

In an opinion filed May 19, 2009, the Court of Appeals gave the Industrial Commission broad discretion to take additional evidence when a case has been remanded for 'proper findings of fact.' *Silva v. Lowe's Home Improvement*, No. COA08-93 (2009).

In *Silva*, the Industrial Commission originally awarded ongoing disability benefits to the injured worker. However, the employer appealed, and the Court of Appeals sent the case back to the Commission because the Commission 'failed to make specific findings of fact as to the crucial questions necessary to support a conclusion as to whether plaintiff had suffered any disability.'

On remand, the Full Commission sent the case to a deputy commissioner to take additional evidence on the issue of disability. On the basis of the 'new evidence,' the Commission again determined that Mr. Silva was entitled to ongoing benefits.

The employer appealed again, arguing that the Commission had no authority to take additional evidence because the Court of Appeals did not instruct it to do so. The Court of Appeals rejected this argument and noted that the Commission has 'plenary power to receive additional evidence' and that the decision to receive additional evidence will be overturned only upon a showing that the Commission has abused its discretion.

The Court of Appeals also noted that the employer failed to object to the taking of additional evidence. Rather, the employer entered a pretrial agreement stipulating to the testimony of the additional witnesses.

Practitioners should keep in mind that even after the Commission's initial determination, the evidentiary record can be reopened on remand. Plaintiff's attorneys, in particular, should pay heed. Employees have the burden of establishing ongoing disability, and you don't want to get caught unprepared when the Commission takes additional evidence. Make sure your clients keep looking for work.

## **What does this mean for the injured worker?**

Keep looking for work even after you've won your case at the Industrial Commission. If your employer appeals and the Court of Appeals sends your case back to the Industrial Commission, the Commission can gather more evidence. If

you haven't been looking for work since your favorable ruling, the Commission could determine that you are no longer disabled.