Bunn; Reversed
Concurring: Sellers
Dissenting: Bolch

NO. COA99-1611

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2000

MARK RATCHFORD,
Employee-Plaintiff-Appellant,

v.

C.C. MANGUM, INC.,
Employer,

ST. PAUL FIRE & MARINE
INSURANCE COMPANY,
Carrier-Defendant-Appellees.

Industrial Commission
I.C. File Number 585911

Appeal by plaintiff from opinion and award of the North Carolina Industrial Commission entered 2 July 1999. Heard in the Court of Appeals 8 November 2000.

Law Offices of George W. Lennon, by George W. Lennon and Michael W. Ballance, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P. by Linda Stephens and Tracey L. Jones, for defendant-appellees.

McGEE, Judge.

Plaintiff Mark Ratchford (plaintiff) appeals from an opinion and award entered by the North Carolina Industrial Commission (Commission) denying his motion to set aside a compromise or clincher agreement with St. Paul Fire & Marine Insurance and its insured C.C. Mangum, Inc. (defendants).

Plaintiff's employment since 1983 was in semi-skilled heavy construction work. Plaintiff suffered an injury to his right knee on 20 October 1995 while employed by C.C. Mangum, Inc. (Mangum). The evidence shows that plaintiff was operating an asphalt roller

when it started to roll over on an embankment. To avoid being crushed by the machine, plaintiff jumped off the equipment and suffered a right proximal tibia fracture. Defendant Mangum submitted to the Commission a report of injury to employee on 24 October 1995 and filed a Form 60 on 13 November 1995, admitting plaintiff's right to workers' compensation benefits for the 20 October 1995 injury.

Plaintiff underwent surgery on his right knee on 21 October 1995. Dr. Douglas R. Dirschl, plaintiff's treating physician and surgeon, released plaintiff from the hospital on 29 October 1995. Dr. Dirschl continued to follow plaintiff's progress and readmitted plaintiff to the hospital on 2 January 1996 to remove plaintiff's external fixator. Plaintiff began intensive physical therapy but did not gain any additional range of motion to his right knee. Plaintiff had surgery by Dr. Dirschl a second time on 2 May 1996. Intensive physical therapy continued until 5 June 1996. Dr. Dirschl stated in a letter dated 5 June 1996 to defendants' medical case manager, Debbie Rogers, R. N. (Rogers), that plaintiff had reached "maximal medical improvement." Dr. Dirschl outlined plaintiff's prognosis to Rogers and concluded that

> [b]ased on [plaintiff's] severe fracture with intra-articular extent and loss of bone, his severe stiffness, and his high potential for post traumatic arthritis, [plaintiff has] a 40% permanent partial impairment of the right leg. [Plaintiff] has many permanent work restrictions. These include: no lifting greater than 30 pounds; no standing for greater than 30 minutes at a time . . .; no climbing, stooping, or crawling; no squatting; and no carrying objects greater than 10 pounds. I believe [plaintiff] will be

> permanently unable to return to his present work."

Defendants responded to Dr. Dirschl's assessment of plaintiff's inability to return to his previous employment by providing copies of general job descriptions for positions of employment with defendant Mangum to Dr. Dirschl for his review. These general job descriptions were modified to accommodate Dr. Dirschl's specific restrictions concerning plaintiff's abilities. Dr. Dirschl sent a letter to Rogers on 2 July 1996 with his comments about Mangum's job descriptions and explaining his exceptions to the duties as presented by Mangum. Dr. Dirschl stated that if plaintiff was allowed to work within the prescribed modifications, then plaintiff would be able to return to work. The record shows plaintiff was not notified nor involved in any of these discussions, nor did he receive written copies of the modified job descriptions.

