NO. COA09-377

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

WILLIAM BRATTAIN,
Employee,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. 588981

NUTRI-LAWN, INC.,
Employer,
NONINSURED,
Defendant.

Appeal by plaintiff from opinion and award entered 17 December 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 30 September 2009.

Hardison & Associates, by Benjamin T. Cochran and Karen Collins, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by James B. Black, IV, for defendant-appellee.

GEER, Judge.

Plaintiff William Brattain appeals from the Full Commission's opinion and award concluding that his employer was not equitably estopped from asserting N.C. Gen. Stat. § 97-24(a) (2009) as a bar to plaintiff's workers' compensation claim. Plaintiff argues that the Commission erred in finding that plaintiff did not rely on his employer's representation concerning the availability of workers' compensation. Based upon our review of the record, we hold that

evidence supported the Commission's finding regarding the lack of reliance, and, therefore, the Commission did not err in concluding that plaintiff's employer is not equitably estopped from asserting § 97-24(a) as a bar to plaintiff's claim. Consequently, we affirm.

Facts

Plaintiff, while employed by defendant Nutri-Lawn, Inc., a lawn treatment company, injured his back when lifting a bag of fertilizer at work on Friday, 1 August 2003. He testified that he initially took some aspirin for the pain, but the pain worsened by the time he went home. On Sunday night, 3 August 2003, plaintiff called defendant's owner, Michael McCollum, and told him he was in a lot of pain and could not work. As to whether plaintiff told McCollum that his pain was from a work-related accident, plaintiff claimed that he "mentioned some about it," but told McCollum that he "could explain more in detail when [he] saw him" in person. After the injury, plaintiff only returned to work for two days and then, due to pain, stopped reporting to work altogether. Plaintiff explained to McCollum that he was in pain, but he did not mention that his pain was work-related because, he testified, McCollum was angry and "didn't give [him] a chance to finish."

Although plaintiff stopped working for McCollum, they stayed in touch, and, over the next several months, they periodically spoke about plaintiff's health, with McCollum on 2 June 2004 writing plaintiff a check in the amount of $390.00 for accrued sick leave. At some point, during one of their conversations, McCollum

informed plaintiff that defendant did not carry workers' compensation insurance because defendant did not need it.

McCollum was under the mistaken impression that defendant did not need workers' compensation insurance based on a conversation with his insurance agent. He knew that defendant would have to be insured if it had three or more employees, but he did not realize that he and his wife — as owners of the business — were also considered employees.[1]

Plaintiff testified that he subsequently sought assistance from the Employment Security Commission, but he was informed that his injury would be covered by workers' compensation and not unemployment benefits. Plaintiff further testified that although he did not have any independent knowledge about workers' compensation, he knew he could call a lawyer. Accordingly, he contacted several attorneys seeking representation to assist him with a workers' compensation claim. He testified that when he told most of these attorneys that defendant did not have workers' compensation insurance, the attorneys were not interested in taking his case. Although the Full Commission found that plaintiff "was misinformed by one attorney who told plaintiff he had 3 years to file a workers' compensation claim," we note that the evidence shows plaintiff was informed he had three years to file a "civil" — not workers' compensation — claim.

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[1]Defendant was contacted by the Fraud Department of the Industrial Commission and paid a civil fine for its failure to carry workers' compensation insurance.

Eventually, sometime around December 2005, plaintiff talked to an attorney in Raleigh who instructed him to immediately contact the Industrial Commission. When plaintiff contacted the Industrial Commission, he was told to fill out a Form 18. Plaintiff filed the Form 18, along with a Form 33 request for hearing, on 22 December 2005, more than two years and four months after the date of injury. Defendant subsequently filed a motion to dismiss plaintiff's claim, asserting that plaintiff's claim was barred by N.C. Gen. Stat. § 97-24(a). The deputy commissioner dismissed plaintiff's claim without conducting an evidentiary hearing on 21 February 2006.

