

Reversed + Remanded  
Chair, Sellers  
Concurring:  
Riggsbee  
Mavretic

NO. COA00-565

NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2001

BRENDA TURNER BIVENS,  
Employee-Plaintiff,

v.

DELTA WOODSIDES/DELTA MILLS,  
Employer-Defendant,

and

LIBERTY MUTUAL INSURANCE COMPANY,  
Carrier-Defendant.

North Carolina  
Industrial Commission  
I.C. File No. 164471

Appeal by defendants from opinion and award entered 6 January 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 March 2001.

Morris York Williams Surles & Barringer, LLP, by Kelly F. Miller and G. Lee Martin, for defendant appellants.

Randy D. Duncan for plaintiff appellee.

McCULLOUGH, Judge.

On 26 July 1991, plaintiff sustained a compensable injury to her back, which required an L5-S1 diskectomy and fusion surgery in October 1992. Plaintiff timely filed her workers' compensation claim, and her case was first heard on 28 June 1994 by a Deputy Commissioner of the North Carolina Industrial Commission. During the hearing, plaintiff presented evidence that her back pain was initially relieved by the October 1992 surgery, but that the pain returned and worsened a few months later. Plaintiff also provided

medical evidence which revealed that her ongoing pain problems were caused by an accumulation of scar tissue at the surgery site. The Deputy Commissioner awarded plaintiff temporary total disability benefits pursuant to N.C. Gen. Stat. § 97-29 (1999), as well as permanent partial disability benefits pursuant to N.C. Gen. Stat. § 97-31.

Defendants appealed the Deputy Commissioner's award. In an opinion and award dated 26 March 1996 (and based mainly on evidence from the 1994 hearing), the Full Commission awarded plaintiff temporary total disability benefits from 12 September 1992 to 2 November 1993 and determined that plaintiff reached her maximum medical improvement on 2 November 1993. In addition to awarding plaintiff temporary total disability benefits, the Industrial Commission found a 5 percent permanent partial disability of plaintiff's back and awarded her permanent partial disability benefits. The Commission also found that plaintiff failed to demonstrate she had conducted a sufficient job search. Based upon this finding, the Industrial Commission declined to award ongoing temporary total disability benefits.

One month later, on 25 April 1996, plaintiff filed a Form 33 Request for Hearing with the Industrial Commission. The Form 33 alleged that "[s]ince [the] June 26, 1994 hearing employee's condition has substantially changed/worsened and employee has been unable to work." Plaintiff also requested additional workers' compensation benefits. The Commission thereafter scheduled a hearing for plaintiff before a Deputy Commissioner.

Plaintiff participated in a second workers' compensation hearing on 25 April 1997, the main issue being whether there had been a substantial "change of condition" warranting modification of her award. Plaintiff testified on her own behalf and also presented deposition testimony from several of her doctors. Plaintiff testified that she underwent pain treatment with Dr. Francisco Naveira from 20 May 1994 to 14 August 1995. Dr. Naveira's deposition reveals that, overall, plaintiff's condition neither progressed nor worsened while he treated her. Plaintiff indicated that Dr. Naveira recommended a dorsal column stimulator for her back, but that defendants refused and failed to provide it. By 12 September 1995, Dr. Naveira increased plaintiff's disability rating to 20 percent of her whole person.

In the fall of 1996, after nearly two years of unemployment, plaintiff worked for a short time as a waitress at two restaurants, but quit due to her increased back and leg pain. Dr. Naveira noted plaintiff's increased pain complaints in December 1996, but continued to encourage plaintiff to engage in some form of activity. Plaintiff was also diagnosed with mild arthritis in her back due to her 1992 surgery.

Plaintiff then began seeing Dr. Jason Greenberg, a neurologist, on 29 November 1996 and continued to see him through 24 September 1997. He noted that she complained of pain and he diagnosed her with failed back syndrome and depression. He believed plaintiff was capable of working, though he did place plaintiff on "no work" status from 29 November 1996 to 1 February

1997 in response to plaintiff's complaints of pain.

