Future Medical Treatment:
Substance and Procedure for § 97-25.1

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The provision for extending the two-year time limitation for medical treatment is not often discussed, but it can make a profound difference for claimants who need medical care in the future. This paper discusses the development of this provision in N.C. Gen. Stat. § 97-25.1, as well as the substantive and procedural issues raised by the statute.

I. Development of § 97-25.1

N.C. Gen. Stat. § 97-25.1 was enacted as part of the 1994 workers' compensation reform, and was a specific response to the Supreme Court's decision in *Hyler v. GTE Products Co.*, 333 N.C. 258, 425 S.E.2d 698 (1993).

In *Hyler*, the Court held that N.C. Gen. Stat. § 97-47 does not apply to an employee's right to claim medical payments under the Act. *Id.* at 266, 425 S.E.2d at 703. Thus, N.C. Gen. Stat. § 97-25 permitted the Industrial Commission to order the employer to pay new or additional medical expenses, even if there had been no material change in the employee's condition or in available medical treatments. *Id.* at 267, 425 S.E.2d at 704. Moreover, an employee would be entitled to reasonably necessary medical treatment "without limitation as to time." *McAllister v. Wellman, Inc.*, 162 N.C. App. 146, 149, 590 S.E.2d 311, 313 (2004) (citing *Hyler*, 333 N.C. at 267, 425 S.E.2d at 704). *Hyler* overturned *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 227 S.E.2d 627 (1976), which had imposed a two-year time limitation on seeking additional medical treatment based on section 97-47. *See Hyler*, 333 N.C. at 273-74, 425 S.E.2d at 707-08 (Meyer, J., dissenting).

The *Hyler* decision brought North Carolina in line with the vast majority of states that provide medical benefits for compensable conditions without any durational limit, such as Virginia, Tennessee, and Georgia. *See* Lex K. Larson, *Larson's Workers' Compensation, Desk Edition* § 94.01[1] (Matthew Bender, Rev. Ed.).

In response, however, the General Assembly enacted section 97-25.1 because *Hyler* potentially exposed defendants to significantly increased liability. *See McAllister*, 162 N.C. App. at 149, 590 S.E.2d at 313 (citing John Richard Owen, *The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance*,73 N.C. L. Rev. 2502, 2506, 2509-2510 (1995)). The new provision reflected a compromise between the parties who crafted the 1994 Reform Act. The statute states:

> The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application

> for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation.

N.C. Gen. Stat. § 97-25.1. The statute's operative standard, "substantial risk," was lifted from the Supreme Court's decision in *Little v. Penn Ventilator Co.*, 317 N.C. 206, 214, 345 S.E.2d 204, 209 (1986) (approving future medical treatment to monitor condition "where there is a substantial risk that an employee's condition will decline"). The provision partially overrules *Hyler* by re-imposing a two-year limit on payment of future medical treatment in the absence of a Commission order for additional medical care. It seeks to balance the employer's interest in closing claims at some specified time against the needs of the injured employee for medical compensation.

II. Substantive Aspects of § 97-25.1

"In deciding whether to enter an award allowing a plaintiff's claim to remain open for future medical treatment, the Commission must determine whether there is a substantial risk of the necessity of future medical compensation." *Taylor v. Bridgestone/Firestone*, 157 N.C. App. 453, 458, 579 S.E.2d 413, 416, *rev'd on other grounds by* 357 N.C. 565, 598 S.E.2d 379 (2003) (citing N.C. Gen. Stat. § 97-25.1). "If additional medical treatment is required, there arises a rebuttable presumption that the treatment is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury." *Id.* (quoting *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999)). Therefore, in ruling on a Form 18M seeking to keep open the possibility of future medical compensation, the Commission must make a two-part inquiry: "(1) whether the plaintiff can show he is at 'substantial risk' of needing future medical treatment and (2) whether the defendants can prove any anticipated future medical treatment will not be reasonably related to the original compensable injury." *Id.*

The operative standard in section 97-25.1 is whether there is a "substantial risk" of needing future medical treatment. Neither the statute nor case law provide a clear definition of "substantial risk." Nonetheless, the appellate cases addressing the issue supply some guidance about the meaning of the term. As with many Court of Appeals cases, however, the decisions to a large degree turn on the standard of review.

In *Adams v. Frit Car, Inc.*, 185 N.C. App. 714, 649 S.E.2d 651 (2007), the Court described the Commission's decision as follows:

> Here, the Full Commission made a number of specific findings as to two doctors' testimony that Mr. Adams would likely need additional medical treatment for his knee in the future, and that such treatment was causally related to the 2000 knee injury. Nevertheless, the Full Commission did not find that a total knee replacement would definitely be necessary, or that there is even a "substantial

> risk" of a need for such surgery. Rather, the Full Commission found that "as a result of his knee injury, Mr. Adams will require future medical treatment *including a possible total knee replacement*." (Emphasis added).

