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 other purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered. See Rule of Appellate Procedure 30 (e)(3).

NO. COA01-1563

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

RICHARD RUSSELL, JR.,
Employee-Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. 475786

FOOD LION, INC.,
Employer-Defendant

and

RISK MANAGEMENT SERVICES, INC.,
Claims Administrator

Appeal by plaintiff from Opinion and Award entered 5 September 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 October 2002.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for plaintiff-appellant.

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

CAMPBELL, Judge.

Plaintiff Richard Russell is a 58-year-old man, who has been diagnosed with spondylolisthesis, a degenerative disc disease, in his lower back. Plaintiff underwent a diskectomy and spinal fusion in that area in 1964, after suffering a football injury. Plaintiff has a GED and has approximately two years of community college education. Plaintiff's work history consists primarily of manual labor jobs.

On or about 29 June 1994, plaintiff was employed with defendant Food Lion, Inc., when he sustained an injury to his back, during and in the course of employment with defendant-employer as a part-time bagger. After the accident, plaintiff continued to perform his job duties until on or about 14 December 1994, when he quit his job with defendant-employer for reasons unrelated to his June 1994 compensable injury. In June of 1995, plaintiff began employment as a dockhand--a job which required that he refuel boats, mow grass, pick up trash, and pull heavy lines to tie up boats.

Plaintiff thereafter filed his original claim against defendant-employer seeking worker's compensation benefits. The medical testimony submitted by plaintiff's several doctors tended to show that plaintiff had suffered a compensable injury on or about 29 June 1994, while in the employ of defendant-employer; that plaintiff had never been taken out of work by his treating physicians; and that by the time he last saw Dr. Randall Sherman, a neurosurgeon, in April 1996, plaintiff had reached maximum medical improvement. Based upon the plaintiff's medical evidence, the Commission found and concluded, in an opinion and award filed 8 April 1997, that plaintiff's June 1994 back injury was compensable and that defendant had a 5% permanent partial impairment of the back. The Commission, therefore, awarded plaintiff benefits under G.S. §97-31(23). As a consequence, defendant-employer's claims administrator, Risk Management Services, Inc., issued a check in the amount of $1129.20 to plaintiff on 18 May 1998.

After experiencing some discomfort in his back, plaintiff filed a motion in the Industrial Commission seeking to have defendant-employer provide additional medical care and treatment under G.S. §97-25. This motion was allowed by the Commission, and plaintiff was examined by Dr. Sherman, the neurosurgeon who had previously treated plaintiff after his June 1994 back injury.

Dr. Sherman examined plaintiff on 16 February 1999, and found plaintiff's condition to be "pretty much the same" as when he last saw plaintiff in April of 1996. Because of plaintiff's complaint of continuous pain, the doctor, however, became concerned that plaintiff's previous spinal fusion was not solid. Dr. Sherman, therefore, referred plaintiff to Dr. J. Abbott Byrd, III, an expert in spine instrumentation fusion. Dr. Byrd saw plaintiff just once, on 5 April 1999 before opining that "the present symptoms and thus [the] necessity for the myelogram and CT scan and possible surgery are related to this work injury of June 1994 at Food Lion." Defendant has not been employed since May 1999.

On or about 15 May 2000, plaintiff filed a motion for change of condition pursuant to G.S. §97-47 for additional benefits for permanent and total disability. This matter was subsequently heard by Deputy Commissioner William C. Bost on 23 August 2000, after which the record was held open until the deposition of Dr. Randall Sherman was taken on 6 October 2000. By opinion and award filed 22 December 2000, Deputy Commissioner Bost concluded that plaintiff had failed to establish that he had sustained a substantial change of condition, so as to entitle him to additional benefits under G.S. §97-47. Plaintiff appealed to the Full Commission, and without taking any further evidence, the Commission affirmed the deputy commissioner's decision. The Commission, like the deputy commissioner had, concluded that plaintiff failed to establish that he sustained a substantial change of condition. Plaintiff again appeals.

On appeal, plaintiff argues that he has met his burden of proving a change of condition under G.S. §97-47, so as to entitle him to additional worker's compensation benefits and payment for continuing medical treatment. We disagree.

