

COURT OF APPEALS OF NORTH CAROLINA

McLean v. Roadway Express, Inc.

56 N.C. App. 451 (1982) · Decided March 16, 1982

OPINION

ARNOLD, J.

ARNOLD, Judge. Defendant assigns as error the Commission's conclusion that plaintiff had suffered a change in condition between the date of his first disability rating and the date of hearing which increased his permanent partial disability from 30% to 50%. Defendant challenges the adequacy of the factual foundation for this conclusion which was set forth in finding of fact #6: 6.

The reason Dr. Pollock changed his rating of permanent partial disability from 30 percent to 50 percent of the back was that the plaintiff had undergone a second operation on his back... and that the plaintiff was still experiencing discomfort in the low back region. Defendant asserts that Dr. Pollock merely changed his opinion as to the extent of plaintiffs disability after the second operation failed to improve his condition. "A mere change of the doctor's opinion with respect to claimant's preexisting condition," defendant notes "does not constitute a change of condition required by G.S.

Section 97-47." Shuler v. Talon Div. of Textron, 30 N.C. App. 570, 577, 227 S.E. 2d 627, 631 (1976). Defendant argues that there was no evidence of a worsening of plaintiffs condition as a result of the second operation since Dr. Pollock testified that he "saw very little difference in his condition in '77 and '79." Moreover, the record reveals no basis for Dr. Pollock's opinion changing his rating from 30 percent to 50 percent partial disability rating.

It is well settled in cases construing G.S. 97-47 that "change of condition," as contemplated by the statute, means "a substantial change, after a final award of compensation, of physical capacity to earn...." Tucker v. FCX, 36 N.C. App. 438, 444, 245 S.E. 2d 77, 80 (1978).

We must agree with defendant that there is no evidence in the record to support the Commission's conclusion that the plaintiff here underwent such a change of condition. Plaintiff asserts as an alternative ground for upholding the Commission's award that he never received a "final rating" and was therefore not bound by the Supplemental Memorandum of Agreement with defendant.

We cannot agree. While it is possible that Dr. Pollock did not intend for the original disability rating to be "final," plaintiffs reliance on that rating in entering into the agreement with his employer and the Commission's approval of the agreement operated to "finalize" the rating.

As stated by this Court in *Watkins v. Motor Lines, Inc.*, 10 N.C. App. 486, 489, 179 S.E. 2d 130, 132 (1971), “[a]n agreement to pay compensation, when approved by the Industrial Commission, is equivalent to an award.” According to the statute, an award may be reviewed solely “on the grounds of a change in condition....” As noted previously, plaintiff here failed to fulfill this threshold requirement.

We conclude that the Commission’s findings and conclusion of law that plaintiff suffered a change of condition is unsupported by the evidence and must be reversed. Reversed. Judges Clark and Whichard concur.