

Mauretic - affirm  
Bunn  
Bolch

NO. COA99-456

NORTH CAROLINA COURT OF APPEALS

Filed: 18 January 2000

FILED  
00 JAN 18 AM 7:06  
IN THE COURT OF APPEALS  
CLERK COURT OF APPEALS  
OF NORTH CAROLINA

KITTY PETTY GOUGE,  
Employee-Appellee

v.

North Carolina  
Industrial Commission  
Nos. 309974 and 618453

JOAN FABRICS CORPORATION,  
Employer-Appellant, and

HEWITT, COLEMAN & ASSOCIATES, INC.,  
Third-Party Administrator-Appellant

Appeal by Defendant from Amended Opinion and Award for the Full Commission filed 25 February 1999. Heard in the Court of Appeals 28 December 1999.

*Randy D. Duncan for employee-appellee.*

*Tate, Young, Morphis, Bach & Taylor, LLP, by Paul E. Culpepper, for employer-appellant.*

WYNN, Judge.

The defendant Joan Fabrics Corporation appeals from an Opinion and Award of the North Carolina Industrial Commission which reversed a deputy commissioner's order reducing the compensation benefits due to plaintiff Kitty Gouge under a Form 21 agreement and awarding the defendant an offset for past overpayments. We affirm the Full Commission's award.

On 6 January 1993, the plaintiff became disabled from work-related bilateral carpal tunnel syndrome on 6 January 1993, while working as a creeler. On 12 April 1993, the Commission approved the parties' Form 21 agreement instituting temporary total

disability benefits. The agreement stipulated to an average weekly wage of \$360.02 and corresponding weekly benefits of \$240.03.

After undergoing corrective surgery, the plaintiff returned to work as a loom inspector until 21 November 1995, when her carpal tunnel syndrome again left her unable to perform her job. Under the Form 21 agreement, the defendant resumed payment of temporary total disability benefits effective 21 November 1995.

In 1996, the plaintiff filed a claim with the Commission, seeking as a new date of onset 21 November 1995. The parties stipulated prior to the hearing, "[t]he only issue for determination in this matter is whether there should be a new date of onset of November 21, 1995." They also agreed that the Commission would determine the plaintiff's average weekly wage using Form 21.

The deputy commissioner found that the plaintiff's loom inspector duties did not place her at an increased risk of developing carpal tunnel syndrome and was not a causal factor in her condition. He issued an order denying the plaintiff's claim. In addition, the deputy commissioner found that the plaintiff's average weekly wage on 6 January 1993 was \$208.39, yielding a compensation rate of \$138.93. Therefore, he ordered the plaintiff's weekly benefits be reduced to \$138.93 beginning 21 November 1995, with the defendant entitled to an offset of \$101.10 per week for the period from 21 November to the date of the order.

The plaintiff appealed to the full Commission, which affirmed the denial of the plaintiff's claim for a new date of onset but

reversed the deputy commissioner's reduction of benefits. The Commission found insufficient evidence in the record to justify setting aside the Form 21 agreement for fraud, misrepresentation, undue influence or mutual mistake under N.C. Gen. Stat. § 97-17 (1991).

This appeal followed.

---

On appeal, the defendant argues that the Commission erred in finding insufficient evidence of mutual mistake or fraud to set aside the Form 21 agreement. In the alternative, the defendant asserts that the parties' pre-trial stipulation in the 1996 date-of-onset proceeding altered the terms of the Form 21 agreement, authorizing the Commission to recalculate plaintiff's average weekly wage and benefits.

"It is well settled that '[a]n agreement for the payment of compensation when approved by the Commission is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal.'" *McAninch v. Buncombe County Schools*, 347 N.C. 126, 132, 489 S.E.2d 375, 379 (1997) (quoting *Tucker v. Lowdermilk*, 233 N.C. 185, 188, 63 S.E.2d 109, 111 (1951)) (alteration in original). Under N.C. Gen. Stat. § 97-17, the Commission may set aside such an agreement only upon a showing "to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake[.]"

In the instant case, the defendant points to the inflated wage

amount contained in the Form 21 agreement as evidence of either mutual mistake by the parties or fraud by plaintiff. We rejected a similar argument in *Swain v. C & N Evans Trucking Co.*, 126 N.C. App. 332, 335-36, 484 S.E.2d 845, 848 (1997).

In *Swain*, this Court found that a miscalculation of an employee's average weekly wage was a mistake of law, rather than fact, and was not a proper basis for disturbing a Form 21 agreement. *Id.* Even assuming the error was a mistake of fact, the *Swain* Court concluded that the employer could not complain of the error, because it had filled out the challenged Form 21. *Id.* The court found no basis in equity to relieve an employer from the consequences of its own negligence. *Id.* We reach the same conclusion here.

The defendant is bound by the agreement that it prepared in 1993. Moreover, the plaintiff's signing of the Form 21 agreement and receipt of benefits thereunder are wholly insufficient to show that the agreement was secured by fraud.

We find no merit to the defendant's claim that the parties pre-trial agreement in the 1996 date-of-onset proceeding modified the terms of their Form 21 Agreement. The stipulation authorized the Commission to calculate the plaintiff's average weekly wage for purposes of the new date of onset. Because the Commission found no new onset date, there was neither occasion nor legal basis under N.C. Gen. Stat. § 97-17 for a recalculation of plaintiff's benefits. Therefore, the Commission did not err.

Affirmed.

-5-

Judges MARTIN and SMITH concur.

Report per Rule 30(e).