This Court's review of workers' compensation cases is "limited to the consideration of two questions: (1) whether the Full Commission's findings of fact are supported by competent evidence; and (2) whether its conclusions of law are supported by those findings." *Calloway v. Memorial Mission Hosp.*, 137 N.C. App. 480, 484, 528 S.E.2d 397, 400 (2000). On appeal, the Commission's findings of fact are conclusive so long as they are supported by competent evidence, although there may be evidence to support findings to the contrary. *Id.* at 484, 528 S.E.2d at 400. "Whether there has been a change of condition is a question of fact[.]" *Pratt v. Upholstery Co.*, 252 N.C. 716, 722, 115 S.E.2d 27, 33-34 (1960). However, whether the facts found amount to a change of condition is a question of law, subject to *de novo* review. *Shingleton v. Kobacker Group*, 148 N.C. App. 667, 670, 559 S.E.2d 277, 280 (2002) (citing *Cummings v. Burroughs Wellcome Co.*, 130N.C. App. 88, 90, 502 S.E.2d 26, 28, *disc. review denied*, 349 N.C. 355, 517 S.E.2d 890 (1998).

G.S. §97-47 provides, in pertinent part,

> Upon 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[.]

N.C. Gen. Stat. §97-47 (2001). This Court has previously defined a change of condition under this statute as "a substantial change in 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. Sears Roebuck & Co.*, 131 N.C. App. 649, 654, 508 S.E.2d 831, 835 (1998). "A change in condition may consist of either: 'a change in the claimant's physical condition that impacts his earning capacity;' 'a change in the claimant's earning capacity even though claimant's physical condition remains unchanged;' 'or a change in the degree of disability even though claimant's

physical condition remains unchanged.'" *Shingleton*, 148 N.C. App. at 670, 559 S.E.2d at 280 (quoting *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996). Significantly, "'[t]he party seeking to modify an award based on a change of condition bears the burden of proving [by a greater weight of the evidence] that a new condition exists and that it is causally related to the injury upon which the award is based.'" *Id*. at 670, 559 S.E.2d at 280 (quoting *Cummings*, 130 N.C. App. at 91, 502 S.E.2d at 29). "A claimant satisfies this burden by producing *medical evidence* establishing a link between the new condition and the prior compensable injury in terms of reasonable medical probability." *Cummings* at 91, 502 S.E.2d at 29 (1998) (emphasis added). This Court has previously noted, "non-expert testimony suggesting a causal relationship is not a sufficient basis upon which to find causality." *Id.; see also Chisholm v. Diamond Condominium Constr. Co.*, 83 N.C. App. 14, 19, 348 S.E.2d 596, 600 (1986) (holding that the Commission properly denied the plaintiff's claim to further compensation based on theory of substantial change in condition where plaintiff's evidence consisted entirely of plaintiff's own testimony and there was no medical evidence concerning the cause and extent of his injuries), *disc. review denied*, 319 N.C. 103, 353 S.E.2d 106 (1987).

In the instant case, plaintiff alleges that contrary to the findings and conclusion of the Commission he has experienced a substantial change of condition and is now totally and permanently disabled. To that end, plaintiff also alleges that he is entitled to payment of continuing medical expenses. To make this showing, plaintiff presented medical records and depositions of treating physicians which had been submitted at the original 1996 hearing in this matter. Plaintiff also presented the 6 October 2000 deposition of one of his treating physicians,

Dr. Sherman, and a 22 April 1999 letter from spine instrumentation fusion expert, Dr. Byrd, who examined plaintiff on 5 April 1999.

Dr. Sherman first saw plaintiff, after plaintiff's initial injury and on referral, on 14 March 1995. At that initial visit, Dr. Sherman had the records of Dr. Hitchings, an MRI and an EMG. Based upon the records, MRI, EMG, and the patient history taken from plaintiff, Dr. Sherman opined that plaintiff's pain was "from an exasperation of an old injury and a congenital condition that he has in his lower back called spondylolisthesis." Dr. Sherman also noted that plaintiff "had a small disk herniation at the level above the spondylolisthesis which I felt might have been playing a role in his recent pain." Dr. Sherman explained that plaintiff's old injury consisted of an old football injury, after which plaintiff had undergone a diskectomy and a fusion. Dr. Sherman treated plaintiff conservatively with Lodene, a prescription anti-inflammatory and pain medicine. Dr. Sherman next saw plaintiff on 16 April 1996, at which time plaintiff complained that his back and leg pain had worsened. At that time, Dr. Sherman recommended another MRI be performed to see what was going on with his lower back. The MRI revealed "the previous lumbar spondylolisthesis and the degenerative disk at L4,5," with no changes. Dr. Sherman did not change plaintiff's treatment, and did not think that surgery was required on the back. Plaintiff returned to Dr. Sherman for the last time on 16 February 1999, complaining of increased pain. After examining plaintiff, Dr. Sherman found his condition to be "pretty much the same" as during his last exam. In light of plaintiff's complaints of constant pain Dr. Sherman was concerned that plaintiff's 1964 spinal fusion may not be solid. Dr. Sherman, therefore, referred plaintiff to Dr. Byrd, a spinal fusion expert. Significantly, Dr. Sherman was not aware that plaintiff had been employed as a dockhand at the time of his examination, and stated that those job duties would not be consistent with his complaints of continuous pain.

