

CHANGES TO G.S. §97-29,
LIMITATIONS ON TOTAL DISABILITY BENEFITS – CAP AND CREDIT

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INTRODUCTION

G.S. §97-29, as amended by House Bill 709, continues to address the conditions for receipt of compensation for total disability. The intent of this paper is to summarize and briefly address some questions in the application of the amendments to G.S. §97-29, described by one knowledgeable commentator as, “a somewhat complicated section” in the new law.

EFFECTIVE DATE

The changes to §97-29 are effective only for “claims arising on or after” June 24, 2011. N.C. Session Law 2011 – 287, § 23. In this context, a claim arises on the date of injury for an “injury by accident.” For occupational disease claims, the claim generally arises on the date of first disability. Taylor v. J.P. Stevens & Co., 300 N.C. App. 94, 265 S.E.2d 144 (1980). Accordingly, claims arising prior to June 24, 2011 will be governed by §97-29 before it was amended in June 2011, and claims arising on and after June 24, 2011 will be governed by the new amended statute.

THE FIRST 500 WEEKS FOLLOWING DISABILITY

House Bill 709 does not contemplate a change in the existing law for proving and maintaining the right to payment of compensation for total disability for a period extending to 500 weeks from the first date of the injured employee’s disability. No change was intended in the legal standards or procedures for establishing or maintaining total disability during this initial 500-week period.

However, except in cases of “permanent and total disability” defined in subsection (d), discussed below, under the new statute, the injured employee will not be entitled to compensation for total disability for a period in excess of this 500 week period unless the employee qualifies for “extended compensation” under subsection (c) of the new §97-29. The employer thus is entitled to stop total disability benefits it is paying at the end of the 500-week period in the absence of a Commission order qualifying the employee for “extended compensation.”

At least one commentator has suggested that the total disability benefit may be terminated, without complying with Industrial Commission Form 24 procedure, at expiration of the 500-week period if the injured employee has taken no action to qualify for “extended compensation.” This exception to the Form 24 procedure, however, is not contained in the new statute and a unilateral termination of benefits would violate the specific G.S. § 97-18.1 mandate that unilateral employer termination of total disability compensation is allowed only when an injured employee returns to work. Even in these circumstances, this is not simply an academic requirement. There may be factual conditions for the Commission to address, for example, relating to the employee’s first date of disability or qualification for benefits under subsection (d) for catastrophic injuries.

The G.S. §97-29(c) “cap” on total disability compensation does not limit the period during which an employee may receive compensation for partial loss of wage-earning capacity under §97-30, as newly amended. The partial disability benefit may extend beyond 500 weeks from the date of first disability. The only time limit on partial disability benefits under the new statute is that these benefits when combined with §97-29 total disability benefits may not exceed a total of “500 weeks of payments.” G.S. §97-30.

PROCEDURE TO QUALIFY FOR “EXTENDED COMPENSATION” FOR TOTAL DISABILITY

With the exception of a catastrophically injured employee now addressed in subsection (d), an injured employee seeking “extended compensation” for total disability beyond the initial 500-week period must apply to the Commission for this compensation after a period of 425 weeks has passed from the first date of disability. In the absence of agreement by the employer, the injured employee must then prove at a formal Commission hearing “by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity.” Following a Commission award of “extended compensation,” this Award will not be stayed unless and until the Full Commission or an appellate court reviews and reverses this award. G.S. §97-29(c).

After there is an award for “extended compensation” for total disability, the Commission may later review this award and, on such review, “make an award ending or continuing the extended compensation.” In the review of the prior Award, the employer has the burden of proving “by a preponderance of the evidence that the employee no longer has a total loss of wage-earning capacity.” G.S. §97-29(c).

While the statutory procedure for filing for “extended compensation” cannot be initiated until 425 weeks has passed from the first date of disability, there is no statutory time limit for doing so. The injured employee thus should be entitled to file his or her application for “extended compensation” for a period at of at least two years from the last payment of disability compensation even if this is, for example, 600 weeks from the date of first disability. G.S. § 97-47.

