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NO. COA10-131

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

MICHAEL LIVINGSTON
Employee/Plaintiff

v.

From the Industrial Commission
I.C. File No. 815245

GOODYEAR RUBBER & TIRE CO.,
d/b/a/ KELLY SPRINGFIELD
TIRE CO., Employer;

TRAVELERS INSURANCE COMPANY,
Carrier;
Defendants.

Appeal by Plaintiff from Opinion and Award entered by the North Carolina Industrial Commission on 17 November 2009. Heard in the Court of Appeals 30 August 2010.

Leicht & Olinger, by Lynn A. Key, for plaintiff.

Cranfill Sumner & Hartzog, LLP, by Jaye E. Bingham and Nicole Dolph Viele, for defendants.

ERVIN, Judge.

Plaintiff appeals from an Opinion and Award of the Industrial Commission entered by Commissioner Bernadine S. Ballance, with the concurrence of Chair Pamela T. Young and Commissioner Danny L. McDonald, denying his request to set aside a previous Opinion and Award that approved a settlement between himself and Defendants Goodyear Rubber & Tire Co. d/b/a Kelly Springfield Tire Co., and Travelers Insurance Company predicated on the assertion that the

Settlement Agreement was invalid on the grounds of mutual mistake. After careful consideration of Plaintiff's challenges to the Commission's order in light of the record and the applicable law, we conclude that the Commission's decision should be affirmed.

I. Factual Background

Plaintiff began working for Defendant Kelly Springfield in 1971, when he was twenty-one years old. At the time of his alleged work-related injury, Plaintiff held a Tire Test Technician position. On 15 June 1996, Plaintiff claimed to have sustained a compensable low back injury when he lifted a large experimental truck tire in order to place it on a press pan. At an August 1996 visit, Dr. Bruce Jauffman, a neurosurgeon, diagnosed Plaintiff as having a "very large disc herniation" at the L4-5 level. Between August 1996 and April 1997, Plaintiff underwent lower back surgery on four occasions in order to address his lower back problem. After the last of these surgical procedures, Dr. Jauffman assigned Plaintiff a disability rating of thirty-four percent and concluded that he was "medically incapable of returning to his job" with Defendant Kelly Springfield.

Plaintiff submitted a claim for Workers' Compensation benefits, which Defendants denied. At the same time, Plaintiff sought long-term disability benefits pursuant to a group policy issued by Aetna and offered through Defendant Kelly Springfield. As a result of the fact that his claim for long-term disability benefits was allowed, Plaintiff began receiving such benefits on 1 June 1998. The long-term disability policy under which the

benefits received by Plaintiff were provided stated that, in the event that Plaintiff received a lump sum workers' compensation benefits payment, Aetna would be entitled to recoup any "part of the lump sum payment that is for disability."

During the summer of 1998, Plaintiff and Defendants attempted to negotiate a settlement of Plaintiff's workers' compensation claim. In the course of those negotiations, Defendants offered to settle Plaintiff's claim for \$42,500, which resulted in a discussion of the extent, if any, to which any decision on the part of Plaintiff to accept that offer would result in an effort by Aetna to obtain an off-set against the disability payments it had made to Plaintiff. By means of a letter dated 2 July 1998, Plaintiff's counsel notified Defendants of Plaintiff's eligibility for long-term disability benefits and indicated that Plaintiff would accept Defendants' settlement offer "assuming the disability carrier doesn't try to get the workers' compensation money." In replying to the 2 July 1998 letter from Plaintiff's counsel, Defendants' counsel stated that he could not "guarantee that the long term disability carrier will not attempt to recoup some of this settlement" while assuring Plaintiff's counsel that "[t]he folks at the plant and I will do everything possible to help Mr. Livingston if the long term disability carrier attempts to claim that this settlement is a payment under the Workers' Compensation Act." Subsequently, counsel for Defendants opined in a letter to Plaintiff's counsel that, "since this is a denied claim and none of the benefits are workers' compensation benefits," Aetna should not

be entitled to recoup any of the settlement proceeds while reiterating that Defendants could not guarantee that Aetna would not attempt to recoup a portion of the long-term disability benefits that Plaintiff received. On 21 September 1998, the parties executed a settlement agreement which the Commission approved on 28 September 1998.

