NO. COA01-522

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

JOSEPH CLUNK,
Employee/Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. 943216

PFIZER, INC.,
Employer,

WAUSAU INSURANCE COMPANY,
Carrier/Defendants.

Appeal by plaintiff from order entered 15 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 January 2002.

James B. Gillespie, Jr. for plaintiff-appellant.

Hedrick, Blackwell and Criner, L.L.P., by Sherman Lee Criner and Jerry L. Wilkins, Jr., for defendant-appellee.

BIGGS, Judge.

Joseph Clunk (plaintiff) appeals an order of the Industrial Commission (Commission), denying his motion to set aside a workers' compensation settlement agreement. For the reasons that follow, we uphold the Commission.

The relevant facts are as follows: Plaintiff began his employment with Pfizer, Inc. (defendant) in 1977, in the company's security department. In June, 1989, plaintiff suffered a back injury that required medical treatment, including two surgical procedures. In January, 1990,

plaintiff and defendant executed an Industrial Commission Form 21, "Agreement for Compensation for Disability," after which plaintiff began receiving temporary total disability benefits. On 31 July 1990, about a year after his injury occurred, plaintiff's treating physician determined that plaintiff had reached maximum medical improvement, and was "entitled to a permanent partial disability of 15%" for the impairment of his back. Plaintiff's physician approved plaintiff's return to work, subject only to a weight lifting limit of 25 pounds.

In August, 1990, plaintiff met with defendant's Director of Human Relations, Herbert Metcalfe (Metcalfe), to discuss his return to work. Metcalfe informed plaintiff that defendant did not have any positions available at that time that met plaintiff's weight lifting restrictions. Metcalfe provided plaintiff with information about long-term disability benefits and social security benefits, and summarized plaintiff's responsibilities regarding the applications for these benefits in a letter to plaintiff. Thereafter, plaintiff decided (1) to apply for long-term disability insurance benefits rather than attempt to return to work for defendant, and (2) to settle his workers' compensation claim against defendant. An attorney for Wausau Insurance Company, defendant's workers' compensation insurance carrier, drafted an Agreement for Final Compromise Settlement and Release (the agreement). The agreement provided that plaintiff would receive a lump sum payment of $20,000, in return for a release of his workers' compensation claim against Defendant. The agreement also adopted the stipulation in the Form 21, that plaintiff's average weekly wages were $523.60, "subject to wage verification." Plaintiff signed the agreement in November, 1990. The agreement was approved by the Industrial Commission on 18 December 1990, and in January, 1991, plaintiff received the $20,000 settlement payment. In a letter to plaintiff dated March, 1991, Cigna, defendant's long term disability insurance carrier, state that the long-term disability payments would be offset by the

settlement payment, and that for this reason the long term disability payments would start in September, 1991.

Five years later, in March, 1996, plaintiff filed a motion to set aside the agreement. He alleged that the agreement was obtained by mutual mistake of fact, because the parties relied on a miscalculation of his average weekly wages when the agreement was drafted. Plaintiff also asserted that Metcalfe made misrepresentations about his eligibility for disability payments, and misrepresented to him that the lump sum payment of $20,000 could be set aside for his future use, because long term disability payments would begin immediately.

In November, 1996, the matter was heard before a deputy commissioner, who limited the testimony of both parties to evidence on the issue of mutual mistake. He issued an opinion in April, 1997, holding that the agreement was obtained by mutual mistake of fact and misrepresentation. Upon defendant's appeal, the case was heard before the Full Commission. In an opinion issued August, 1998, the Commission held that, because no evidence was presented of fraud, misrepresentation, undue influence, abuse of confidential relationship, or mutual mistake in the calculation of plaintiff's wages, any error in calculating plaintiff's weekly wages was an error of law, not of fact. The Commission also held that the deputy commissioner should not have reached the issue of misrepresentation without receiving more evidence. Accordingly, the Commission reversed the deputy commissioner, and remanded for the taking of more evidence.

On remand, the matter was heard before a second deputy commissioner, who issued an opinion in May, 1999. The opinion included, in pertinent part, the following:

> 1. At the time of the hearing . . . plaintiff was forty-three (43) years old. Plaintiff has a ninth grade education, as well as a GED, and has taken computer and business classes. . . .

. . . .

8. Plaintiff accepted an offer to settle his workers' compensation claim for $20,000.00 by an Agreement for Final Compromise Settlement and Release. Plaintiff read this Agreement, signed it, and accepted the check resulting from the approval of said Agreement.

. . . .

10. Plaintiff was satisfied with the amount and terms of the workers' compensation settlement. He was upset that the long term disability carrier considered the workers' compensation settlement to be considered as a credit against long term disability owed.

