NO. COA09-391

NORTH CAROLINA COURT OF APPEALS

Filed: 19 January 2010

HELEN K. SPERRY,
Plaintiff,

v. North Carolina Industrial Commission
No. 396280

KOURY CORPORPATION,
Employer-Defendant, and
SELECTIVE INSURANCE COMPANY,
Carrier-Defendant.

Appeal by Plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 3 February 2009. Heard in the Court of Appeals 30 September 2009.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and Jeanette F. Gray, for Plaintiff.

Rudisill, White & Kaplan, P.L.L.C., by Bradley H. Smith, for Defendants.

ERVIN, Judge.

Plaintiff Helen K. Sperry appeals from the 3 February 2009 Opinion and Award of the North Carolina Industrial Commission affirming with modifications the 26 June 2008 Opinion and Award of Deputy Commissioner Bradley W. Houser denying Plaintiff total disability compensation benefits subsequent to 1 September 2006 while awarding Plaintiff "all related medical expenses incurred or to be incurred by plaintiff as the result of her injury by

accident, for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, give relief or tend to lessen plaintiff's period of disability." After careful consideration of the record in light of the applicable law, we conclude that the Commission's decision should be affirmed.

I. Factual Background

Plaintiff was born on 24 February 1950 and began her employment with Defendant Koury Corp. as a resident manager on 15 March 1985. At the time of her initial employment with Koury, Plaintiff managed two apartment complexes. Plaintiff's duties as resident manager included leasing, checking apartments, evictions, generating reports, payroll, and supervision of maintenance personnel. Both before and after the incident that gave rise to Plaintiff's claim, the resident manager position required no heavy lifting and allowed Plaintiff to sit and stand as needed.

On 5 June 2001, Plaintiff underwent a lumbar fusion unrelated to her subsequent work-related injury. Plaintiff was out of work for three to four months following this procedure.

In the late afternoon on 8 April 2003, Plaintiff tripped over a rug runner and sustained a compensable injury to her lower back. As a result of this incident, Plaintiff experienced back pain and sought treatment from Dr. Mark Roy. Dr. Roy assigned permanent work restrictions, instructing Plaintiff not to lift more than ten pounds, not to bend or stretch, not to climb stairs or walk excessively, and to sit and stand as needed.

On 14 April 2003, Plaintiff returned to her resident manager's position and continued to work her usual hours while complying with the restrictions imposed by Dr. Roy. Plaintiff's restrictions did not limit her ability to perform any of the duties associated with her job as resident manager, although there were a number of days upon which Plaintiff was unable to work due to her injury. Except for those dates,[1] Plaintiff continued working as resident manager from 14 April 2003 through 31 October 2005 without the necessity for special accommodations.

On 27 June 2003, Dr. Roy noted that a CAT scan revealed no loosening of any hardware related to Plaintiff's 2001 fusion surgery. In addition, an MRI failed to demonstrate any disc or compressive pathology. Dr. Roy continued to examine Plaintiff every two or three months. On 7 May 2005, Dr. Roy concluded that Plaintiff had reached maximum medical improvement and assigned her a thirty percent permanent partial disability rating to her back. Dr. Roy apportioned ten percent of Plaintiff's rating to the 2001 fusion procedure and twenty percent to the 8 April 2003 work-related injury.

On 1 November 2005, Plaintiff temporarily left her employment with Koury pursuant to the Family and Medical Leave Act (FMLA) in order to take care of her eighty-seven year old mother, who had

[1] The specific dates Plaintiff missed due to her back injury were 4 June 2003, 17 May 2005, and 4 October 2005 through 6 October 2005.

broken her hip.[2] Although Plaintiff intended to return to work in January 2006, she remained out of work for the purpose of undergoing three different surgeries unrelated to her 8 April 2003 compensable injury, the last of which was performed in August 2006. On 28 February 2006, the Commission approved a settlement embodied in a Form 21 agreement which was based on a twenty percent permanent partial disability rating to Plaintiff's back.

