

## 500 Weeks of TTD Benefits, Part 2

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**By Joseph D. Delfino on March 21, 2022**

In a recent publication, we discussed the issue of what standard the North Carolina Industrial Commission and North Carolina Courts would use to interpret the provision of the North Carolina Workers' Compensation Act dealing with the 500-week cap on weekly TTD benefits.

By way of review, for workers' compensation claims arising before June 24, 2011, an employee was entitled to lifetime temporary total disability (TTD) benefits under the North Carolina Workers' Compensation Act if said employee continued to be disabled. However, in 2011 the North Carolina legislature passed several revisions to the Workers' Compensation Act. One of the revisions altered

N.C. Gen. Stat. § 97-29(b), which now states:

"The employee shall not be entitled to compensation pursuant to this subsection greater than 500 weeks from the date of first disability unless the employee qualifies for extended compensation under subsection (c) of this section."

As such, for any and all claims arising on or after June 24, 2011, an employee would only be entitled to 500-weeks of benefits unless the employee qualifies for extended benefits under N.C. Gen. Stat. § 97-29(c). N.C. Gen. Stat. § 97-29(c) states:

"An employee may qualify for extended compensation in excess of the 500-week limitation on temporary total disability as described in subsection (b) of this section only if (i) at the time the employee makes application to the Commission to exceed the 500-week limitation on temporary total disability as described in subsection (b) of this section, 425 weeks have passed since the date of first disability and (ii) pursuant to the provisions of G.S. §97-84, unless agreed to by the parties, the employee shall prove by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity."

Since the revisions to the North Carolina Workers' Compensation Act in 2011, both employees and employers have speculated as to how the Commission and the Courts would define the phrase "total loss of wage-earning capacity."

Although the issue has still not been settled, a recent case before the North Carolina Industrial Commission sheds some light on the Industrial Commission's interpretation of the phrase "total loss of wage earning capacity."

In the case of *Betts v. North Carolina Department of Health and Human Services*, the Full Commission dealt with a claim of entitlement by Plaintiff to more than 500-weeks of TTD benefits.

In that case, Plaintiff had suffered a compensable injury to the right ankle on August 12, 2011. Plaintiff returned to work briefly following the injury, but had not worked since September 11, 2013. Plaintiff has undergone at least six surgical procedures for the right ankle. Plaintiff was eventually released from care with work restrictions that limited her to sedentary duty.

In discussing whether Plaintiff was entitled to more than 500-weeks of TTD benefits, the Full Commission first focused on all activities performed by Plaintiff since the incident occurred. The Full Commission discussed volunteer duties that Plaintiff had performed since August 12, 2011, including leading a Girl Scout Troop, and also discussed activities that Plaintiff performed at home, such as mowing the lawn and planting flowers. The Full Commission also focused on how effective Plaintiff was in her volunteer duties and how valuable she was to those organizations.

In this claim, Plaintiff had retained a vocational expert to testify that Plaintiff needed to elevate her leg, had limited education, and that her work in direct patient care jobs would not provide skills to transfer to sedentary work. The vocational expert concluded that Plaintiff was unable to return to competitive employment and was experiencing a total loss of wage earning capacity. Defendants had retained a vocational expert who testified that Plaintiff could return to a wage earning capacity given the work restrictions assigned.

The Full Commission eventually decided that Plaintiff was not entitled to more than 500-weeks of TTD benefits. The Full Commission stated:

“...the Full Commission finds that Plaintiff has the capacity to earn wages, and thus, has failed to prove by the preponderance of the evidence that she has sustained a total loss of wage-earning capacity. At a minimum, Plaintiff is a likely candidate to perform stay at home flexible work or part-time work. Indeed, at oral argument, Plaintiff's counsel conceded that she could perform one to two hours of work a week for wages.”

Perhaps the most interesting part of the decision is contained in the Conclusions of Law section of the opinion, wherein the Full Commission addressed the issue of the phrase “total loss of wage-earning capacity” and stated:

“N.C. Gen. Stat. § 97-29(c) does not invoke “disability” as defined by N.C. Gen. Stat. § 97-2(9), nor does it require the employee to prove that she is unable to obtain competitive employment. Indeed, to qualify for benefits extending beyond 500 weeks, the statute on its face requires the employee to prove “by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity.” Though the Full Commission is unaware of our appellate courts interpreting this subsection, the provision does not specify the same or greater wages, refer to suitable employment, full-time employment, or “competitive employment.” The Full Commission interprets this statutory language by using the plain, ordinary and literal meaning of the words contained therein...

Therefore, the Full Commission construes N.C. Gen. Stat. § 97-29(c), in accordance

with the common understanding of the words “total,” “loss,” and “capacity” as requiring Plaintiff to prove by a preponderance of the evidence that she has sustained a complete destruction of the ability to earn wages. Here, Plaintiff has satisfied the time prerequisites to qualify for extended compensation as set out in N.C. Gen. Stat. § 97- 29(c). However, the Full Commission concludes that Plaintiff has the capacity to earn some wages, and thus, has failed to prove by the preponderance of the evidence that she has sustained a “total loss of wage-earning capacity” due to her compensable right ankle injury.”

While this decision by the Full Commission will likely be appealed to the Court of Appeals and possibly the North Carolina Supreme Court, it is a good sign for employers and insurance carriers that the Full Commission appears to be interpreting the phrase “total loss of wage earning capacity” based on the plain meaning of the words. If the Courts eventually uphold this decision, employers and insurance carriers will be in a much better position to argue that an employee is not entitled to more than 500-weeks of TTD benefits.