THE SUBSTANTIVE STANDARD TO QUALIFY
FOR “EXTENDED COMPENSATION”

The amended G.S. §97-29 does not expand on the definition of “total loss of wage-earning capacity.” This was unnecessary. This is the same standard applied by the Commission and by the North Carolina courts in the past in determining whether an injured employee is entitled to compensation under §97-29 for total disability. Absent agreement by the parties, the new statute mandates only that at the formal hearing some time following 425 weeks from the date of first disability, the injured employee must prove anew by a preponderance of the evidence that he or she has sustained “a total loss of wage-earning capacity.” §97-29(c). The determinative factor here thus is whether the injured employee can continue to prove a “total loss of wage-earning capacity.”

The substantive standard is the same standard applied prior to House Bill 709 and the same standard that still applies to injuries occurring before June 24, 2011. In fact, in §97-29, prior to the recent amendment, the statute provides in the first line as a condition for receiving total disability benefits that “the incapacity for work resulting from the injury is total.” A “total loss of wage-earning capacity” has been the consistent legal standard for payment of compensation for total disability. *E.g.*, *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 10, 562 S.E.2d 434, 441(2002) *aff’d*, 357 N.C. 44, 577 S.E.2d 620 (2003) (A loss of wage-earning capacity may either be total, in which case the employee is entitled to benefits pursuant to N.C. Gen.Stat. §97-29, or partial, in which case the employee is entitled to benefits pursuant to N.C. Gen.Stat. §97-30); *Trivette v. Mid-South Mgmt., Inc.*, 154 N.C. App. 140, 147, 571 S.E.2d 692, 697 (2002) (“Based on this evidence, the Commission found that plaintiff’s ‘disability’ or loss of wage-earning capacity during the period ending 7 January 1997 was total, meaning that she was ‘entitled to receive benefits for as long as the total loss of wage-earning capacity lasts.’); *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 346, 561 S.E.2d 298, 304 (2002) (“We conclude that the Commission’s findings, which are supported by competent evidence, show that plaintiff has satisfied his burden of proving total loss of wage earning capacity and that defendant has failed to rebut plaintiff’s evidence by showing that plaintiff possessed wage earning capacity.”); *Zimmerman v. Eagle Elec. Mfg. Co.*, 147 N.C. App. 748, 752, 556 S.E.2d 678, 680-81 (2001) (“As the plaintiff points out, the Court has clearly outlined different methods that a plaintiff may employ to prove total loss of wage-earning capacity, and thus, entitlement to total disability benefits under N.C. Gen.Stat. §97-29 (1999). *See Russell v. Lowes Product Distribution.*”).

The standard necessary to prove total disability for “extended compensation” thus is the same old standard for proving total disability applied in the past by the Commission and the North Carolina courts.

It is significant that the “500 week” cap and procedures for obtaining “extended compensation” in §97-29(c) do not affect the injured employee’s right to payment of medical compensation. The limitations on payment of medical compensation continue to be governed by G.S. 97-25.1.

One important question which has been raised is the date on which the Commission must find that the injured employee has proven by “a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity.” One defense commentator has suggested that:

It would be our argument that, if the claimant applies for those extended benefits at 425 weeks, the Commission has to wait until 500 weeks have elapsed or have some evidence as to what the employee’s condition would be at 500 weeks before they can award these extended benefits. The employer will presumably have 75 weeks to do vocational rehabilitation or other rehabilitation efforts in order to establish that the claimant does have wage-earning capacity and therefore would be ineligible for extended compensation benefits.

This view, however, is not supported by the statutory language. It is instead reasonable to infer that the General Assembly intended that the injured employee qualify for “extended compensation” for total disability, by demonstrating a total loss of wage-earning capacity, at a time following the time the employee applies for “extended compensation” 425 weeks or later after the date of first disability. The Commission thereafter, following a formal hearing, awards the employee “extended compensation” if the employee sustains his or her burden of proof without regard to the date of expiration of the 500 weeks. The language does not suggest that the “total loss of wage-earning capacity” necessarily is at the very point when the 500 weeks expires. The statutory language deals with process and not the date for the finding of “total loss of wage-earning capacity.”

