlement agreement. As this Court has observed:

> Compromise settlement agreements, including mediated settlement agreements, are governed by general principles of contract law. It is a well-settled principle of contract law that a valid contract exists only where there has been a meeting of the minds as to all essential terms of the agreement. To be enforceable, the terms of a contract must be sufficiently definite and certain.

Lemly v. Colvard Oil Co., 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) (internal citations and quotation marks omitted).

Here, the Commission examined the settlement negotiations between the parties and concluded:

> During negotiations, defendants agreed to submit the Medicare Set Aside to CMS for review because the settlement offer exceeded $250,000.00 and plaintiff had applied for SSDI benefits. Defendants stated they would obtain prior approval from CMS of the amount of funds allotted for the MSA. Moreover, defendants expressly denied that they would assume the risk on the MSA when questioned by plaintiff's counsel. Because the settlement offer by defendants contained contingencies, which were not met when CMS denied approval of the proposed MSA in the amount of $65,000.00, there was not "a meeting of the minds" as to all essential terms by the parties with respect to reaching a final settlement of the claim. As a result, the terms of the contract are not definite or certain and therefore there

is no enforceable agreement in this claim.

In support of that conclusion, the Commission found that: "[o]n March 31, 2009, defendants offered $285,000.00 plus funding for a Medicare Set Aside in the amount of $65,000.00." The Commission noted that plaintiff's counsel had certain questions regarding the 31 March settlement offer. The Commission then found that defendants responded to those questions by:

> agree[ing] that: (1) all related and authorized medical treatment would be paid until the date of the settlement; (2) defendants would get prior approval of the Medicare Set Aside from CMS; (3) no credits would be applied to the settlement number; (4) the Medicare Set Aside would be submitted to [CMS] because the settlement offer was over $250,000.00 and plaintiff applied for Social Security Disability Insurance; (5) defendants would check on medical retirement approval with defendant-employer and (6) plaintiff would continue to receive temporary total disability benefits until all contingencies of the settlement agreement were approved. A final settlement agreement was contingent upon all of these terms being met.

According to the Commission's opinion and award, "plaintiff rejected the formal settlement offer" and "countered with a demand of $315,000.00 plus funding for the Medicare Set Aside."

The Commission found that defendants submitted a proposed MSA in the amount of $65,948.00 to CMS, but that MSA was denied. CMS initially proposed instead $381,385.00 to cover Medicare's

interests, but, after two requests for reconsideration, CMS made a final determination and counter-proposal of $266,207.00.

The Commission rejected Mr. Rainey's claim that defendants had agreed to a settlement of $315,000.00 plus the funding of the MSA as approved by CMS. The Commission noted that defendant employer "had a strict policy in place prohibiting settlement agreements in which the medical portion of the claim was left open." The Commission further found:

> During negotiations, plaintiff's counsel questioned whether defendants would assume the risk on the Medicare Set Aside. Defense counsel responded that "We [defendants] will get prior approval from CMS". The Full Commission finds, based upon a preponderance of the evidence, defendants did not agree to assume the risk on the Medicare Set Aside. Thus, when CMS denied approval of the proposed Medicare Set Aside for $65,000.00 and recommended a final amount of $266,207.00, the contingency that CMS approve the Medicare Set Aside was not met. The Deputy Commissioner found and the Full Commission agrees that there was no "meeting of the minds" by the parties with respect to reaching a final settlement of the claim. As a result, there is no enforceable agreement in this claim.

Mr. Rainey argues, however, that this Court's decision in *Lemly* supports his position that there was an enforceable agreement in this case. In *Lemly*, the parties had participated in a mediation and, at the conclusion, all signed a handwritten memorandum of settlement setting out the terms of the parties'

agreement and specifying that the plaintiff "'shall execute clincher setting out above terms and other standard language.'"[1] *Id.* Subsequently, after the plaintiff refused to sign the clincher agreement, the Commission concluded that the handwritten memorandum was not enforceable as a compromise settlement agreement. *Id.* at 102, 577 S.E.2d at 714.

On appeal, this Court noted that the parties had settled all issues between them at the mediation, that the handwritten memorandum signed by all the parties and their attorneys set forth all of the terms, and that the clincher agreement sent to the plaintiff the day after the mediation contained the standard terms required by the Workers' Compensation Rules of the North Carolina Industrial Commission. *Id.* at 103-04, 577 S.E.2d at 715-16. The Court then held, based on those facts:

> While the better practice would be for the parties to execute a clincher agreement which contains all the required terms and language at the conclusion of the mediated settlement conference if an agreement is reached, the signed "Memorandum of Settlement" here fully complies with Rule 502(2) of the Workers' Compensation Rules and is a valid compromise settlement agreement subject to approval by the Industrial Commission pursuant to Rule 502(1).

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[1] "'A "clincher" or compromise agreement is a form of voluntary settlement used in contested or disputed cases.'" *Id.* at 103, 577 S.E.2d at 715 (quoting *Ledford v. Asheville Hous. Auth.*, 125 N.C. App. 597, 599, 482 S.E.2d 544, 546 (1997)).

Id. at 104, 577 S.E.2d at 716. The Court, therefore, reversed and remanded for the Commission to decide whether to approve the agreement. *Id.*

In short, in *Lemly*, there was no dispute that the parties had agreed to all of the terms of the settlement. The only dispute was whether the handwritten memorandum was an enforceable agreement under the Workers' Compensation Rules. Here, in contrast, the key dispute between the parties is whether there was any agreement as to the MSA. Mr. Rainey contends that defendants agreed to whatever MSA the CMS approved, while defendants contend that CMS' approval of a $65,000.00 MSA was a condition precedent to settlement. The Commission agreed with defendants.

On appeal, Mr. Rainey simply asks that this Court find different facts by drawing different inferences from the evidence. The Commission's findings of fact are, however, supported by the record evidence, including the emails, and the Commission drew reasonable inferences from the evidence. Consequently, the findings of fact are binding on appeal under our standard of review. Because of that standard of review, Mr. Rainey's reliance on *Chaisson v. Simpson*, 195 N.C. App. 463, 673 S.E.2d 149 (2009), is misplaced.

Although *Chaisson* involved a dispute between the parties regarding the settlement amount, the Commission enforced the settlement consistent with the plaintiff's contentions. *Id.* at 469, 673 S.E.2d at 155. On appeal, this Court ***affirmed*** the Commission because the testimony of the plaintiff and the defendant's counsel, as well as documentary evidence, supported the Commission's findings that the parties had reached a settlement for the higher amount. *Id.* at 472-73, 673 S.E.2d at 157.

The Court in *Chaisson* noted that "'[w]hether mutual assent is established and whether a contract was intended between [the] parties are questions for the trier of fact.'" *Id.* at 471, 673 S.E.2d at 156 (quoting *Snyder v. Freeman*, 300 N.C. 204, 217, 266 S.E.2d 593, 602 (1980)). In this case, the Commission's finding of fact that the approval of the MSA for $65,948.00 was a condition precedent to approval of any settlement between Mr. Rainey and defendants is supported by evidence. Therefore, as in *Chaisson*, because the Commission's findings of fact regarding the purported settlement agreement are supported by the evidence, we are required to affirm the decision below.

Mr. Rainey's remaining arguments are all reiterations of his primary argument that the parties' agreement did not require approval of an MSA in a specific amount. The arguments all

necessitate that we disregard our standard of review. We may not do so and, therefore, affirm the Commission's opinion and award.

Affirmed.

Judges STEPHENS and McCULLOUGH concur.

Report per Rule 30(e).