During the period from January 2006 to August 2006, when Plaintiff was out of work for reasons unrelated to her compensable injury, Plaintiff was consistently in contact with Koury. Koury agreed to an extension of Plaintiff's FMLA leave. Although Plaintiff notified Koury that she would be ready to return to work on 1 September 2006, Koury terminated Plaintiff on 31 August 2006. Plaintiff has not worked or received indemnity compensation since that time.

Beverly Carlton, Defendants' vocational expert, testified that the fact that Plaintiff returned to work as a resident manager

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[2] At one point in her brief, Plaintiff contends that this case poses a question of first impression, which she describes as "the status of an injured worker who is working for defendant-employer with permanent work restrictions, goes out of work on FMLA leave which is extended by the employer, until the employee notifies the employer mid-August 2006, that she will be able to return to work on September 1, 2006, and then the employer terminates the employee effective August 31, 2006, and during the FMLA leave the injured worker accepts the payment of her [permanent partial disability] rating pursuant to a Form 21 approved on February 28, 2006, based upon reaching [maximum medical improvement] on May 7, 2005." However, given Plaintiff's subsequent concession that "[t]his claim is not before this Court as a[n] FMLA action," we will decide this case solely on the basis of Plaintiff's rights under the Workers Compensation Act without reference to any rights that Plaintiff may have or have had under the FMLA.

after her injury on 8 April 2003 substantiated her wage-earning capacity. Ms. Carlton further stated that Plaintiff would have been capable of performing her job as resident manager had the position been available following her recovery from her August 2006 surgery. According to Dr. Roy, Plaintiff has remained at maximum medical improvement since 7 May 2005 and is capable of working for Koury as a resident manager.

Plaintiff's claim was heard before the Deputy Commissioner on 28 February 2008. On 26 June 2008, the Deputy Commissioner entered a decision denying Plaintiff's request for total disability compensation on and after 1 September 2006. The Deputy Commissioner concluded that the Form 21 agreement, which was approved on 26 February 2006, gave rise to a presumption of disability; however, based on the credible evidence of record, the Deputy Commissioner concluded that Defendants had rebutted that presumption by presenting evidence of Plaintiff's capacity to earn wages after her injury based upon the fact that she had continued to work as a resident manager from 14 April 2003 through 31 October 2005. The Deputy Commissioner further concluded that Plaintiff experienced no change of condition associated with her 8 April 2003 injury after she reached maximum medical improvement on 7 May 2005 or after the Commission approved the Form 21 agreement on 28 February 2006. As a result, the Deputy Commissioner determined that "[a]ny inability plaintiff has had to earn wages subsequent to 31 August 2006 is not related to her 8 April 2003 injury by accident." However, the Deputy Commissioner awarded Plaintiff "all

. . . medical expenses incurred or to be incurred by plaintiff as the result of her 8 April 2003 injury by accident[.]"

Plaintiff appealed the Deputy Commissioner's decision to the Commission on 26 June 2008. On 3 February 2009, the Commission entered an order denying Plaintiff's request for total disability compensation on and after 1 September 2006, but awarding Plaintiff "all related medical expenses incurred or to be incurred by plaintiff as the result of her injury by accident, for so long as such examinations, evaluations and treatments may reasonably be required to effect a cure, give relief or tend to lessen plaintiff's period of disability." Plaintiff noted an appeal to this Court from the Commission's decision.

II. Standard of Review

The standard of review in workers' compensation cases is well-established. "The Industrial Commission is the fact-finding body." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986) (citing *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976)). "In considering factual issues, the Commission's responsibility is to judge the credibility of the witnesses and the weight to be given to their testimony." *Hendrix*, 317 N.C. at 186, 345 S.E.2d at 379 (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683-84 (1982)). Our review of a Commission decision is limited to two issues: "whether there was any competent evidence before the Commission to support its findings of fact and whether the findings of fact justify its legal conclusions and decision." *Buchanan v. Mitchell County*, 38 N.C.