Plaintiff was asked to attend a meeting at defendants' office in July 1996. At this meeting defendants' representatives presented plaintiff with the modified job descriptions and asked him to return to work with Mangum. Plaintiff testified

> that particular morning, they told me that they had a job for me running a roller, and I told them that I was not going to work for C.C. Mangum anymore. And I said I was not going to work around heavy equipment anymore because I knew my limit - I knew what I was capable of doing. And that particular time, I did not want to go back out there to work. That particular day, I wore shorts. And I explained to them that I knew for myself that I could not have sat on that roller or on that paver and d[one] what they wanted me to do.

Following the meeting Jerry Evans (Evans), Mangum's risk and safety manager, informed Brenda Hammond (Hammond), St. Paul's claim supervisor for plaintiff's workers' compensation claim, that plaintiff refused to accept employment with Mangum. St. Paul filed a Form 24 with the Commission to terminate payment of compensation to plaintiff. According to Hammond's testimony, she contacted plaintiff and explained to him that because he had refused to return to work, she was obligated to begin the process to terminate his disability benefits and file the Form 24. During the conversation, Hammond offered to settle plaintiff's workers' compensation claim for $30,000.00. Hammond testified she explained to plaintiff that this $30,000.00 would be a full and final settlement or a clincher agreement.

Plaintiff attended a meeting at the law firm of the attorneys representing defendants and signed a clincher agreement on 12 August 1996. The clincher agreement was submitted to the Commission for review and approval.

Ronnie Rowell (Rowell), an Agency Legal Specialist for the Commission, was assigned to review the clincher agreement. Rowell testified that the clincher agreement was accompanied by the following documentation: (1) Form 19, Employer's Report of Injury; (2) Form 60, Employer's Admission of Employee's Right to Compensation; (3) Form 24, Application to Terminate or Suspend Payment of Compensation; and (4) medical documentation that was attached to the Form 24 outlining plaintiff's care since his injury and Dr. Dirschl's prognosis for plaintiff. A series of three

rehabilitation reports dated 13 April, 13 June and 15 July 1996 were not included in the clincher packet, although Hammond testified that defendants had these medical reports in their possession.

Rowell testified he had concerns about the clincher agreement; specifically, the forty percent disability rating to plaintiff's injured leg, that plaintiff had not returned to work, and that there had only been a ten-month period between the date of the compensable injury and the signing of the clincher agreement. Rowell contacted Jack Holmes, a private workers' compensation attorney who worked as a consultant for St. Paul Insurance and Rowell contacted plaintiff, who was not represented by counsel, to discuss his concerns regarding the clincher agreement. Rowell testified that during a telephone conversation with plaintiff, he explained plaintiff's workers' compensation rights and plaintiff affirmed that he understood his rights to compensation. Rowell testified that plaintiff confirmed that his financial situation as head of a household with an unemployed wife and three children, required that he sign the clincher agreement. Based upon this conversation, Rowell approved the clincher on 5 September 1996.

Plaintiff requested a hearing on 26 December 1996 before the Commission on the clincher agreement, stating that the clincher had been improvidently approved by the Commission. A deputy commissioner filed an opinion and award on 6 July 1998 denying plaintiff's motion to set aside the clincher. The deputy commissioner found that the "Industrial Commission approved the

voluntary settlement agreement only after a full investigation" and "[t]he rehabilitation reports submitted after the agreement was approved contained no additional or different information that would have caused the Commission not to approve the agreement." The deputy commissioner based her denial of plaintiff's motion to set aside the clincher on N.C. Gen. Stat. § 97-17 "because the competent evidence of record fails to support [plaintiff's] contention that the agreement was entered into due to fraud, misrepresentation, undue influence or mutual mistake." Plaintiff appealed from the opinion and award of the deputy commissioner to the Commission.

The Commission heard plaintiff's appeal and filed an opinion and award, with a dissent, on 2 July 1999 denying plaintiff's request to set aside the clincher agreement. Plaintiff appeals the decision of the Commission.

"[O]n appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court'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) (citing *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)).