Six years later, Aetna asserted the right to an off-set against the payment that Plaintiff received under the Settlement Agreement under the long-term disability benefits policy. According to Aetna, one-half of the \$42,500 settlement agreement constituted "other income" as defined in the long-term disability benefits policy so as to be subject to recoupment by means of a suspension of Plaintiff's long-term disability payments. Although Plaintiff challenged Aetna's recoupment decision, his efforts to prevent the off-set were unsuccessful.

On 16 March 2006, Plaintiff requested that a hearing be held for the purpose of determining whether the Settlement Agreement should be set aside pursuant to N.C. Gen. Stat. § 97-17 on the grounds that it had been procured through fraud, misrepresentation or mutual mistake. The issues raised by Plaintiff's filing were heard before Deputy Commissioner Victoria M. Homick on 17 December 2008. By means of an Opinion and Award dated 20 April 2009, Deputy Commissioner Homick denied Plaintiff's request to set aside the Settlement Agreement. Plaintiff noted an appeal to the Commission from Deputy Commissioner Homick's order.

In an Opinion and Award filed 17 November 2009, the Commission affirmed Deputy Commissioner Homick's decision. In its order, the Commission found as a fact that:

6. In approximately June 1998, plaintiff and his counsel, Mr. Perry, commenced settlement discussions regarding plaintiff's workers' compensation claim with Mr. Samuel H. Poole, Jr., then counsel for defendant.

7. In a letter to Mr. Poole dated July 2, 1998, plaintiff's counsel, Mr. Perry, advised defendant of plaintiff's eligibility for [long-term disability (LTD)] benefits. In the same correspondence, and in reply to defendant's settlement offer of \$42,500.00, plaintiff conveyed a conditional acceptance. The contingency of plaintiff's acceptance was set forth in counsel's letter as follows: "The \$42,500.00 is acceptable in princip[le] assuming the disability carrier doesn't try to get the workers' compensation money."

8. Mr. Perry testified that he received a copy of Aetna's LTD policy during settlement negotiations, and that he understood the terms and conditions. Mr. Perry acknowledged that[,] pursuant to the terms of the policy, Aetna was entitled to recover a percentage attributable to disability compensation benefits.

9. On July 9, 1998, defense counsel forwarded to plaintiff's counsel a proposed compromise settlement agreement. Addressing the contingency in plaintiff's July 2, 1998 letter, namely that the "disability carrier doesn't try to get the workers' compensation money," defense counsel wrote in his cover letter as follows:

. . . I cannot guarantee that the long term disability carrier will not attempt to recoup some of this settlement. The folks at the plant and I will do everything possible to help Mr. Livingston if the long term disability carrier attempts to claim

that this settlement is a payment under the Workers' Compensation Act.

10. Since defendants could not offer plaintiff assurance that Aetna would not attempt to obtain any proceeds from the settlement, the contingency of plaintiff's acceptance could not be met. Thus, no settlement agreement was reached at that point in time.

11. On July 17, 1998, defense counsel sent a follow-up letter to plaintiff's counsel on whether the LTD carrier would be entitled to off-set its payment of benefits to plaintiff against any workers' compensation claim settlement. As noted below, defendants also expressed their opinion that an off-set should not be allowed.

As we briefly discussed, the employer has indicated to me that the issue you raised was investigated and, since this is a denied claim and none of the benefits are workers' compensation benefits, there should not be an off-set. We cannot guarantee that Aetna will not pursue this matter, but we believe that an offset should not be allowed.

12. Mr. Perry testified that he and Mr. Poole discussed the possibility that Aetna could seek an offset of any settlement reached and that he and Mr. Poole would work to draft the language for the settlement agreement in such a way as to minimize the risk of an off-set. Mr. Perry testified that he understood there were no guarantees that Aetna would not take an off-set; however, he and Mr. Poole worked together to minimize that possibility.

13. In letters dated July 9, 1998, and July 17, 1998, Mr. Poole informed Mr. Perry that[,] although the proposed settlement agreement provided that the benefits should not be construed as workers' compensation benefits, and he and the defendant-employer felt and hoped Aetna would not take an off-set, he could not guarantee it. At hearing, plaintiff testified that he had received a

copy [of] Mr. Poole's July 17, 1998 letter. Mr. Poole testified that[,] regardless of their intent or the settlement agreement language, defendant-employer could not control Aetna's decision to take an off-set.