App. 596, 599, 248 S.E.2d 399, 401 (1978), *cert. denied*, 296 N.C. 583, 254 S.E.2d 35 (1979) (citing *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E.2d 449 (1977)). Although the Commission's findings of fact are conclusive upon appeal when supported by competent evidence, *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), the Commission's conclusions of law are subject to *de novo* review. *Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 86, 361 S.E.2d 575, 577 (1987).

III. Substantive Legal Analysis

Plaintiff contends that the Commission erred because (1) the Commission failed to conclude that she was entitled to total disability benefits from and after 1 September 2006; (2) the Commission failed to find that Plaintiff experienced no change of condition subsequent to reaching maximum medical improvement on 7 May 2005 or the approval of the Form 21 agreement on 28 February 2006; and (3) the Commission failed to find that Plaintiff was entitled to compensation for days on which she missed work prior to 1 September 2006. We disagree.

A. Entitlement to Total Disability Benefits

A presumption that an employee is disabled arises where the claimant and employer have executed a Form 21, Agreement for Compensation for Disability, or a Form 26, Supplemental Agreement as to Payment of Compensation, assuming that the forms include a stipulation that the employee is subject to a continuing disability and are later approved by the Commission. *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 706, 599 S.E.2d 508, 512 (2004).

"Settlement agreements between the parties, approved by the Commission pursuant to N.C. [Gen. Stat.] § 97-17, are binding on the parties and enforceable, if necessary, by court decree." *Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 139, 530 S.E.2d 62, 64 (2000) (citing *Pruitt v. Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976)). "[A]n approved Form 21 agreement is considered a settlement between the parties, which results in a rebuttable presumption of continuing disability." *Saunders*, 352 N.C. at 139, 530 S.E.2d at 64 (citing *Saums v. Raleigh Community Hospital.*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997); *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971); *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996); *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 283, 458 S.E.2d 251, 257, *disc. rev. denied and cert. denied*, 341 N.C. 647, 462 S.E.2d 507 (1995); *Radica v. Carolina Mills*, 113 N.C. App. 440, 447, 439 S.E.2d 185, 190 (1994)). "[H]owever, . . . the specific terms of the agreement . . . result[] in the ongoing presumption, not the Form 21 itself." *Id.* For example, if the agreement states that the plaintiff is totally disabled, the agreement logically creates a presumption that the plaintiff is totally disabled; on the other hand, if the agreement states that the plaintiff is partially disabled, the agreement only creates a presumption that the plaintiff is partially disabled. *See Id; see also Dancy v. Abbott Labs.*, 139 N.C. App. 553, 559, 534 S.E.2d 601, 605 (2000), *aff'd*, 353 N.C. 446, 545 S.E.2d 211 (2001). In this case, the Form

21 agreement affirmatively states that Plaintiff suffered from permanent partial disability due to her back injury and that Koury and its carrier "hereby undertake to pay compensation to the employee at the rate of $380.29 per week beginning 11/16/05, and continuing for 60 weeks." As a result, the Form 21 agreement between Plaintiff and Defendants only created a presumption that Plaintiff was partially disabled rather than a presumption that Plaintiff was totally disabled.

In the absence of a presumption that Plaintiff was totally disabled, Plaintiff's claim for total disability benefits after 1 September 2006 required the Commission to determine whether Plaintiff suffered from an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9). An employee seeking compensation for a disability bears "the burden of proving the existence of [her] disability and its extent." *Hendrix*, 317 N.C. at 185, 345 S.E.2d at 378. In order to find that an employee is disabled, the Commission must find: "(1) that plaintiff was incapable after [her] injury of earning the same wages [she] had earned before her injury in the same employment, (2) that plaintiff was incapable after [her] injury of earning the same wages [she] had earned before [her] injury in any other employment, and (3) that [her] incapacity to earn was caused by [her] injury." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683.