Plaintiff argues several assignments of error. We first review plaintiff's argument that the Commission erred in failing to make findings of fact that it was undisputed that the full and complete rehabilitation records of St. Paul's assigned

rehabilitation nurse were not provided to the Commission at the time plaintiff's compromise agreement was submitted to the Commission for approval, as required by the rules of the Commission.

The deputy commissioner found as a fact in her 6 July 1998 opinion and award that "at the time that R. Rowell reviewed the Industrial Commission file, the rehabilitation reports generated during Ms. Rogers' handling of plaintiff's claim were not included in the file." Plaintiff cites the plain language of N.C. Gen. Stat. § 97-82 (1994), which states:

> If after seven days after the date of the injury, or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this Article, a memorandum of the agreement in the form prescribed by the Industrial Commission, *accompanied by a full and complete medical report, shall be filed with and approved by the Commission;* otherwise such agreement shall be *voidable by the employee* or his dependents.

(emphasis added). Based on the intent of N.C.G.S. § 97-82, the plaintiff contends that he may set aside the clincher agreement due to the incomplete medical record which accompanied the clincher when it was submitted to the Commission.

Our Supreme Court has held that under N.C.G.S. § 97-82 "[t]he Commission recognizes . . . two forms of voluntary settlements, namely, the compensation agreement in uncontested cases, and the compromise or 'clincher' agreement in contested or disputed cases." *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 430, 444 S.E.2d 191, 193 (1994). In *Pratt v. Central Upholstery Co.*, 252 N.C.

716, 720, 115 S.E.2d 27, 32 (1960), our Supreme Court stated that

> G.S. § 97-82 provides that the memorandum of agreement (form 21) submitted to the Commission for approval shall be 'accompanied by a full and complete medical report.' The Commission is not in a position to make a proper award, approve an agreement, until the extent of incapacity and permanent impairment, if any, are determined.

"The conclusion the agreement is fair and just must be indicated in the approval order of the Commission and must come after a full review of the medical records filed with the agreement submitted to the Commission." *Lewis v. Craven Regional Med. Cntr.*, 134 N.C. App. 438, 441, 518 S.E.2d 1, 3 (1999) (citing N.C.G.S. § 97-82(a) (Supp. 1998)) (agreement tendered to Commission must be "accompanied by a full and complete medical report").

As noted above, the plain language of N.C.G.S. § 97-82 requires that "a memorandum of agreement . . . [be] accompanied by a full and complete medical report." In addition, the North Carolina Industrial Commission's Workers' Compensation Rules state:

> No compromise agreement will be considered unless the following additional requirements are met:
>
> *All medical, vocational, and rehabilitation reports* known to exist, including but not limited to those pertinent to the employee's future earning capacity, *must be submitted with the agreement* to the Industrial Commission by the employer, the carrier/administrator, or the attorney for the employer.

Workers' Compensation Rules of the North Carolina Industrial Commission, Rule 502(3)(a) (2000 Ann. R.) (emphasis added).

Defendants argue that failure to comply with Rule 502 is not, in itself, a sufficient basis under N.C.G.S. § 97-17 to set aside a compromise agreement but cite no case law to support their assertion. Defendants further argue that N.C.G.S. § 97-17 requires a showing of "error due to fraud, misrepresentation, undue influence or mutual mistake" to set aside a compromise agreement. However, plaintiff is not requesting that the compromise agreement be set aside pursuant to any of these statutory factors and is not asserting that defendants committed fraud or misrepresentation when the 19 April, 13 June, and 15 July 1996 rehabilitation records of Rogers were omitted from the clincher agreement file upon its submission to the Commission. Plaintiff asserts that the omission of these records is a clear violation of the Commission's rule that "[a]ll medical, vocational, and rehabilitation reports known to exist . . . must be submitted with the agreement to the Industrial Commission" and without said reports, the compromise agreement should not even be considered.

