

# NC Workers' Compensation Update: Court of Appeals Enters First Appellate Decision

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## North Carolina Court of Appeals Enters First Appellate Decision on Extended Benefits Beyond 500 Weeks

In 2011, the North Carolina state legislature instituted a 500-week cap on temporary total disability benefits as part of its revisions to the Workers' Compensation Act under N.C. Gen. Stat. 97-29. The cap applies to all cases with a date of injury on or after June 24, 2011. However, the legislature included provisions in N.C. Gen. Stat. 97-29(c), rendering the 500-week limitation a "soft" cap, allowing claimants to seek extended benefits in excess of 500 weeks once 425 weeks of disability had passed and upon establishing by a preponderance of the evidence that the employee has sustained a "total loss of wage-earning capacity." Other than naming this basic legal burden, the legislature did not elaborate on what additional legal standards may be employed to determine a claimant's eligibility for extended benefits. Specifically, the legislature did not specify what was meant by the phrase "total loss of wage-earning capacity."

Because of the 425-week hurdle to make a claim for extended benefits, it has taken a decade for the first of these extended benefits cases to become ripe for decision, but we are now in receipt of the first North Carolina Court of Appeals decision interpreting N.C. Gen. Stat. 97-29(c) and the phrase "total loss of wage earning capacity". *Sturdivant v. NC Department of Public Safety* (COA22-421) was filed on March 21, 2023. In that case, the plaintiff sustained a compensable back injury in 2011. After passing the 425-week threshold, the plaintiff filed a Form 33 requesting a hearing on the issue of extended benefits. While the Deputy Commissioner and Full Commission in the case had agreed with the defendants' position that the standard for establishing a "total loss of wage earning capacity" was higher than the standard for establishing "total disability" prior to 500 weeks, the Court of Appeals disagreed. The Court found that the phrases "total loss of wage-earning capacity" and "total disability" are synonymous. The Court indicated that the traditional Russell factors will remain the standard for assessing disability, even beyond 500 weeks. Pursuant to these factors, which have been the standard for establishing disability since 1993, a claimant will qualify for disability benefits if he can prove that:

1. He is incapable of working in any employment;
2. He is capable of some work but, after a reasonable job search, cannot locate suitable employment due to his work restrictions;
3. It is futile for him to seek work; or
4. He has returned to work at a lower wage due to work restrictions from a compensable injury.

With the above being said, the Court did hold that a claimant seeking extended benefits is not entitled to a presumption of disability when seeking benefits beyond 500 weeks. Consequently, just as a claimant bears the burden of establishing disability before 500 weeks, a claimant retains the burden of establishing disability when seeking compensation beyond 500 weeks.

Practically speaking, the Court's decision appears to significantly soften the 500 week cap, as the standard outlined by the Court is significantly lower than the standard proposed in the case by the defendants, the Deputy Commissioner and the Full Commission. Given that this is an issue of first impression, it is possible the case will be heard by the North Carolina Supreme Court.

**MGC will provide additional updates as this case progresses. In the meantime, should have you any questions or concerns regarding the ruling, please do not hesitate to contact one of our North Carolina worker's compensation attorneys [here](#).**

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