In its order, the Commission made the following findings of fact with respect to the disability issue:

6. On June 27,2003, Dr. Roy noted that a CT scan showed no loosening of any hardware related to the 2001 fusion surgery and that an MRI failed to demonstrate any disc or compressive pathology. Dr. Roy continued to treat plaintiff conservatively with medication and periodic follow-up examinations every two or three months.

7. On May 7, 2005, Dr. Roy opined that plaintiff had reached maximum medical improvement and assigned her a 30% permanent partial disability rating to her back. In response to a questionnaire from plaintiff's counsel, Dr. Roy apportioned 10% of plaintiff's rating to the 2001 fusion surgery and 20% to the work-related accident of April 8, 2003.

8. The parties entered into an Industrial Commission Form 21 agreement to pay plaintiff compensation for the 20% permanent partial disability rating to her back, which was approved by the Commission on February 28, 2006.

9. Following her injury by accident, on April 14, 2003, plaintiff returned to work at her job as resident manager. Upon returning to work, plaintiff's restrictions did not limit her ability to perform any of the duties associated with her job as resident manager. Plaintiff missed work due to her work-related back injury and pain on June 4, 2003, May 17, 2005, and from October 4, 2005 through October 6, 2005. Except for these missed work dates, plaintiff continued working as resident manager from April 14, 2003 through October 31,2005, without accommodations having to be made by defendant-employer.[3]

10. On November 1, 2005, plaintiff went out of work pursuant to the Family and

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[3] Although Plaintiff regularly refers to her resident manager's position as an "accommodated" position in her brief, it is clear from this finding that the Commission rejected this characterization in its findings of fact.

Medical Leave Act (FMLA). Plaintiff took this leave to care for her mother who had fallen and broken her hip.

11. Although plaintiff intended to return to work for defendant-employer in January of 2006, she remained out of work to undergo surgery on her right and left thumbs and to repair a hernia. These conditions were not related to her employment with defendant-employer. The hernia repair was the last procedure performed and was performed in August 2006. Plaintiff had no work restrictions assigned as a result of these conditions or surgeries.

12. From January 2006 to August 2006 when she was out of work due to non-work related conditions and surgeries, plaintiff remained in contact with defendant-employer regarding her temporary inability to return to work. Additionally, plaintiff met with Mr. Koury on multiple occasions to discuss her return to work and to request an informal extension of her FMLA leave during this period, which was allowed by Mr. Koury. At no time prior to August 31, 2006, did any representative of defendant-employer inform plaintiff that her job would not be available when her leave ended.

13. Following plaintiff's hernia surgery, she went to see Mr. Koury and informed him that she would be ready to return to work in a few weeks on or about September 1, 2006. However, Mr. Koury instructed plaintiff to report to Human Resources. When plaintiff reported to Human Resources, Robin Smith informed plaintiff that she was terminated, effective August 31, 2006.

14. While plaintiff was out of work on FMLA, a co-worker assumed the majority of the duties of the resident manager job, such that defendant no longer had a need for plaintiff to return to that position.

15. As for plaintiff's ability to return to other employment, Beverly Carlton,

> defendants' vocational expert, testified that plaintiff's ability to perform the resident manager position from April 8, 2003 until October 31, 2005 showed an ability to earn wages. Ms. Carlton further testified that the resident manager position which plaintiff performed was a job that was available to the general public in the open job market. Additionally, plaintiff testified that she would have been capable of performing her job as resident manager, had the position been available after she recovered from her hernia repair. Ms. Carlton performed a labor market survey which showed opportunities for plaintiff to return to work at suitable employment within plaintiff's restrictions and education level and that paid at or near her pre-injury average weekly wage.[4]
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> 16. According to Dr. Roy, plaintiff has remained at maximum medical improvement since May 7, 2005. Further, while plaintiff is taking a number of medications for her back condition, Dr. Roy opined that none of those medications adversely affect her ability to work, specifically with regard to the resident manager position. Finally, Dr. Roy stated that plaintiff continues to be capable of working for defendant-employer as a resident manager. . . .
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> . . . .
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> 19. Subsequent to August 31, 2006, plaintiff's inability, if any, to earn