11. According to the testimony of plaintiff at the hearing, Mr. Metcalfe told him that the $20,000 would be given him in a lump sum and could be utilized for emergency medical care in the future. Mr. Metcalfe allegedly told plaintiff that he could put the $20,000 received from the Settlement Agreement in the bank for future medical treatment and that he could use the long-term disability benefits to cover the costs of daily living.

. . . .

14. Evidence before the undersigned reveals that plaintiff's average annual wage was $38,220 at all relevant times. As found as fact by the Full Commission, at the time the parties entered into the Form 21 Agreement and the "Clincher Agreement", both parties were operating under a mistake of law as to plaintiff's average weekly wage.

15. Herbert Metcalfe was deposed in this matter and the undersigned has carefully read and considered his testimony. Mr. Metcalfe denied telling the plaintiff that he could put the $20,000 lump sum payment in the bank and live off of his long term benefits.

. . . .

17. There is no clear and convincing evidence that plaintiff's testimony is truthful, and the testimony of Mr. Metcalfe is not. The undersigned finds that Mr. Metcalfe did not inform plaintiff that he could put the $20,000 lump sum in the bank and use the long term benefits for daily living. . . .

The deputy commissioner concluded that: (1) the calculation of plaintiff's weekly wage presented only a question of law; (2) plaintiff failed to prove by the greater weight of the evidence the existence of fraud, misrepresentation, undue influence, or abuse of a confidential relationship by defendant, and; (3) there was no basis to set aside the agreement. Plaintiff appealed this decision to the Commission. On 15 February 2001, the Commission issued an opinion affirming the deputy commissioner's conclusions that there had been neither mutual mistake of fact nor misrepresentation, and holding that there was no basis to rescind the agreement. Plaintiff appeals from this order.

Standard of Review

Appellate review of decisions of the Industrial Commission is "limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000) (citation omitted). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to support a contrary finding, *Hedrick v. PPG Industries*, 126 N.C. App. 354, 484 S.E.2d 853, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997), and the Commission is the sole judge regarding the credibility of witnesses and the strength of evidence. *Effingham v. Kroger Co.*, __ N.C. App. __, __ S.E.2d __ (filed 5 March 2002). However, the Commission's conclusions of law are reviewed *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

I.

Plaintiff argues first that the Commission erred by approving the compromise settlement agreement in 1991. He contends that the Commission did not fulfill its obligation to review the agreement prior to its approval. We disagree.

"Every compensation and compromise agreement between an employer and an injured employee must be determined by the Commission to be fair and just prior to its approval." *Lewis v. Craven Reg'l Med. Ctr.*, 134 N.C. App. 438, 441, 518 S.E.2d 1, 3 (1999) (overturning Industrial Commission's approval of agreement that did not include an "entry indicating it had conducted a fairness inquiry or otherwise determined the agreement to be fair and just"). Further, the Industrial Commission Rule 502(1) states:

> All compromise settlement agreements must be submitted to the Industrial Commission for approval. Only those agreements deemed fair and equitable and in the best interest of all parties will be approved.

Plaintiff contends that, had the Commission undertaken a "proper review" of the agreement, it would have found "significant irregularities" precluding approval of the agreement. Defendant, however, argues that plaintiff failed to preserve for appellate review the sufficiency of the Commission's review of the agreement. In this, defendant is correct; none of plaintiff's assignments of error address this issue as required by N.C.R. App. P. 10(a). However, in the interests of justice, and pursuant to our authority under N.C.R. App. P. 2, this Court will address the merits of plaintiff's argument. *State v. Gilmore*, 142 N.C. App. 465, 542 S.E.2d 694 (2001) (Court reviews issue, despite defendant's failure to preserve it for review).

In support of plaintiff's argument that the agreement was not "fair and just" and should not have been approved, he advances several claims, including: (a) defendant's failure to comply with the requirements of Industrial Commission Rule 502; (b) allegations that Metcalfe misrepresented relevant facts regarding plaintiff's eligibility for benefits and the terms of the

agreement, and (c)assertions that, had plaintiff refused to settle, he might have qualified for benefits under another provision of the workers' compensation act that would "potentially" have yielded a higher payment. We address these *seriatim*.

Plaintiff contends that the agreement failed to include biographical information required by Industrial Commission Rule 502, and further argues that the Commission's failure to identify this error demonstrates its lack of care in reviewing the agreement. However, plaintiff relies for this contention on a superceded version of Rule 502. Effective 1 January 1990, Rule 502 does not require the inclusion of plaintiff's age, educational and occupational background, etc., in cases where the plaintiff is not making a claim for total wage loss due to injury or occupational disease. The subject agreement was signed after 1 January 1990, and states that plaintiff "makes no claim for wage loss." Therefore, the omission of the biographical data from the agreement was not error, and, thus, the Commission's failure to reject the agreement on this basis does not suggest laxity in its review.