Plaintiff began seeing Dr. Alfred Rhyne on 22 April 1998. Dr. Rhyne testified that plaintiff's first operation produced scar tissue, which in turn caused her pain. On 2 June 1998, Dr. Rhyne performed an L5-S1 diskectomy and fusion surgery on plaintiff to repair the damage caused by the first procedure in 1992. Though Dr. Rhyne agreed plaintiff could not work right after the surgery, he did believe plaintiff could return to work in six to eight months.

Based upon all the evidence, the Deputy Commissioner found a substantial change of condition and awarded plaintiff ongoing temporary total disability benefits pursuant to N.C. Gen. Stat. § 97-29. The Deputy Commissioner also awarded a 25 percent attorney's fee, all reasonable medical expenses, and costs. The opinion and award were entered on 5 November 1998, and both parties timely appealed to the Full Commission. On 6 January 2000, the Full Commission adopted the Deputy Commissioner's opinion and award, with minor modifications. Following entry of the Full Commission's opinion and award, defendants appealed.

#### Proof of Substantial "Change of Condition"

Our review of an opinion and award from the Industrial Commission is limited to two issues. We must first determine whether there is any competent evidence in the record which supports the findings of fact made by the Commission. We must then determine whether those findings of fact justify the Commission's conclusions of law. *Saums v. Raleigh Community Hospital*, 346 N.C.

760, 765, 487 S.E.2d 746, 750-51 (1997); *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). The Industrial Commission's conclusions of law, however, are subject to de novo review by this Court. *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996), *aff'd*, 352 N.C. 668, 535 S.E.2d 33 (2000). The Deputy Commissioner's finding that plaintiff has proven a substantial change of condition under N.C. Gen. Stat. § 97-47, now adopted by the Full Commission, is a question of law subject to de novo review by this Court. *Id.*

Defendants argue that the Industrial Commission erred in finding there was sufficient competent evidence to show that plaintiff sustained a substantial change of condition under N.C. Gen. Stat. § 97-47 that entitles her to continuing temporary total disability benefits. We agree with defendants.

N.C. Gen. Stat. § 97-47 (1999) states that

[u]pon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award. No such review shall affect such award as regards any moneys paid but no review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

A substantial change of condition is "a substantial change in

[a claimant's] physical capacity to earn wages, occurring after a final award of compensation, that is different from that existing when the award was made." *Bailey v. Soars Roebuck & Co.*, 131 N.C. App. 649, 654, 508 S.E.2d 831, 835 (1998).

A substantial change of condition may be proved in one of three ways. First, a claimant can provide evidence showing a change in her physical condition that impacts her earning capacity. Second, a claimant can provide evidence showing a change in her earning capacity even though her physical condition remains unchanged. Finally, a claimant can provide evidence showing a change in the degree of disability even though her physical condition remains unchanged. *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996).

It should be noted that "'a continued incapacity of the same kind and character and for the same injury is not a change of condition[.]'" *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 104, 360 S.E.2d 109, 114 (1987) (quoting *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 103-04, 296 S.E.2d 456, 459 (1982)). Since plaintiff's evidence was essentially a repetition of her previous presentations of evidence, and since her injury did not actually worsen, we hold that plaintiff did not prove a substantial change of condition under any of the three methods discussed above.

The Commission made the following pertinent findings of fact:

2. By Form 33 dated 25 April 1996, plaintiff has alleged a substantial change of condition since the 26 June 1994 hearing and

requested additional compensation and medical treatment.

3. Before filing the Form 33, plaintiff requested that defendants approve further medical treatment but it was not authorized.

\* \* \* \*

12. Since the 28 June 1994 hearing, plaintiff's pain in her back and down her leg has intensified over time. Moreover, plaintiff's level of pain is real and she is not malingering. As of 29 November 1996, plaintiff's pain had substantially worsened and as a result she sustained a substantial change of condition when she was taken out of work by Dr. Greenberg.

13. Plaintiff has failed back syndrome and depression likely resulting from the original injury and surgery. A failed back syndrome is chronic pain that is significant, recurring and difficult to treat.

14. The 2 June 1998 surgery was necessitated by plaintiff's prior compensable back surgery and is a continuation of that procedure. As a consequence of the surgery and the post-operative recovery period, plaintiff is capable of employment in sedentary light duty positions.