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[4] Although Plaintiff contends that the Commission erred by failing to make findings of fact addressing the exact nature of the restrictions imposed by Dr. Roy, it is clear from this and other findings that the Commission was aware of the restrictions under which Plaintiff returned to work at Koury following her 8 April 2003 injury and that these restrictions did not impair her ability to perform the normal duties associated with that position or to find work in similar positions. Under this set of circumstances, we do not believe that the Commission's failure to make factual findings concerning the exact nature of the restrictions that Dr. Roy imposed upon Plaintiff entitles her to appellate relief.

> wages is not related to her April 8, 2003 injury by accident.

Based on these findings of fact, the Commission determined that "Plaintiff's claim that she is entitled to total disability compensation subsequent to September 1, 2006 is DENIED."

The Commission's findings with respect to the issue of whether Plaintiff was subject to a total disability on and after 1 September 2006 are amply supported by the record evidence. As the Commission specifically noted, Dr. Roy opined that none of the medications Plaintiff took adversely affected her ability to work, with specific reference to the resident manager position that she had previously occupied, and that Plaintiff continues to have the ability to work for Koury as a resident manager. When asked, "[d]o you have an opinion, within a reasonable degree of medical certainty, whether [Plaintiff's] absence from work from September 1st until the present . . . is related to her April 8th, 2003 fall[,]" Dr. Roy responded, "I don't think that it is[;] I think it's related to the other problems, [b]ecause she was working up until she went out for her thumb and her hernia." Although Plaintiff repeatedly refers in her brief to the fact that Dr. Roy signed a Form 28U following Plaintiff's termination, the Commission has fact-finding responsibility in workers compensation cases, and its factual findings to the effect that Plaintiff was not disabled have the required evidentiary support, giving them binding effect on appeal. Thus, the Commission's findings that Plaintiff had the ability to work and that her earning capacity was not impaired have adequate evidentiary support and the Commission did not commit any

error of law by denying Plaintiff's request for total disability compensation from and after 1 September 2006.[5]

B. Change in Condition

N.C. Gen. Stat. § 97-47 provides in part that:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award.

A "change in condition" is a condition occurring after a final award of compensation that is "different from those existent when the award was made." *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987). A "change in condition" can consist of a change in the claimant's physical condition that impacts his earning capacity, *McLean v. Roadway Express*, 307 N.C. 99, 103-04, 296 S.E.2d 456, 459 (1982), a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, *Smith v. Swift & Co.*, 212 N.C. 608, 610, 194 S.E. 106, 108 (1937), or a change in the degree of disability even though claimant's physical condition remains unchanged. *West v. Stevens Co.*, 12 N.C. App. 456, 461, 183 S.E.2d 876, 879 (1971). "A change of condition refers to conditions

[5] The issue of whether Plaintiff is entitled to total disability benefits under a "change in condition" theory is addressed in the next subsection of this opinion. The Commission's order suggests that it viewed the "change in condition" argument as the essence of Plaintiff's claim.

different from those in existence when an award was originally made and a continued incapacity of the same kind and character and for the same injury is not a change in condition." *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996) (quotations omitted). "'The party seeking to modify an award based on a change of condition bears the burden of proving that a new condition exists and that it is causally related to the injury upon which the award is based.'" *Shingleton v. Kobacker Grp.*, 148 N.C. App. 667, 670, 559 S.E.2d 277, 280 (2002) (quoting *Cummings v. Burroughs Wellcome Co.*, 130 N.C. App. 88, 91, 502 S.E.2d 26, 29 (1998)). "'Whether the facts amount to a change of condition pursuant to N.C. Gen. Stat. § 97-47 is a question of law,' and thus, is subject to *de novo* review." *Cummings*, 130 N.C. App. at 90, 502 S.E.2d at 28, *disc. review denied*, 349 N.C. 355, 517 S.E.2d 890 (1998) (quoting *Lewis*, 122 N.C. App. at 149, 468 S.E.2d at 274 (citing *Weaver*, 319 N.C. 247, 354 S.E.2d 480)).