Plaintiff appealed the dismissal to the Full Commission on 23 May 2006. The Full Commission vacated the dismissal and remanded for the deputy commissioner to take evidence on the issue whether defendant was equitably estopped from denying plaintiff's claim. On remand, the deputy commissioner conducted an evidentiary hearing and issued an opinion and award concluding that defendant was equitably estopped from raising the two-year time limitation of § 97-24(a). Defendant then appealed to the Full Commission, which filed an opinion and award on 17 December 2008 reversing the deputy commissioner's opinion and award and dismissing plaintiff's workers' compensation claim as barred by § 97-24(a). Plaintiff timely appealed to this Court.

Discussion

There is no dispute that plaintiff's claim was untimely under N.C. Gen. Stat. § 97-24(a). The sole issue on appeal is whether

defendant is equitably estopped from relying on § 97-24(a) as a bar to plaintiff's recovery.

The Supreme Court has explained that "[a]ppellate review of an award from the Commission is generally limited to 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." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 40, 653 S.E.2d 400, 409 (2007). Under the Workers' Compensation Act, the Commission is "'the fact finding body'" and "'the sole judge of the credibility of the witnesses and the weight to be given their testimony.'" *Id.* at 40-41, 653 S.E.2d at 409 (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962); *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). "Thus, on appeal, appellate courts do '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.'" *Id.* at 41, 653 S.E.2d at 409 (quoting *Anderson*, 265 N.C. at 434, 144 S.E.2d at 274). "Reviewing courts do not function as appellate fact finders." *Id.*

In setting out this standard of review, we acknowledge that this Court has previously held that facts related to the issue of equitable estoppel are "*jurisdictional* facts" requiring de novo review. *Craver v. Dixie Furniture Co.*, 115 N.C. App. 570, 577, 447 S.E.2d 789, 794 (1994). This Court applied that principle in *Gore v. Myrtle/Mueller*, 178 N.C. App. 561, 631 S.E.2d 892, 2006 WL

1984642, *2, 2006 N.C. App. LEXIS 1749, *5 (2006) (unpublished) ("Findings of jurisdictional facts are not conclusive on appeal, even when supported by competent evidence."). The Supreme Court, however, in reversing this Court in *Gore*, applied the customary standard of review, upholding the Commission's decision because its pertinent finding was supported by competent evidence and was, therefore, binding. 362 N.C. at 39, 653 S.E.2d at 408. Accordingly, "we are bound to follow the Supreme Court's decision" and apply the customary standard of review here. *State v. Parker*, 140 N.C. App. 169, 172, 539 S.E.2d 656, 659 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 394, 547 S.E.2d 37, *cert. denied*, 532 U.S. 1032, 149 L. Ed. 2d 777, 121 S. Ct. 1987 (2001).

As a general matter, we note that the essential elements of equitable estoppel are "(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts." *Gore*, 362 N.C. at 39, 653 S.E.2d at 408. "There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply." *Id.* at 33, 653 S.E.2d at 405. With regard to a plaintiff asserting the defense of equitable estoppel, the plaintiff "must (1) lack the knowledge and the means of knowledge as to the real facts in question; and (2) have relied upon the conduct of the

party sought to be estopped to his prejudice." *Id.* at 39, 653 S.E.2d at 408.

Plaintiff's primary contention on appeal relates to this last element. He argues that the Commission erred in finding that he "did not rely on any statements made by defendant or Mr. McCollum regarding his workers' compensation claim." Rather, he insists, the evidence showed that he *did* rely on McCollum's statement about the availability of workers' compensation, that he was "lulled into a sense of security that he was proceeding properly," and that his seeking advice from the Employment Security Commission and attorneys did not change the fact of his reliance on McCollum's statement.