Plaintiff also asserts that Metcalfe made misrepresentations to him concerning the payment of long term disability benefits, and his eligibility for other benefits. The Commission had before it the testimony of both plaintiff and of Metcalfe regarding the issue of misrepresentation, and the resolution of the issue was a question of credibility. "The Commission is the sole judge of the credibility of a witness and the weight to be given to his testimony." *Jones v. Candler Mobile Village*, 118 N.C. App. 719,722, 457 S.E.2d 315, 318 (1995). In the instant case, the Commission found that "plaintiff failed to prove by the greater weight of the evidence that his decision to execute the Agreement . . . was error due to fraud, misrepresentation, undue influence, or abuse of a confidential relationship on the part of [the] defendants." We conclude that the Commission's findings in this regard are supported by

competent evidence, and thus are binding on appeal. Accordingly, plaintiff has not shown that this issue should have precluded the Commission's approval of the agreement, nor that it provides a basis to set the agreement aside.

Plaintiff also alleges that at the time that he signed the agreement he had "potentially more favorable options" for obtaining benefits, and that the Commission should not, therefore, have approved the compromise settlement agreement. We disagree.

Plaintiff correctly cites *Vernon v. Steven L. Mabe Builders*, 336 N.C. 425, 444 S.E.2d 191 (1994), for its holding that, where a claimant establishes his entitlement to choose between two disability payment options, "the employee qualifying for both [should] have the benefit of the more favorable one." Thus, the Commission should not approve a settlement agreement that provides for a claimant to accept the lesser of two remedies for which he qualifies. *Id.* at 431, 444 S.E.2d at 194.

In the instant case, the record does not establish plaintiff's entitlement to either of two disability payment options. Instead, the compromise settlement agreement states that defendant did not accept plaintiff's contention that his injury resulted in a permanent 15% disability to his back, but would nonetheless agree to a payment of $20,000 in return for plaintiff's relinquishment of any Workers' Compensation claims against defendant. The compromise settlement agreement reflects the resolution of this dispute between the parties. However, plaintiff now contends that, had he refused a compromise settlement agreement, he would have prevailed in a contested case, and would have qualified for one or more of the following: "temporary total disability benefits," according to plaintiff, payable under N.C.G.S. §97-30; "weekly compensation" based on a 15% disability rating of his back, calculated pursuant to N.C.G.S. §97-31; or "permanent total disability" payments under N.C.G.S. §97-29. He further

asserts that the payments due under this scenario would have greatly exceeded the amount of his settlement. On this basis, plaintiff argues that the Commission erred in upholding the compromise settlement agreement. Plaintiff thus invites this Court to speculate on the outcome of a hypothetical contested workers' compensation claim case, in order to determine whether the hypothetical award would exceed the settlement amount. This "would require us to engage in sheer speculation . . . [which] we may not do." *State v. McCollum*, 334 N.C. 208, 221-222, 433 S.E.2d 144, 151 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

The North Carolina Supreme Court has summarized the nature of a workers' compensation compromise agreement, and the Commission's obligation to review the agreement, as follows:

> A compromise is essentially an adjustment and settlement of differences. If there are no differences or uncertainties there is no reason for compromise. The law permits compromise settlements . . . provided they are submitted to and approved by the Industrial Commission[, and thus] . . . [protects] the employee [who compromises] . . . with respect to his injuries. The presumption is that the Industrial Commission approves [compromises] only after a full investigation and a determination that the settlement is fair and just.

Caudill v. Manufacturing Co., 258 N.C. 99, 106, 128 S.E.2d 128, 133 (1962). We conclude that the plaintiff has not presented evidence to overcome the presumption that the Commission's approval of the settlement agreement was based upon a "full investigation and determination." We further conclude that the Commission did not err in approving the compromise settlement agreement.

II.

Plaintiff argues next that the Commission erred by denying plaintiff's 1996 motion to rescind the agreement. Plaintiff contends that the agreement was founded upon a mutual mistake of fact regarding the amount of his average weekly wages. We do not agree.

Recision of a workers' compensation settlement agreement is governed by N.C.G.S. §97-17 (1999), which provides in pertinent part:

> . . . [N]o party to any agreement for compensation approved by the Industrial Commission shall . . . deny the truth of the matters [contained in the settlement agreement,] *unless* it shall be made to appear to the satisfaction of the Commission that *there has been error due to fraud, misrepresentation, undue influence or mutual mistake,* in which event the Industrial Commission may set aside such agreement. (emphasis added).