In this case, Plaintiff claims that her condition changed subsequent to reaching maximum medical improvement on 7 May 2005 and to the approval of the Form 21 agreement[6] on 28 February 2006. In essence, Plaintiff asserts that her condition changed when she was terminated from her employment on 31 August 2006 on the theory that this event produced a change in her earning capacity despite

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[6] "The employer and the insurance carrier are entitled to treat final payment under a Form 21 agreement as closing the proceeding, absent timely notice that an employee seeks further compensation due to change of condition." *Apple v. Guilford County*, 321 N.C. 98, 101, 361 S.E.2d 588, 591 (1987); *see also* N.C. Gen. Stat. § 97-47.

the fact that her physical condition remained basically unchanged. We are not persuaded by Plaintiff's argument.

In addition to the findings of fact that we have quoted above, the Commission made the following findings of fact with regard to Plaintiff's alleged change of condition:

> 17. Based upon the greater weight of the evidence of record, the Commission finds that the post-injury resident manager job that plaintiff performed was not make-work and constituted suitable employment.
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> 18. Plaintiff has not experienced a change of condition as it relates to her April 8, 2003 injury by accident since she reached maximum medical improvement on May 7, 2005 or since the approval of the Form 21 on February 28, 2006.
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> 19. Subsequent to August 31,2006, plaintiff's inability, if any, to earn wages is not related to her April 8, 2003 injury by accident.

Based on these findings of fact, the Commission concluded as a matter of law that:

> 2. In order for the Commission to award plaintiff total disability compensation, plaintiff must prove that she experienced a change of condition after approval of the Form 21 for the permanency rating on February 28, 2006, and subsequent payment by defendants. Plaintiff may prove a change of condition by showing either a change in her physical condition that affects her ability to earn wages or a change in her earning capacity although her physical condition remains the same. *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 477 S.E.2d 190 (1996). In the case at bar, plaintiff's physical condition and wage earning capacity have remained unchanged since she reached maximum medical improvement and any failure to

> locate employment is not the result of the compensable injury by accident. *Id.*
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> 3. Therefore, plaintiff sustained no change of condition as it relates to her April 8, 2003 injury by accident since she reached maximum medical improvement on May 7, 2005 or since the approval of the Form 21 on February 28, 2006. N.C. Gen. Stat. § 97-47.

The Commission's findings are amply supported by competent evidence.

Ms. Carlton testified that Plaintiff had told her that she was "able to go back to work" after her 8 April 2003 injury "under those work restrictions" imposed by Dr. Roy. According to Ms. Carlton, Plaintiff had the ability "to perform the work, [and] maintain the job." Ms. Carlton asserted that "the fact that she went back to work and earned those wages substantiates her wage-earning capacity." Ms. Carlton believed that, "based on the labor market survey[,] . . . there were opportunities for [Plaintiff] to return to work" and receive a salary equivalent to her average weekly wage prior to her back injury.[7] Ms. Carlton further opined that Plaintiff's ability to perform her job as resident manager from 14 April 2003 through 31 October 2005 demonstrated her capacity to earn wages during that period of time and thereafter.

In addition, Plaintiff testified that she returned to work on 14 April 2003 and performed the duties applicable to the resident

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[7] Plaintiff repeatedly points to the fact that Ms. Carlton did not actually find work for Plaintiff in her brief. However, as we have already noted, the relevant issue is whether Plaintiff's earning capacity had changed, and not whether Plaintiff could actually find work.

manager's job at her pre-injury average weekly wage. Plaintiff testified that she continued to work as a resident manager for approximately two and one-half years until going out on FMLA leave. Plaintiff described the position as "clerical[,]" consisting largely of "paperwork." When asked, "did [the work restrictions] really change in any way the way you performed your job physically," Plaintiff responded in the negative. Plaintiff agreed that "no heavy lifting was required;" that she could "sit and stand as [she] needed;" and that the physical requirements of her job had not changed since she began to work there over twenty years prior to 28 February 2008.