Id. at 720, 649 S.E.2d at 655. The Court held that "the Full Commission had sufficient evidence to support their findings of fact and to conclude that there is a substantial likelihood that Mr. Adams will need additional treatment for his knee in the future, regardless of what that treatment might entail." *Id.* at 720-21, 649 S.E.2d at 655.

In *Queen v. Penske Corp.*, 174 N.C. App. 814, 625 S.E.2d 121 (2005), the physician testified that there was a "possibility of future surgery" for the plaintiff's compensable back condition. *Id.* at 818, 625 S.E.2d at 124. The Court held that under section 97-25.1, the Commission is "specifically authorized to consider the possibility of future medical needs and to provide for them in awards." *Id.* Based on the testimony about the plaintiff's "possible need for back surgery in the future," the Court upheld the Commission's conclusions, which included the surgery as compensable treatment. *Id.* at 819, 625 S.E.2d at 125.

By contrast, in *Perez v. Clark*, No. COA 10-49, 2010 N.C. App. LEXIS 2043 (June 9, 2010) (unpublished), the relevant physician, "Dr. Iglehart testified that the fact that Plaintiff has had one bowel obstruction makes him more likely to have another one, and that Plaintiff may need further care at that point. However, Dr. Iglehart testified that there is no need for further surgery on Plaintiff's colon." *Id.* at *20. In addition, he testified that "in terms of any other specific treatment that [Plaintiff] needs for these conditions, I don't think he would benefit from any further treatment." *Id.* at *22. Based on this record, the Court upheld the Commission's conclusion that the plaintiff had not demonstrated that there was a substantial risk of future medical treatment. *Id.* at *23.

And, in *Taylor*, the Supreme Court adopted Judge Hunter's dissent in a *per curiam* opinion, and he had concluded that there was competent evidence to support the Commission's conclusion that the plaintiff <u>had not</u> shown a substantial risk of future medical treatment. *Taylor v. Bridgestone/Firestone*, 357 N.C. 565, 598 S.E.2d 379 (2003). The dissent focused on part of the physician's testimony where he stated that he "would have to fall back and say plaintiff has a *moderate* risk of having to have more treatment and problems with that shoulder, despite the restrictions." *Taylor*, 157 N.C. App. at 462, 579 S.E.2d at 418 (Hunter, J. dissenting) (emphasis in original). Although there was testimony supporting the plaintiff's position, this testimony regarding a "moderate" risk was enough to support the Commission.

The Full Commission has likewise not explicitly defined what "substantial risk" means. There are many decisions finding that there is substantial risk based on expert testimony that specifically uses the same term, or is even more unequivocal. *See, e.g.*, *Helms v. Carolina Cool Carriers*, I.C. No. 496447, 2007 N.C. Wrk. Comp. LEXIS 390, at *8 (Full Comm. Nov. 1, 2007) (finding a substantial risk because the physician "testified that to a reasonable degree of medical certainty that there is a substantial risk that plaintiff will need future medical treatment for his knee"); *Walden v. Fred Smith Co.*, I.C. No. 797340, 2010 NC Wrk. Comp. LEXIS 46, at *15-16 (Full Comm. Feb. 26, 2010) (finding a substantial risk because the physician testified "that

plaintiff would need new orthotics every two years as well as ongoing anti-inflammatory medication").

Similarly, if a physician completes a Form 18M attesting to a substantial risk, and no other evidence on the issue is submitted, this is usually sufficient for the Commission. *See, e.g.*, *Haywood v. Diyahs Homes, Inc.*, I.C. No. 676118, 2011 NC Wrk. Comp. LEXIS 329, at *11-12 (Full Comm. Oct. 7, 2011) (finding a substantial risk because the physician documented on the Form 18M that the plaintiff was in need of additional medical treatment).

On the other hand, the Commission has not found substantial risk where (1) the physician so testifies in those terms, *Holden v. Brickey Acoustical, Inc.*, I.C. No. 595281, 2010 NC Wrk. Comp. LEXIS 63, at *13 (Full Comm. March 10, 2010) (physician "was of the opinion that plaintiff did not face a substantial risk of needing a future right knee replacement"); (2) the physician testifies that the need for treatment in the future "is not foreseeable now," *Holmes v. Cape Fear Valley Health System*, I.C. No. 186094, 2008 NC Wrk. Comp. LEXIS 61, at *7 (Full Comm. Feb. 28, 2008); or (3) the physician could "only speculate" as to whether future treatment would be necessary, *Dockery v. Aramark Corp.*, I.C. No. 072083, 2004 NC Wrk. Comp. LEXIS 196, at *4 (Full Comm. June 16, 2004).

Taken together, these cases illustrate that an employee will be able to meet the substantial risk standard if there is credited evidence that she "will need," "likely will need," or there is a "substantial risk" that she will need future treatment. An employee will not be able to meet the standard, however, if the credited evidence shows there is "no need" for treatment, future treatment is "not foreseeable," or the need for treatment is "speculative."