14. Mr. Rodney Jennings, the workers' compensation manager for defendant-employer also testified that defendant-employer has no influence over Aetna's interpretation or application of the long-term disability policy provisions, and could not instruct or recommend whether Aetna should take an off-set in a workers' compensation settlement. Rather, he noted such decisions are within Aetna's sole discretion. . . .

15. Mr. Perry testified he informed plaintiff that[,] despite all the precautionary measures taken in drafting the settlement agreement, there was still a risk Aetna would take an off-set. Knowing that an off-set could be a possibility, plaintiff nonetheless signed the settlement agreement.

16. Plaintiff testified he had no direct or indirect contact with defendant-employer or defendant-carrier after his workers' compensation claim was filed or during settlement negotiations. He stated that neither the defendant-employer nor defendant-carrier said anything to influence him to enter the settlement agreement. Plaintiff testified that Mr. Perry was the only person with whom he spoke about whether the settlement agreement would impact his long-term disability benefits.

17. On August 12, 1998, Mr. Perry requested that Mr. Poole revise the proposed settlement agreement to include social security language; however, he did not request any revisions with regard to long-term disability.

18. After months of negotiating and numerous revisions to the agreement, plaintiff and defendants executed a settlement agreement for \$42,500.00, which was signed by plaintiff on September 21, 1998 and approved by the Industrial Commission on September 28, 1998.

19. In pertinent part, the agreement provided, "Whereas, the parties acknowledge that this is a compromised settlement of a strongly contested matter and that the payments made pursuant to this agreement should not be considered a payment of workers' compensation benefits as these funds may be used for vocational retraining or any number of other items and should not be presumed to be benefits under the Workers' Compensation Act."

20. Plaintiff testified that he read the settlement agreement prior to signing it. Mr. Perry testified that plaintiff was still willing to accept the settlement knowing that Aetna could take an off-set.

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23. Although the parties hoped that Aetna would not take an off-set against plaintiff's workers' compensation settlement, and even believed it was not entitled to do so, there is no evidence of fraud, misrepresentation or undue influence on the part of defendant to justify setting aside the compromise settlement agreement. Furthermore, there is no evidence of mutual mistake of fact to warrant setting aside the agreement.

24. Based on the competent evidence of record, the Full Commission finds that the compromise settlement agreement signed by plaintiff on September 21, 1998, and approved by the North Carolina Industrial Commission on September 28, 1998 was not procured by fraud, misrepresentation, undue influence or any other conduct by defendant, nor was there evidence of mutual mistake of fact.

Based upon these findings of fact, the Commission concluded as a matter of law that:

1. In order for a party to set aside a compromise settlement agreement, the moving party has the burden of proving that there has been error due to fraud, misrepresentation, undue influence, or mutual mistake. A settlement agreement may be overturned only in cases where there is evidence that there has

been fraud, misrepresentation, undue influence, or mutual mistake. N.C. Gen. Stat. §97-17(a); *Glenn v. McDonald's*, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

2. In the present case, plaintiff has failed to show that the compromise settlement agreement signed by plaintiff on September 21, 1998, and approved by the North Carolina Industrial Commission on September 28, 1998 was procured by fraud, misrepresentation, undue influence, or mutual mistake and therefore, shall not be set aside. N.C. Gen. Stat. §97-17(a); *Glenn v. McDonald's*, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

As a result, the Commission denied "Plaintiff's claim to set aside the compromise settlement agreement." Plaintiff noted an appeal to this Court from the Commission's order.

II. Legal Analysis

A. Standard of Review

"The standard of appellate review of an opinion and award of the Industrial Commission is well-established." *Aaron v. New Fortis Homes, Inc.*, 127 N.C. App. 711, 714, 493 S.E.2d 305, 306 (1997). Appellate review of a Commission decision is limited to determining whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004). The Commission's findings of fact "are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding." *Murray v. Associated Insurers, Inc.*, 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995). The 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).

B. Mutual Mistake

On appeal, Plaintiff contends that the Commission erroneously found that "there is no evidence of mutual mistake of fact to warrant setting aside the" settlement agreement.¹ In essence, Plaintiff argues that the Commission misapplied controlling legal principles because, having found that the parties believed that Aetna would not and could not take an off-set against plaintiff's worker's compensation settlement, it was obligated to set aside the Settlement Agreement on the grounds of mutual mistake. Plaintiff's assertion lacks merit.