CREDIT FOR SOCIAL SECURITY RETIREMENT BENEFIT

House Bill 709 for the first time introduces a credit for an injured employee’s social security retirement benefits. This credit is against “extended compensation” for total disability. There thus is no social security retirement benefit credit against compensation paid for total disability within the 500 weeks following the date of first disability. This credit applies only to total disability “extended compensation” paid following the 500 weeks and applies only after an injured employee is receiving retirement benefits under the Social Security Act after reaching full retirement age. §97-29(c). The full retirement age is now 66 years and will increase to 67 years over time under the present social security law. 42 U.S.C. § 416(l).

There is no credit for (1) social security disability benefits, (2) social security widow or widower’s survivor benefits, or (3) reduced early retirement benefits for which an employee may qualify presently at age 62. This credit also is limited to the injured employee’s primary social security benefit, without taking into account cost-of-living increases, and does not include any dependent or auxiliary benefits paid on the injured employee’s social security account. §97-29(c).

Finally, there is no credit for social security retirement benefits against permanent and total disability compensation paid under §97-29(d).

PERMANENT AND TOTAL DISABILITY COMPENSATION

The only circumstances in which an employee injured on and after June 24, 2011 is entitled to compensation for “permanent and total disability” are defined specifically in §97-29 (d).

First, House Bill 709 did not change the treatment of statutory permanent and total disability claims defined in §97-31(17). These are injuries resulting in the “loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof.” Therefore, these catastrophically injured employees continue to be entitled to compensation for total and permanent disability and “entitled to lifetime compensation, including medical compensation, regardless of whether or not the employee has returned to work in any capacity.” §97-29(d).

Second, three additional categories of injuries that “may qualify for permanent and total disability” are defined in House Bill 709. Permanent and total disability for these injuries, however, is only presumed, since the employer may rebut the total disability by demonstrating, “by a preponderance of the evidence that the employee is capable of returning to suitable employment as defined in G.S. §97-2(22).”

This new category includes injured employees who have one or more of the following “physical or mental limitations” from the injury:

- (2) Spinal injury involving severe paralysis of both arms, both legs, or the trunk.
- (3) Severe brain or closed head injury as evidenced by severe and permanent:
 - a. Sensory or motor disturbances;
 - b. Communication disturbances;
 - c. Complex integrated disturbances of cerebral function; or
 - d. Neurological disorders.
- (4) Second-degree or third-degree burns to thirty-three percent (33%) or more of the total body surface.

Catastrophically injured employees in these categories are entitled to medical compensation for their injuries during their lifetime, even though their permanent total disability may be rebutted. Also, by separately addressing this distinct group of injuries in subsection (d), employees with these injuries are not subject to the 500-week statutory cap or the credit for social security retirement benefits against “extended compensation” in subsection (c) applicable to other injuries.

PROHIBITION ON SIMULTANEOUS CONCURRENT COMPENSATION

G.S. §97-29(e) and (f) incorporate expressly the principle from the Whitley and Gupton decisions that an injured employee entitled to benefits under G.S. §97-29 or G.S. §97-30 and under G.S. §97-31, is entitled to “select the more favorable remedy, but cannot recover compensation under both sections . . .” simultaneously. Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 96, 348 S.E.2d 336, 340(1986). G.S. §97-29(e) and (f), therefore, now specifically state:

(e) An employee shall not be entitled to benefits under this section of G.S. 97-30 and G.S. 97-31 at the same time.

(f) Where an employee can show entitlement to compensation pursuant to this section or G.S. 97-30 and a specific physical impairment pursuant to G.S. 97-31, the employee shall not collect benefits concurrently pursuant to both this section or G.S. 97-30 and G.S. 97-31, but rather is entitled to select the statutory compensation which provides the more favorable remedy.

This language is intended to incorporate what is currently known as the “Collins principle” that the employer is entitled to a credit against compensation owed for a rating for weekly compensation paid under §97-29 and – 30 after the date of “maximum medical improvement” or the first date the employee is entitled to select disability based on the specific physical impairment under §97-31. Collins v. Speedway Motor Sports Corp., 165 N.C. App. 113, 598 S.E.2d 185 (2004)

CONCLUSION

The provisions for payment of total disability compensation in House Bill 709 may have produced a “somewhat complicated section.” The General Assembly, however, has provided the Commission with more than eight years to consider the application of most of this new language, since these statutory changes will apply only to claims arising after June 23, 2011.