NO. COA03-1375

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2004

CHARLES SHERRILL,
Employee,
Plaintiff,

v. North Carolina Industrial Commission
I.C. File No. 737180

CAROLINA CABLE CONTRACTORS, INC.,
Employer,

CLARENDON NATIONAL
INSURANCE COMPANY,
Carrier,
Defendants.

Appeal by defendants from opinion and award entered 19 February 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 June 2004.

Richard B. Harper for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by George H. Pender and Tara D. Muller, for defendant-appellants.

THORNBURG, Judge.

Defendants appeal from an opinion and award of the full Commission awarding plaintiff further benefits due to a change in condition.

At the time of the hearing before the Deputy Commissioner on 27 June 2000, plaintiff was 58 years old. Plaintiff worked in several position with A&P Tea Company for twenty years before starting to work as a telephone contractor/splicer in 1979. On 21 April 1997, plaintiff was

employed as a telephone splicer with Carolina Cable Contractors, Inc. ("Carolina Cable"). On that date, plaintiff was in the field in Georgia making a cable splice when he fell from his ladder, injuring his head, neck and lower back.

Plaintiff was taken to Ridge Crest Hospital in Clayton, Georgia, immediately after the accident. On 30 April 1997, plaintiff was first examined by Dr. William Handley, a board-certified orthopedic surgeon, who would become plaintiff's primary treating physician. Dr. Handley found that plaintiff had sustained an anterior compression fracture of the vertebra in the lumbar spine at the L1 vertebra. Dr. Handley treated plaintiff through pain control measures and limiting plaintiff's activities to give plaintiff's injury time to heal. By 10 December 1997, Dr. Handley believed that plaintiff was at maximum medical improvement and gave him a rating of 10% permanent partial disability of the lumbar spine. Plaintiff was advised to avoid heavy lifting and was not prescribed any medications. Plaintiff returned to work for Carolina Cable in January of 1998, but due to the long commute from his home in Franklin, North Carolina, to work in Georgia, plaintiff took a job closer to home in March of 1998 with Nichols Construction Company.

Dr. Handley saw plaintiff again on 27 August 1998. Plaintiff was having some soreness in his back that Dr. Handley attributed to a strain in his back superimposed on the old fracture. Dr. Handley recommended that plaintiff take Motrin, an anti-inflammatory, and that he rest for a period of time.

Plaintiff again saw Dr. Handley on 28 June 1999 for back pain. At this point, plaintiff was experiencing back pain and pain that sometimes radiated into his right leg, which he had not complained of previously. X-rays of plaintiff's back showed that he had developed degenerative disc disease and a spur formation in the area of the previous fracture, between T12 and L1. Dr.

Handley again recommended plaintiff take Motrin, advised plaintiff on some back rehabilitation exercises, told plaintiff to rest and suggested an MRI scan if the symptoms continued. Plaintiff returned to Dr. Handley in August of 1999 with the same complaints and Dr. Handley recommended conducting the MRI scan. The MRI scan was conducted on 29 February 2000. The MRI scan continued to show plaintiff's compression fracture and signs of degenerative disc disease.

On 29 March 2000, Dr. Handley gave plaintiff a prescription for Darvocet, a mild narcotic, to take for pain primarily at night. Plaintiff was to continue with Motrin during the day. Dr. Handley also advised plaintiff to refrain completely from doing any heavy lifting. Dr. Handley continued these recommendations when plaintiff saw him on 11 May 2000 and 22 May 2000. On 26 June 2000, Dr. Handley also prescribed Vioxx, an anti-inflammatory, to replace the Motrin that plaintiff had been taking during the day.

On 19 September 2000, at the request and direction of defendants, plaintiff was also examined by Dr. Todd B. Guthrie. Dr. Guthrie opined that plaintiff's condition had substantially changed since he returned to work in January of 1998.

On or about 1 March 2000, plaintiff's job with Nichols Construction was changed to accommodate his growing discomfort. Plaintiff began doing verification work for Nichols Construction on a temporary basis. On 25 August 2000, plaintiff was laid off from Nichols Construction. Plaintiff found work on 18 January 2001 with James Goodhew as a guide and installer of telephone drop lines. The job did not require any heavy lifting and was only for 5 hours per day. Plaintiff was laid off from this job on 19 October 2001, due to the seasonal nature of the work.

Plaintiff testified at the hearing that he was unable to enjoy fishing and golf nor was he able to walk as much as did before due to the persistent pain in his back. Also, plaintiff testified that he had trouble sleeping due to the pain in his back.

Carolina Cable stipulated to a compensable injury by accident in a Form 60, filed on 17 August 1998. A Form 21 was approved by the Commission on 31 August 1998 wherein it was stipulated that plaintiff had sustained injuries to his head and back and that he returned to work on 19 January 1998. On or about 23 November 1998, defendants executed a Form 28B wherein they advised the Commission that the last compensation check was forwarded to plaintiff on 16 September 1998 and that the last medical compensation was paid on 29 April 1998. Plaintiff gave notice of a change of condition and requested a hearing on the matter. The Deputy Commissioner concluded that plaintiff had experienced a substantial change of condition and awarded plaintiff further benefits. Defendants appealed to the full Commission. The full Commission allowed a motion by the plaintiff to take additional evidence concerning the change in plaintiff's employment since the time of the hearing before the Deputy Commissioner in June of 2000. The full Commission also concluded that plaintiff had experienced a change in condition and awarded further benefits. From the full Commission's opinion and award, defendants appeal.