Our review of the record reveals, however, that the Commission's finding of fact is amply supported by competent evidence. On cross-examination of plaintiff, the following exchange occurred:

> Q: And so you didn't rely on anything that Mike McCollum might have told you in regards to your alleged incident?
>
> A: Well, I ---
>
> Q: You went to investigate yourself. Is that accurate?
>
> A: Well, if I asked the attorney for advice, I reckon you could say that.

Additionally, when asked why he waited to submit a Form 18, he admitted that he was "going by what attorneys told me. . . . I thought of attorneys like they were judges almost. . . . *I put all my trust in them*, you know." (Emphasis added.) Indeed, he

indicated that he waited to pursue his claim against defendant because, in part, he "was told [he] had three years," and so "[o]f course" he believed he had three years. Thus, despite plaintiff's contentions to the contrary, the record contains evidence supporting the Commission's finding that plaintiff "relied on the information provided to him by the attorneys to whom he spoke" and "did not rely on any statements made by defendant or Mr. McCollum regarding his workers' compensation claim."

We note in passing that although plaintiff, citing *Belfield v. Weyerhaeuser Co.*, 77 N.C. App. 332, 335 S.E.2d 44 (1985), argues that he was lulled into a false sense of security, the facts of this case are distinguishable from those of *Belfield*. In *Belfield*, 77 N.C. App. at 337, 335 S.E.2d at 47, this Court *upheld* the Commission's application of estoppel when the defendant's agent specifically assured the plaintiff that "she would 'take care of' the paper work[,]" the plaintiff was illiterate, and a previous claim by the plaintiff against the employer had been processed without his involvement. Although the plaintiff saw a lawyer, the lawyer was suggested and retained by the defendant, and the Court determined that the meeting with the lawyer did not disturb the plaintiff's reliance on the defendant's misrepresentation. *Id. See also Gore*, 362 N.C. at 29, 39, 653 S.E.2d at 402, 408 (applying estoppel where plaintiff filled out Form 18 with defendant's human resources worker, and human resources worker assured plaintiff that she would "'find out where it needs to go[,]'" but Form 18 was never submitted to Industrial Commission; upholding Commission's

finding of fact that plaintiff "was under the reasonable belief and reasonably relied on her perception that the forms would be properly filed"). In contrast to *Belfield* and *Gore*, plaintiff here had no assurance from defendant that he would be taken care of or that any claim would be processed on his behalf.

We believe this case is more similar to *Wall v. Macfield/Unifi*, 131 N.C. App. 863, 509 S.E.2d 798 (1998), and *Weston v. Sears Roebuck & Co.*, 65 N.C. App. 309, 309 S.E.2d 273 (1983), *disc. review denied*, 311 N.C. 407, 319 S.E.2d 281 (1984). *See Wall*, 131 N.C. App. at 866, 509 S.E.2d at 800 ("The defendants were not estopped from asserting a jurisdictional bar because plaintiff was not lulled into a false sense of security. Defendant employer never told plaintiff that they would file her workers' compensation claim; in fact, plaintiff was told that they would deny any claim she filed."); *Weston*, 65 N.C. App. at 311, 314-15, 309 S.E.2d at 275, 277 (not applying estoppel where plaintiff "'discussed the matter with one or more lawyers, none of whom had any authority to speak for defendant-employer'" and waited 10 years to file Form 18, thereby "affirmatively demonstrat[ing] that plaintiff was no longer relying on whatever promises or representations had been made to him by defendant").

As in *Wall*, defendant informed plaintiff that no workers' compensation would be available: McCollum "said there was nothing he was going to do to help." As in *Weston*, plaintiff discussed his claim with various lawyers, and his own testimony supports the Commission's view that he was not relying on McCollum's statement.

In conclusion, we hold that the only finding of fact challenged by defendant is supported by competent evidence. Further, the Commission's findings support its determination that defendant is not equitably estopped from asserting § 97-24(a) as a bar to plaintiff's claim. Under the applicable standard of review, we must affirm.

Affirmed.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).