Defendants also contend, as the Commission stated in its opinion, that when Rowell reviewed the medical documentation submitted with the clincher agreement that the omitted rehabilitation reports "basically confirm . . . the medical documentation that was submitted . . . [and] it would not have changed [Rowell's] decision at the time to approve the agreement." Defendants contend that since Rowell testified that the information contained in the omitted reports would not have affected his approval of the clincher agreement that there was no "unfairness

resulting from the error."

Our Courts have held that the Commission is required to follow statutory guidelines. *See Salaam v. N.C. Dept. of Transportation*, 122 N.C. App. 83, 468 S.E.2d 536 (1996) (Commission must stay within the guidelines of N.C.G.S. § 97-27 in admitting deposition materials); *Vernon v. Mabe*, 336 N.C. 425, 444 S.E.2d 191 (1994) (Commission must assure settlement in accord with N.C.G.S. § 97-29, 97-31); and *Glen v. McDonald's*, 109 N.C. App. 45, 425 S.E.2d 727 (1993) (Commission must follow the language of N.C.G.S. § 97-17 in setting aside an agreement). The language of N.C.G.S. § 97-82 and Rule 502(3)(a) of the N.C. Industrial Commission expressly states that the complete medical record must accompany a memorandum of agreement that is brought before the Commission for assessment and the Commission is required to follow the statutory requirements. Our holding supports the stated legislative intent of N.C.G.S. § 97-82 that "[t]his provision was inserted in the statute to protect the employees of the State against the disadvantages arising out of their economic status and give assurance that the settlement is in accord with the intent and purpose of the Act." *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953). The statutory language of N.C.G.S. § 97-82 is clear and requires that "a full and complete medical report, shall be filed with [an agreement]. . . otherwise such agreement shall be voidable by the employee[.]" We will not dilute the language of this statutory requirement by determining that the case before us is an exception to this mandate.

The unambiguous language of N.C.G.S. § 97-82 is that "[t]he memorandum of agreement, accompanied by a full and complete medical report, *shall* be filed with and approved by the Commission; otherwise such agreement *shall* be voidable by the employee or his dependents." (emphasis added). The statute does not permit the Commission's legal specialist to determine if the medical record is complete. Defendants admitted failing to provide necessary records to the Commission at the time the clincher agreement was submitted for approval. Rowell had no way of knowing he was looking at only part of the records available in this case and in the possession of defendants.

Our Court's review of Commission decisions is limited to a determination of "(1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law." *Beaver v. City of Salisbury*, 130 N.C. App. 417, 419, 502 S.E.2d 885, 887 (1998) (citing *Lowe v. BE&K Construction Co.*, 121 N.C. App. 570, 573, 468 S.E.2d 396, 397 (1996)). Therefore, "[t]his Court cannot substitute its judgment for that of the Commission." *Gay v. J.P. Stevens & Co.*, 79 N.C. App. 324, 325, 339 S.E.2d 490, 491 (1986). We acknowledge that the Commission may "weigh the evidence [presented to the deputy commissioner] and make its own determination as to the weight and credibility of the evidence." *Keel v. H & V Inc.*, 107 N.C. App. 536, 542, 421 S.E.2d 362, 367 (1992) (citing *Hobgood v. Anchor Motor Freight*, 68 N.C. App. 783, 785, 316 S.E.2d 86, 87 (1984)). However, the statutory guidelines,

which the Commission must follow, are not flexible rules to be determined by the Commission. The submission of the clincher agreement, without the full medical record, violates the plain language of N.C.G.S. § 97-82 and Rule 502 of the N.C. Industrial Commission. Accordingly, plaintiff has requested the clincher agreement be set aside. We reverse the decision of the Commission affirming the clincher agreement and hold that the clincher agreement is voidable by plaintiff pursuant to N.C.G.S. § 97-82. The opinion and award of the Commission is reversed and remanded.

Reversed and remanded.

Judges LEWIS and HORTON concur.

Report per Rule 30(e).