The North Carolina Workers' Compensation Act permits employers and employees to execute settlement agreements consistent with applicable law and subject to approval by the Industrial Commission. N.C. Gen. Stat. § 97-17(a) (2003). A Commission-approved settlement agreement may only be set aside on the basis of fraud, misrepresentation, undue influence, or mutual mistake of fact. N.C. Gen. Stat. § 97-17(a). According to general principles of contract law, which are applicable to agreements settling workers' compensation claims, *Lemly v. Colvard Oil Co.*, 157 N.C. App. 99, 103, 577 S.E.2d 712, 715 (2003) (stating that settlement

¹ Although both parties have treated the challenged Commission determination as a finding of fact, we are not convinced that they have categorized this portion of the Commission's order correctly. However, given that the essential issue before us, which is whether the historic facts found by the Commission support its determination that the parties did not labor under a mutual mistake of fact at the time that they entered into the Settlement Agreement, would be the same regardless of how we elected to categorize the language in question, we need not resolve the issue of whether the challenged "finding of fact" is actually a conclusion of law in order to decide this case.

agreements in workers' compensation cases are "governed by general principles of contract law"), "[a] mutual mistake of fact is a mistake 'common to both parties and by reason of it each has done what neither intended.'" *Swain v. C & N Evans Trucking Co.*, 126 N.C. App 332, 335, 484 S.E.2d 845, 848 (1997) (quoting *Marriott Financial Services, Inc. v. Capitol Funds*, 288 N.C. 122, 135, 217 S.E.2d 551, 560 (1975)). In order to justify granting relief from a contract on the basis of mutual mistake, the mistaken fact upon which the tribunal relies must be "'of an existing or past fact which is material'" and "'which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement. . . .'" *Howell v. Waters*, 82 N.C. App. 481, 486, 347 S.E.2d 65, 69 (1986), *disc. review denied*, 318 N.C. 694, 351 S.E.2d 747 (1987) (quoting *MacKay v. McIntosh*, 270 N.C. 69, 73, 153 S.E.2d 800, 804 (1967)). On the other hand, a "mistake in prophecy, or in opinion, or in belief relative to a future event . . . is not such a mutual mistake" that warrants setting aside a settlement agreement. *Caudill v. Manufacturing Co.*, 258 N.C. 99, 103, 128 S.E.2d 128, 131 (1962). In *Caudill*, the Court upheld a settlement agreement despite the fact that the plaintiff's injuries turned out to be more serious than they were originally understood to be because "it [was] clear that the parties were contracting with reference to future uncertainties and were taking their chances as to future developments" and because their error as to the extent of the plaintiff's injuries did not involve a fact that existed "at the time the compromise settlement was made and approved."

Caudill, 258 N.C. at 106, 128 S.E.2d at 133. See also *N.C. Monroe Construction Co. v. North Carolina*, 155 N.C. App. 320, 332, 574 S.E.2d 482, 489 (2002), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 370 (2003) (rejecting a mistake of fact defense because the State's ability to transfer decision-making authority to another agency at a subsequent time was "the type of 'future event' that does not support a claim of mutual mistake of fact"). Moreover, an error concerning the legal consequences of an agreement does not constitute a mutual mistake of fact sufficient to justify relieving a party from the necessity to honor its contractual obligations. *Mims v. Mims*, 305 N.C. 41, 61, 286 S.E.2d 779, 792 (1982) (stating that "[t]he parties' mistake as to the legal consequences of naming them both as grantees . . . is not the kind of mistake for which reformation of the instrument may be granted").