III. Procedural Aspects of § 97-25.1

Section 97-25.1 is implemented by Industrial Commission Rule 408. When the parties agree on the provision of future medical treatment, the Commission may order its approval by stipulation of the parties, or by approval of a Form 21, Form 26, or Form 26A specifying agreement on the issue. Absent agreement by the parties, the Commission may enter an order for future medical treatment on its own motion or by approval of a Form 18M or other written request. A claim made under section 97-25.1, using either a Form 18M or other written request to the Commission tolls the two-year time limit in Section 97-25.1. I.C. Rule 408(2).

Other written requests that are sufficient to make a claim include a Form 33 or Form 18 if the issue of additional medical treatment is specified. *See, e.g.*, *Kennedy v. Minuteman Powerboss*, I.C. Nos. 673731 & W04978, 2011 NC Wrk. Comp. LEXIS 165, at *13-14 (Full Comm. June 20, 2011) ("A Form 33 filed with the Industrial Commission indicating Plaintiff's need for additional medical treatment pursuant to N.C. Gen. Stat. § 97-25.1 is sufficient to serve as a written request for additional medical compensation."); *Fontenot v. Ammons Springmoor Associates*, 176 N.C. App. 93, 100-01, 625 S.E.2d 862, 867-68 (2006) (concluding that a Form 18 requesting medical treatment was a sufficient request under section 97-25.1). However, it is certainly the better practice to use a Form 18M instead of another form.

A Form 18M should be filed with the Executive Secretary, with copies to the defendants. Upon receipt, the Executive Secretary will provide notice to the defendants, who then have thirty days to accept or deny the request. If the Form 18M request is contested, it is treated as a medical motion and decided by the Executive Secretary. Either party may appeal the Executive Secretary's decision by Form 33 within 15 days. The issue is then put before a Deputy Commissioner and the standard hearing procedures are used.

A couple of questions have arisen regarding when the 18M procedure can be invoked. First, some defendants have argued that a Form 18M cannot be filed while they are still providing compensation because the two-year clock in section 97-25.1 has not been started. In *Collins v. Wal-Mart Store, Inc.*, I.C. Nos. 239411 & 266663, 2007 NC Wrk. Comp. LEXIS 223 (Full Comm. June 5, 2007), the Full Commission specifically considered and rejected this argument in approving a Form 18M. *Id.* at *11. There are also many cases where the Commission has approved a Form 18M while other benefits are still being paid. Therefore, if an employee may need additional medical treatment after a two-year gap, it may be best to litigate the 97-25.1 issue along with the other issues in the case.

Second, some plaintiffs have argued that the two-year time limit in section 97-25.1 does not start unless or until there is a "final award," just as section 97-47 operates. The Court of Appeals, however, has recently rejected this argument in *Busque v. Mid-America Apartment Communities*, 707 S.E.2d 692 (2011). In that case, the plaintiff suffered a compensable injury and filed a Form 18 in January 2003. *Id.* at 694. The defendants covered her medical expenses through April 2003, when she was released from medical care with no medical restrictions. *Id.* The defendants apparently never filed a Form 60, 61, or 63. Four years later, in July 2007, the plaintiff filed a Form 33 seeking additional medical treatment for an allegedly compensable condition. *Id.* The Commission denied her request for compensation, but ordered defendants to pay for a second opinion evaluation for the plaintiff. *Id.* Both parties appealed.

The defendants contended that section 97-25.1 barred the plaintiff's claim because it was filed more than two years after the last payment for medical care. *Id.* at 699. In response, the plaintiff argued that the term "last payment of . . . compensation" in section 97-25.1 can only refer to a "final award." *Id.* at 700. The Court rejected the plaintiff's argument, holding that under the "straight-forward reading" of section 97-25.1, plaintiff's claim was filed too late after that last payment for medical care. *Id.* The Court also rejected the argument that defendants made any representation that could equitably estop them from invoking section 97-25.1. *Id.* Therefore, it overturned the award of a second opinion evaluation. *Id.*

Another potential issue is whether the Commission's approval of a Form 18M or similar application prevents the defendants from contesting the issue of relatedness when the need for medical treatment actually does arise in the future. The Court of Appeals has not addressed this issue, but the Full Commission has stated that the "approval of a Form 18M does not preclude defendants at some point in the future from contesting whether specific medical treatment is causally related to the compensable injury by accident." *Williams v. Truland Systems Corp.*, I.C. No. 813249, 2003 NC Wrk. Comp. LEXIS 197, at *8 (Full Comm. May 15, 2003).

Finally, one other situation that can occur is when a carrier has authorized treatment, or the Commission has ordered it to, but the carrier has failed to actually make payment to the medical provider for this past medical treatment. A motion or other action to compel the defendants to make payments for approved treatment would not be subject to the time limit in section 97-25.1. And, if a medical bill is then paid by the defendants, this should restart the two-year clock for any additional medical treatment.

Conclusion

The 97-25.1 procedure can be a significant part of an employee's case in order to ensure the provision of medical care in the future. It can and often should be litigated along with an employee's primary claims for compensation. However, when not used initially, employees must be especially vigilant to file a claim if necessary before the two-year limit runs.