In the case *sub judice*, the parties executed an Industrial Commission Form 21, a form used to document an agreement for compensation for disability and set out the relevant details. In this form, the parties stipulated that plaintiff's average weekly wage was $523.60. The Form 21 also stated that the amount was "subject to wage verification"; however, there is no indication that the amount initially stated on the form was ever changed as the result of any subsequent wage verification. The settlement agreement adopted this stipulation regarding plaintiff's average weekly wage of $523.60. However, the parties did not include plaintiff's overtime hours in their calculation of plaintiff's weekly wage. Plaintiff contends that if overtime were included, his average weekly wage would have been $735, and further contends that this miscalculation was a mutual mistake of fact.

Assuming, *arguendo*, that the parties made an error in the calculation of plaintiff's weekly wages, such an error is a mistake of law, and not a mutual mistake of fact. *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 335-336, 484 S.E.2d 845, 848 (1997) (citations omitted) (computation of average weekly wages "requires application of the definition set forth

in [G.S. §97-2(5)], and the case law construing that statute and thus raises an issue of law, not fact"; therefore, an error in computation is not a mistake of fact). In *McAninch v. Buncombe County Schools*, 347 N.C. 126, 489 S.E.2d 375 (1997), the Commission upheld a workers' compensation form 21 agreement, finding it to be fair and equitable. However, this Court recalculated the amount of weekly wages. The North Carolina Supreme Court held:

> [T]he recalculation of plaintiff's average weekly wages by the Court of Appeals . . . constituted an improper contravention of the Commissions's fact finding authority[.]

McAninch, 347 N.C. at 131, 489 S.E.2d at 378.

> Because there is no evidence of fraud, misrepresentation, undue influence or abuse of a confidential relationship, *any mistake made by either or both of the parties to the Agreement in the computation of the 'average weekly wages' is not a basis for setting it aside*. (emphasis added)

Swain, 126 N.C. App. at 332, 484 S.E.2d at 848. Because it is a mistake of law, an alleged miscalculation of plaintiff's average weekly wages does not provide grounds for setting aside a workers' compensation settlement agreement "unless accompanied by fraud, misrepresentation, undue influence, or abuse of a confidential relationship." *Foster v. Carolina Marble and Tile Co.*, 132 N.C. App. 505, 509, 513 S.E.2d 75, 78 (upholding agreement to compensate plaintiff, although his injury was excluded by statute from workers' compensation coverage; Court holds that parties made mistake of law, which was not a basis to set aside agreement) *disc. review denied*, 350 N.C. 830, 537 S.E.2d 822 (1999) (citation omitted).

In the instant case, the Commission found no evidence of fraud, misrepresentation, undue influence, or abuse of a confidential relationship with regard to the calculation of plaintiff's average weekly wage, and therefore concluded that "both parties were operating under a mistake of law." We conclude that the Commission's findings were supported by the evidence, and that

these findings supported its conclusion, which were set forth in its opinion as a finding of fact, that the miscalculation was a mistake of law and did not provide a basis to overturn the agreement. Accordingly, this assignment of error is overruled.

III.

Plaintiff's final argument is that, even if the entire agreement is not set aside, the stipulated *amount* of his average weekly wage is "non conclusive as a matter of law," and thus may be recalculated if it is erroneous. However, the amount of average weekly wages may not be recalculated on appeal to correct a mistake of law. *See, e.g.*, *McAninch*, 347 N.C. at 131, 489 S.E.2d at 378 ("recalculation of plaintiff's average weekly wages" on appeal held "an improper contravention of the Commissions's fact-finding authority"); *Swain*, 126 N.C. App. 332, 484 S.E.2d 845 (error in wage calculation is mistake of law). This assignment of error is overruled.

Finally, we note that plaintiff submitted a Memorandum of Additional Authority in support of his assertion that the agreement was not fair and just. However, the sole authority thus presented to the Court is an unpublished opinion. Under N.C.R. App. P. 30(e)(3), "[a] decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered." "An unpublished opinion 'establishe[s] no precedent and is not binding authority.'" *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000) *(*quoting *United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 396, 485 S.E.2d 337, 339, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 37 (1997)). Further, the North Carolina Supreme Court's denial of discretionary review did not confer approval of the unpublished opinion. *See Insurance Co. v. Chantos*, 293

N.C. 431, 437, 238 S.E.2d 597, 602 (1977) (the "denial of certiorari . . . does not necessarily constitute approval of the reasoning or the merits of that decision").

For the reasons discussed above, we conclude that the Commission did not err in approving the compromise settlement agreement, nor in denying plaintiff's motion to rescind the agreement. Accordingly, the decision of the Commission is affirmed.

Affirmed.

Judges WALKER and Judge MCGEE concur.

Reported per Rule 30(e).