Defendants argue on appeal that the Industrial Commission erred in allowing plaintiff's claim because the time for review of such claims, as set out in N.C. Gen. Stat. §97-47, had passed and that the Industrial Commission erred in awarding benefits because plaintiff had not suffered a change in condition. We disagree.

Defendants argue that plaintiff's claim was time barred by N.C. Gen. Stat. §97-47. N.C. Gen. Stat. §97-47 provides in 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 . . . increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, . . . no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article . . . .

N.C. Gen. Stat. §97-47 (2003). Defendants argue that the date of last compensation was 29 April 1998 and that the instant action was not reviewed until 27 June 2000, meaning that review was barred by N.C. Gen. Stat. §97-47.

"With respect to the statute of limitations contained in G.S. 97-47, our courts have consistently held that the limitation is not jurisdictional, but is a technical legal defense which the employer may assert." *Vieregge v. N.C. State University*, 105 N.C. App. 633, 640, 414 S.E.2d 771, 775 (1992). This Court has also stated that this defense may not be raised for the first time on appeal, but "must be affirmatively raised prior to a hearing on the merits or it is waived." *Nelson v. Food Lion, Inc.*, 92 N.C. App. 592, 594, 375 S.E.2d 162, 164, *dis. review denied*, 324 N.C. 336, 378 S.E.2d 795 (1989) (citing *Gragg v. Harris & Son*, 54 N.C. App. 607, 284 S.E.2d 183 (1981)). We find no evidence in the record that defendants raised this issue before the hearing on the merits. Thus, defendants have waived this issue on appeal.

Even assuming *arguendo* that defendants had properly preserved the issue, the claim was not barred by the time period set forth in N.C. Gen. Stat. §97-47. The two year period begins to run at the time final payment is accepted, *Hill v. Hanes Corp.*, 79 N.C. App. 67, 339 S.E.2d 1 (1986), and it is the date of filing for review, not the date the matter is reviewed, that matters for timeliness issues. *Baldwin v. Cotton Mills*, 253 N.C. 740, 117 S.E.2d 718 (1961). The full Commission found that plaintiff received his last compensation from defendants on or about 23

September 1998. Plaintiff filed his request for a review on 28 September 1999. Plaintiff's request was within the 2 year period prescribed by N.C. Gen. Stat. §97-47.

Defendants' second argument is that plaintiff failed to show a change in condition. Defendants argue that plaintiff only showed that he had normal flare-ups in pain and missed only about two weeks of work in more than two years. Defendants assert that this evidence does not support a conclusion that plaintiff suffered a substantial change in his physical capacity to earn wages. We disagree.

When the Court of Appeals reviews a decision of the full Commission, it must determine, first, whether there is competent evidence to support the Commission's findings of fact and, second, whether the findings of fact support the conclusions of law. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). "[T]he appellate courts are bound by the Commission's findings of fact when supported by any œompetent evidence . . . ." *Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). "The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings." *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). Conclusions of law, including whether there has been a change of condition pursuant to N.C. Gen. Stat. §97-47, are reviewable *de novo* by this Court. *Id*.

A plaintiff's change in condition can 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. *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996). "'[I]n determining

if a change of condition has occurred . . . the primary factor is a change in condition *affecting the employee's physical capacity to earn wages . . . .*'" *East v. BabyDiaper Services, Inc.*, 119 N.C. App. 147, 151, 457 S.E.2d 737, 740 (1995) (quoting *Lucas v. Bunn Manuf. Co.*, 90 N.C. App. 401, 404, 368 S.E.2d 386, 388 (1988)) (emphasis in original). "[T]he burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify." *Blair*, 124 N.C. App. at 423, 477 S.E.2d at 192.

Defendants only assign error to one finding of fact made by the full Commission. In finding of fact # 21, the full Commission found:

> 21. By August 5, 1999, and certainly by May 22, 2000, plaintiff sustained a substantial change in his physical condition which effected [sic] capacity to earn wages starting on August 25, 2000 when he was laid off from his work with Nichols Construction. His low back pain had increased significantly. He had degenerative disc disease at the location of his compression fracture at L1 that had not been noted previously. He had spurring of his spine that had not been present previously. He had to take pain medications including Darvocet that he was not taking at the time of his final award on or about September 23, 1998. As a result of his increased low back pain, plaintiff's sleep had become significantly disturbed. Dr. Handley changed his restriction from "avoiding heavy lifting" to "no heavy lifting." As a result of this substantial change of condition, plaintiff was placed in a temporary light duty job with Nichols Construction which reflects a substantial change in his physical ability to earn wages. Plaintiff was subsequently laid off by Nichols Construction and was temporarily employed in a part-time light duty position with John Goodhew.

This finding primarily summarizes the previous findings made by the full Commission in the opinion and award. We conclude that all the findings by the full Commission are amply supported by the testimony of plaintiff, Dr. Handley and John Goodhew and plaintiff's medical records, including the notes from Dr. Guthrie's independent evaluation of plaintiff. As the

findings of fact are supported by competent evidence, they are binding upon this Court on appeal.

We further conclude that the findings of fact were sufficient to support the conclusion that plaintiff sustained a change in condition. Plaintiff showed that the pain in his back had increased, that he was no longer able to work, that he had been prescribed medications, that he was having trouble sleeping due to his back pain and that he was not able to enjoy fishing and golf like he used to. While the changes in plaintiff's physical condition are arguably not very substantial, the effect has been to render plaintiff unable to work at all. See *Lucas v. Bunn Manuf. Co.*, 90 N.C. App. 401, 404, 368 S.E.2d 386, 388 (1988).

Affirmed.

Judges HUDSON and GEER concur.

Report per Rule 30(e).