In this case, Plaintiff contends that the parties to the settlement agreement were mutually mistaken as to whether the long-term disability insurance carrier from whom Plaintiff had received benefit payments would pursue an off-set from the settlement proceeds and, if such an effort were to be made, whether it would prove successful. According to Plaintiff, both parties entered into the Settlement Agreement on the understanding that no such off-set would occur. However, the Commission's factual findings, none of which have been challenged on appeal as lacking sufficient evidentiary support and which are, for that reason, binding upon us for purposes of deciding Plaintiff's challenge to the Commission's order, *Estate of Gainey v. Southern Flooring & Acoustical Co.*, 184

N.C. App. 497, 501, 646 S.E.2d 604, 607) (2007) (stating that, "[e]xcept for jurisdictional questions, failure to assign error to the Commission's findings of fact renders them binding on appellate review") (citing *Cornell v. Western & S. Life Ins. Co.*, 162 N.C. App. 106, 110-11, 590 S.E.2d 294, 297 (2004), demonstrate that, at the time they entered into the Settlement Agreement, all parties were aware that Plaintiff's long-term disability insurance policy gave Aetna the right to seek recoupment of any "part of the lump sum payment that is for disability." In addition, the Commission's findings demonstrate that all parties knew that there were no guarantees as to whether any recoupment attempt by Aetna would be successful. On 2 July 1998, Defendant's counsel wrote to Plaintiff's counsel that he could not "guarantee that the long term disability carrier will not attempt to recoup some of this settlement." Defendant's counsel reiterated this statement on 17 July 1998 by writing to Plaintiff's counsel that "[w]e cannot guarantee that Aetna will not pursue this matter, but we believe that an offset should not be allowed." Finally, Plaintiff's counsel testified that his client accepted the Settlement Agreement despite knowing that Aetna might attempt to obtain an off-set from the settlement proceeds. As a result, the Commission's findings clearly establish that the parties, while sharing the belief that an off-set would be inappropriate, knew that there was some risk that Aetna would, in fact, succeed in recouping a portion of the settlement proceeds. Although the parties attempted to dissuade Aetna from pursuing an off-set against the settlement proceeds by

including language in the Settlement Agreement expressly stating that the settlement payment did not constitute workers' compensation benefits and although Defendants agreed to assist Plaintiff in resisting any off-set claim that Aetna might advance, the Commission's findings of historic fact clearly establish that the parties did not enter into the Settlement Agreement without recognizing the possibility that Aetna might prevail in the event that it asserted an off-set claim. As a result, contrary to Plaintiff's contention, the parties' belief that Aetna would not attempt to obtain an off-set and that any such effort would fail constitutes a "'future event' that does not support a claim for mutual mistake of fact," *N.C. Monroe Construction Co.*, 155 N.C. App. at 332, 574 S.E.2d at 489, rather than a mutual mistake of fact sufficient to justify setting the Settlement Agreement aside. Thus, the Commission did not err when it denied Plaintiff's request for relief from the Settlement Agreement on the grounds of mutual mistake.²

² Alternatively, Plaintiff argues that, to the extent that the Commission's finding that he signed the Settlement Agreement "knowing that an off-set could be a possibility" constituted a determination that he assumed the risk of a mistaken fact in accordance with the principles outlined in *Roberts v. Century Contr'rs, Inc.*, 162 N.C. App. 688, 692-93, 592 S.E.2d 215, 219 (2004), the Commission erred in making that determination because "there is no evidence . . . establishing [that] the parties entered into any agreement that allocated to plaintiff any risk of the LTD carrier being entitled to take any portion of the settlement proceeds as an offset;" that "plaintiff did not enter into the settlement agreement with limited knowledge of the facts regarding the LTD carrier's entitlement, or lack thereof, to an offset;" and that "there exists no circumstance in this case that would make it reasonable for the Commission to allocate to plaintiff any risk of forfeiture of the settlement proceeds to the LTD carrier as an offset." However, the finding in question does not constitute a

III. Conclusion

Thus, for the reasons set forth above, we conclude that the Commission did not err in concluding that the parties' beliefs concerning the likelihood and appropriateness of a future off-set against the proceeds of the parties' settlement arising from Aetna's rights under the long-term disability policy applicable to Plaintiff did not suffice to demonstrate the existence of a mutual mistake sufficient to support a decision setting aside the Settlement Agreement. As a result, the Commission's order should be, and hereby is, affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge STROUD concur.

Report per Rule 30(e).

discussion of the allocation of risk of the type contemplated in *Roberts*. Instead, it is nothing more than a recognition that both parties, including Plaintiff, entered into the Settlement Agreement with full awareness that Aetna might attempt to obtain an off-set against the settlement proceeds, a fact which is highly relevant to a determination of whether the parties entered into the Settlement Agreement while subject to a mutual mistake of fact.