Based on those findings, the Commission concluded as a matter of law:

1. Plaintiff's pain level increased significantly and she became incapable of earning wages beginning 29 November 1996. Her increased pain has resulted in additional treatment including surgery and a diminution in her ability to work. Plaintiff is now capable of sedentary light duty work. The significant increased pain and reduction in physical capacity to work has resulted in a change of condition as of 29 November 1996. N.C. Gen. Stat. § 97-47; *Lucas v. Bunn Mfg. Co.*, 90 N.C. App. 401, 368 S.E.2d 386 (1988).

After careful consideration of the evidence, we find that

plaintiff's evidence at the second hearing was a mere repetition of her earlier assertions about the increased pain she suffered. Plaintiff's doctors confirmed their medical diagnoses and reiterated that plaintiff suffered from failed back syndrome. Dr. Naveira stated that, while he treated plaintiff, her condition remained stable, neither progressing nor worsening. Indeed, the Full Commission cited the deposition testimony of Dr. Naveira and Dr. Greenberg as support for its finding that plaintiff suffered from failed back syndrome. Plaintiff's other evidence also failed to provide an adequate basis for a finding of a substantial change of her condition. Plaintiff's own testimony, as well as that of her friend, Deborah Haynes, merely indicated that plaintiff continued to suffer back pain and was unable to function as easily as she had before her injury. At the hearing on 28 June 1994, plaintiff was asked:

Q. How severe is the pain that you're having?

A. At times it can be -- on a scale of one to ten, it can be a ten.

At her second hearing, plaintiff was again asked to rate her pain:

Q. How would you describe the level of pain that you experience without any aggravation of the pain that you have all the time on a scale of one to ten, with one being a mild and ten being a very severe---?

A. It stays around eight and -- maybe between eight and nine.

Thus, according to plaintiff's own testimony, her condition slightly improved between her first and second hearings.



Defendants maintain that ongoing temporary total disability benefits are appropriate only where the claimant cannot earn any wages. See *McGee v. Estes Express Lines*, 125 N.C. App. 298, 300, 480 S.E.2d 416, 418 (1997). Plaintiff cannot make this showing. The testimony of her doctors indicates that, while plaintiff could not work right after her 1998 surgery, she could begin work after a six-to-eight-month recovery period. Plaintiff's first hearing led to a finding of fact that she had not performed an adequate job search. That finding was adopted at the second Full Commission hearing, and plaintiff has not appealed that finding of fact. Moreover, we note that the Commission specifically concluded that "[p]laintiff is now capable of sedentary light duty work." Such a conclusion simply does not comport with an award of ongoing temporary total disability payments. As long as plaintiff is capable of earning some wages, she should not be entitled to ongoing temporary total disability, and the Commission erred in granting those payments as part of her overall award.

Defendants also note the timing of plaintiff's Form 33 and direct our attention to the fact that, within months of the first hearing, plaintiff was able to secure work at two different restaurants. Moreover, Dr. Naveira encouraged plaintiff to engage in activities such as work, despite her condition. These events strengthen our conclusion that plaintiff was capable of earning some wages, and that ongoing temporary total disability benefits were therefore improperly awarded.

We also find support for our reversal of the Industrial

Commission's opinion and award through interpretation of the Workers' Compensation Act. "[T]he Workers' Compensation Act was never intended to be a general accident and health insurance policy." *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 542, 485 S.E.2d 867, 869 (1997) (quoting *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 253, 354 S.E.2d 477, 483 (1987)). Earning capacity, and not physical impairment, is the main inquiry for deciding whether a claimant should receive workers' compensation benefits. See *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)).

Apparently, the reason for plaintiff's increased disability award was a mere difference of opinion among her treating physicians, rather than an actual change in her condition. Thus, the Industrial Commission erred in granting plaintiff additional disability payments at the second hearing.

Defendants also urge us to strike plaintiff's Form 33 Request for Hearing because there was no factual or legal basis for modification of her award. Because we are reversing and remanding this case to the Industrial Commission on the issue of the substantial change of condition, we need not reach defendants' arguments, as they are now moot.

Reversed and remanded.

Chief Judge EAGLES and Judge BRYANT concur.

Report per Rule 30(e).