A careful review of the record reveals the total absence of any evidence tending to show that Plaintiff's failure to return to work prior to 31 August 2006 stemmed from her work-related back injury. Instead, the record reflects that Plaintiff remained out of work prior to 31 August 2006 in order to take care of her mother and to undergo various surgical procedures. In addition, there is no evidence that the extent of Plaintiff's physical disability had increased. The mere fact that Koury did not allow Plaintiff to return to work for reasons that were unrelated to her compensable back injury simply does not constitute a change in condition of the type contemplated in N.C. Gen. Stat. § 97-47. As a result, we conclude that the Commission's findings with respect to the "changed conditions" issue are supported by competent evidence and that the Commission's conclusion that Plaintiff's condition has not

changed due to a decreased earning capacity is supported by the Commission's findings.

C. Compensation for Days Missed

Finally, Plaintiff contends that the Full Commission erred by failing to award disability compensation for days that Plaintiff missed from work prior to 1 September 2006. Admittedly, the Commission found that Plaintiff missed work on 8 June 2003, 17 May 2005, and 4 October 2005 through 6 October 2005. However, the sole issue raised by Plaintiff at the hearing before the Commission, as evidenced by the pretrial agreement and Plaintiff's testimony,[8] was whether Plaintiff was entitled to compensation subsequent to 1 September 2006. Since the claim that Plaintiff brings to this Court relating to compensation for days that Plaintiff missed from work prior to 1 September 2006 was not asserted before the Commission, the Commission had no obligation to decide that claim and we do not address matters raised for the first time on appeal.[9] *See, e.g., Booker v. Medical Center*, 297 N.C. 458, 481-82, 256

[8] When asked if her claim was "from September 1st, 2006, until the present and continuing," Plaintiff responded, "[y]es."

[9] Plaintiff advances other arguments relating to issues that were not presented to the Commission, including claims that: (1) Defendants incorrectly classified Plaintiff's claim as a "medical only claim" in their interrogatory responses when there is no evidence of record that Plaintiff objected to Defendants' classification or disputed that classification before the Commission and (2) that Defendants failed to file a Form 60, a Form 28, a Form 28B and a Form 28T. However, given that there is no indication that Plaintiff brought these issues to the Commission's attention, we decline to address these arguments on appeal for the same reason that we decline to address Plaintiff's assertion that the Commission erred by failing to award compensation for days that Plaintiff missed work due to her 8 April 2003 injury prior to 1 September 2006.

S.E.2d 189, 204 (1979) (stating that, "[h]ad appellees squarely presented the issues of notice at the hearing before the Commission, it could have conducted an inquiry in accordance with [N.C. Gen. Stat. §] 97-22 to determine whether or not [the party] was prejudiced by the lack of notice[;] [however,] [t]o allow an employer to raise the issue for the first time on appeal deprives the claimants of the benefits of that determination and could easily lead to a denial of compensation in a case where the facts would justify a finding of no prejudice"); *see also* N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial [tribunal] a timely request, objection or motion stating the specific grounds for the ruling the party desired the [tribunal] to make"). As a result, we decline to address Plaintiff's challenge to the Commission's failure to award compensation for days missed prior to 1 September 2006.

IV. Conclusion

For the foregoing reasons, we conclude that the Commission did not commit an error of law in determining that Plaintiff was not entitled to a presumption of total disability arising from the Form 21 agreement, that the Commission did not err in failing to find that Plaintiff had established an entitlement to total disability benefits on the basis of a change in conditions or any other theory, and that Plaintiff's other arguments have not been properly preserved for appellate review. As a result, we affirm the Commission's order.

AFFIRMED.

Judges GEER and STROUD concur.

Report per Rule 30(e).