Clarifying the Necessity of Expert Testimony to Prove Ongoing Disability

June 25, 2015

Media Contact
Erica Gianetti
Marketing & Communications Supervisor
erica.gianetti@mgclaw.com

On April 21, 2015, the North Carolina Court of Appeals made clear that a claimant must provide expert testimony to prove that there is no job for him based on his age, experience and education, even though he is otherwise capable of some work. *See Fields v. H&E Equip. Servs., L.L.C.*, No. COA14-1094, at *8 (N.C. Ct. App. Apr. 21, 2015). This case is important because it clarifies that a claimant's subjective assertion regarding the futility of his job search is not enough to prove ongoing disability under the North Carolina Workers' Compensation Act.

In *Fields*, the claimant suffered a back injury on May 24, 2012 when he removed a forty-three pound battery from a motor vehicle.[1] The claimant worked for the defendant-employer as a mechanic and was sixty-five years old at the time of his injury with only a tenth grade education.[2] His job duties included changing batteries, tires, brakes and other types of equipment.[3] The defendant-insurer filed a Form 61 denying the compensability of the claimant's low back injury based, in part, on the argument that claimant's low back injury did not result from a specific traumatic incident.[4] The North Carolina Industrial Commission disagreed and found the back injury was compensable.[5] The Industrial Commission therefore awarded ongoing disability benefits.[6]

On appeal, the defendants argued the award of disability benefits was in error because the claimant failed to prove ongoing disability—specifically, the claimant failed to prove it was futile for him to engage in a job search based on his age, experience and education. The Court of Appeals agreed and reversed the award of disability benefits.

When a defendant-insurer files a Form 61 denying the compensability of an alleged work-related injury, a claimant bears the burden of proving ongoing disability to be entitled to an award of disability benefits.[7] Disability means incapacity because of injury to earn the wages which the claimant was receiving at the time of injury in the same or any other employment.[8] Quite simply, disability is the loss of wage-earning capacity. To prove disability, a claimant must show:

(1) he cannot earn the same wages in the same job after his injury; (2) he cannot earn the same wages in a different job after his injury; and (3) his inability to earn the same wages in any job is caused by his injury.[9]

A claimant can prove his inability to earn the same wages in the same job or any other job through one of four ways: (1) medical evidence that he is mentally or physically incapable of working in any capacity; (2) evidence that he is capable of some work, but has not been able to find any; **(3) evidence that he is capable of some work, but that it would be futile to attempt to find any based on his age, experience, or lack of education**; or (4) evidence that he has obtained a job at a lower wage than his previous job.[10] Importantly, a claimant must only prove one of these four "factors" in order to demonstrate he cannot earn the same wages in his previous job or any other job. The issue in *Fields* was whether the claimant proved "factor 3."[11]

The Court of Appeals found that claimant failed to prove the futility of his job search efforts.[12] The court noted that the claimant failed: (1) to provide a vocational expert to opine that his back condition made it futile to seek other job opportunities; (2) to present labor market statistics stating that his back condition made him incapable of re-entering the labor market; (3) to provide medical evidence that his back condition would make it impossible for him to work; and (4) to present any evidence that a man of his age, education, experience, and physical abilities would be incapable of working anywhere.[13] The Court of Appeals therefore concluded there was no competent evidence to support the finding that it would futile for the claimant to seek competitive employment.[14] Since the claimant failed to prove his job search efforts would be futile, the Court of Appeals held the Industrial Commission erred in awarding claimant ongoing disability benefits.[15]

This case represents the most recent example of a claimant's evidentiary burden to prove ongoing disability for purposes of the *North Carolina Workers' Compensation Act*.

This article originally appeared on May 28, 2015 on the Workers' Compensation Institute's website, and is republished here with permission.

ABOUT THE AUTHOR

Kevin Pratt is an attorney with McAngus Goudelock & Courie. MGC is a metrics-driven law firm built specifically to meet the needs of insurance companies and their customers. From 12 regional offices, we serve clients across the Southeast. Mr. Pratt may be reached at 704.405.4591.

[1] *Fields*, No. COA14-1094, at *2.

[2] *Id.*

[3] *Id.*

[4] *Id.* at *4.

[5] *Id.*

[6] *Id.*

[7] *See, e.g.*, *Clark v. Wal-Mart*, 360 N.C. 41, 45, 619 S.E.2d 491, 493 (2005).

[8] N.C. Gen. Stat. § 97-2(9).

[9] *Id.* at *7 (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

[10] *Id.* at *7 (citing *Russell v. Lowes Prod. DIstrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (Ct. App. 1993).

[11] There was no dispute that claimant failed to prove factors 1, 2, or 4.

[12] *Fields*, at *8.

[13] *Id.* at 9.

[14] *Id.*

[15] *Id.* at *10.