Dr. Byrd saw plaintiff on one occasion. Based upon plaintiff's subjective reports of continuous pain after his June 1994 on-the-job injury, Dr. Byrd ordered that plaintiff have a myelogram and CT scan. Without the benefit of these test results, Dr. Byrd penned a letter dated 22 April 1999 in which he stated, "Based on the history given to myself by the patient it is my opinion that the present symptoms and thus is necessity for the myelogram and CT scan and possible surgery are related to this work injury of June 1994 at Food Lion."

After reviewing the evidence of record, the Full Commission made the following pertinent findings regarding plaintiff's current medical condition:

> 16. After last seeing Dr. Sherman on April 26, 1996, Plaintiff did not return or seek medical treatment until February 1999--a period of almost three (3) years.
>
> 17. On February 16, 1999, Plaintiff saw Dr. Sherman. At this visit Plaintiff was complaining of back pain. Dr. Sherman stated, "All of this in my mind goes back along with his condition in his back, which is a Grade II spondylolisthesis and I doubt the fusion is solid. Whether it was never solid in the first place or whether his accident at Food Lion created further instability at the fusion site I do not know."
>
> 18. Dr. J. Abbott Byrd, from Virginia, saw Plaintiff one time on April 22, 2000, nearly six (6) years after the initial injury. Dr. Byrd related Plaintiff's condition to the June1994 incident, but the Full Commission gives less weight to Dr. Byrd's opinion because Dr. Byrd only saw the Plaintiff on one occasion, approximately six (6) years post the alleged date of injury; it does not appear that Dr. Byrd had the benefit of Plaintiff's past medical records; and Dr. Byrd's opinion rests primarily on the verbal history related to him by Plaintiff[.]
>
> 19. Plaintiff chose not to offer deposition testimony of Dr. Byrd; therefore, the Full Commission has no further information upon which to judge the weight of Dr. Byrd's opinion.
>
> 20. Dr. Sherman testified under oath on October 6, 2000. In the judgment of the Full Commission, Dr. Sherman's testimony and medical reports should be given greater weight because he was Plaintiff's treating physician and treated Plaintiff

> since March 14, 1995. Dr. Sherman is in the best position to testify as to causation because of his ability to observe Plaintiff over this time period.
>
> 21. Dr. Sherman testified that Plaintiff has spondylolisthesis and that it is a congenital condition. Dr. Sherman testified that Plaintiff's spondylolisthesis was a longstanding problem for which the Plaintiff underwent surgery in 1964. Dr. Sherman testified that the condition would be expected to continue to deteriorate over time as it did with the Plaintiff over the thirty (30) year period since his 1964 fusion surgery. Dr. Sherman testified that it was expected the condition would continue to progress until it required surgical intervention. Dr. Sherman testified that people with spondylolisthesis experience lifelong back problems if left untreated.
>
> 22. Dr. Sherman further testified the Food Lion injury was not a significant injury and that, when he last saw Plaintiff in April of 1996, Plaintiff had returned back to his baseline level.
>
> 23. Dr. Sherman is in the best position to testify about medical causation in this case and, based on his testimony and the medical records, the greater weight of the medical evidence supports a finding that the Plaintiff has not sustained a substantial change of condition related to the minor Food Lion injury.

The Commission, as finder-of-fact, "is the sole judge of the credibility of [the] witnesses and the weight to be given their testimony[.]" *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993). In this case, the Commission had before it a letter from Dr. Byrd and the testimony of Dr. Sherman. The Commission was free to give greater weight to Dr. Sherman's more extensive medical testimony. As that testimony supports the Commission's findings of fact, those findings are binding on appeal. Moreover, in light of those findings, the Commission's conclusion that "[t]he greater weight of the medical evidence, including medical records and medical depositions, fails to establish that [p]laintiff has sustained a substantial change of condition," is proper. Similarly, the Commission's conclusion that "[p]laintiff . . . has not proven by the greater weight of the competent medical evidence of record that his continuing

need for medical attention is related to and necessary for treatment of his June 1994 injury," is also legally proper.

Having so concluded, we affirm the opinion and award of the Commission.

Affirmed.

Judges WYNN and McGEE concur.

Report per Rule 30(e).