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North Carolina General Statutes Section 97-31: Must it Provide Exclusive Compensation for Workers who Suffer Scheduled Injuries?

The North Carolina Workers' Compensation Act[1] establishes three avenues of compensation for injured workers. First, section 97-29 provides benefits to workers who are unable to work as a result of an injury.[2] Second, section 97-30 makes benefits available to workers who are able to earn some wages but less than the amount that they were earning prior to their injury.[3] The amount of compensation awarded to workers under these two sections is determined by the duration of a worker's disability.[4] Finally, section 97-31 awards compensation to workers even if they suffer no diminution of earning capacity as a result of their injury.[5] Unlike sections 97-29 and 97-30, compensation under section 97-31 is limited to a fixed duration and a list of specifically enumerated injuries.[6] This compensation is "in lieu of all other

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1. N.C. GEN. STAT. §§ 97-1 to -122 (1979 & Cum. Supp. 1983).

2. The pertinent part of *id.* § 97-29 (Cum. Supp. 1983) provides:

> Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars ($30.00) per week.

3. The pertinent part of *id.* § 97-30 provides:

> Except as otherwise provided in G.S. 97-31, where the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid, as hereinafter provided, to the injured employee during such disability, a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than the amount established annually to be effective October 1 as provided in G.S. 97-29 a week, and in no case shall the period covered by such compensation be greater than 300 weeks from the date of injury.

4. *Id.* §§ 97-29, -30; *see id.* § 97-2(9) (1979) (definition of "disability" under the Act).

5. Watts v. Brewer, 243 N.C. 422, 424, 90 S.E.2d 764, 767 (1956); Anderson v. Northwestern Motors, 233 N.C. 372, 374, 64 S.E.2d 265, 266 (1951); Loflin v. Loflin, 13 N.C. App. 574, 577, 186 S.E.2d 660, 662, *cert. denied*, 281 N.C. 154, 187 S.E.2d 585 (1972).

6. N.C. GEN. STAT. § 97-31 (1979) provides:

> In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:
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> (1) For the loss of a thumb, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 75 weeks.
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> (2) For the loss of a first finger, commonly called the index finger, sixty-six and two thirds percent (66⅔%) of the average weekly wages during 45 weeks.
>
> (3) For the loss of a second finger, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 40 weeks.
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> . . . .
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> (24) In case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000).

N.C. GEN. STAT. § 97-31 (1979).

compensation."[7] The critical language of section 97-31 provides: "In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement . . . ."[8]

The North Carolina Supreme Court has interpreted section 97-31's "in lieu of" proviso as entitling an injured employee to compensation exclusively under the schedule, if all his injuries are included in it.[9] The court of appeals adhered to this view[10] until 1983 when it rejected the exclusive compensation theory in *West v. Bladenboro Cotton Mills, Inc.*[11] and *Cook v. Bladenboro Cotton Mills, Inc.*[12] Instead of viewing section 97-31 as an exclusive source of compensation for a worker with a scheduled injury, *West* and *Cook* interpreted section 97-31 as an alternative basis of compensation for a worker who also qualified under another compensatory section of the Workers' Compensation Act.[13] This rationale allows a worker to elect the most favorable statutory remedy; if he chooses to receive compensation under section 97-31, however, he cannot recover additional compensation under another section of the Act,[14] because compensation under section 97-31 is "in lieu of all other compensation."

The *Cook* and *West* interpretations of section 97-31 are more equitable and more consistent with the underlying policy of the workers' compensation law than the supreme court's construction. Although these cases depart from precedent set by a higher court, they should not be overruled. Instead, the supreme court should reevaluate its interpretation of section 97-31 and, at the earliest opportunity, approve the court of appeals' approach.

Cook and *West* are strikingly similar. In both cases, claimants were employed for most of their adult lives at the Bladenboro Cotton Mills where they were exposed to high levels of cotton dust. When Bladenboro was purchased by Highland Mills in 1979, neither claimant obtained employment because pulmonary testing revealed that their lungs were impaired.[15] Both plaintiffs had little hope of securing other employment. Cook had "to take her time in climbing stairs and [could] become over exerted while sweeping."[16] She unsuccessfully sought work at the local employment agency and was turned

7. *Id.*

8. *Id.*

9. *See* Perry v. Hibriten Furniture Co., 296 N.C. 88, 249 S.E.2d 397 (1978).

10. *See* Baldwin v. North Carolina Memorial Hosp., 32 N.C. App. 779, 233 S.E.2d 600 (1977); Loflin v. Loflin, 13 N.C. App. 574, 186 S.E.2d 660, *cert. denied*, 281 N.C. 154, 187 S.E.2d 585 (1972); Dudley v. Downtowner Motor Inn, 13 N.C. App. 474, 186 S.E.2d 188 (1972).

11. 62 N.C. App. 267, 302 S.E.2d 645 (1983).

12. 61 N.C. App. 562, 300 S.E.2d 852 (1983).

13. *West*, 62 N.C. App. at 270-71, 302 S.E.2d at 648; *Cook*, 61 N.C. App. at 565-66, 300 S.E.2d at 854-55.

14. *West*, 62 N.C. App. at 271, 302 S.E.2d at 648. *See also supra* text accompanying note 8.

15. *West*, 62 N.C. App. at 268, 302 S.E.2d at 646; *Cook*, 61 N.C. App. at 563-65, 300 S.E.2d at 853-54.

16. *Cook*, 61 N.C. App. at 563, 300 S.E.2d at 853.

down for a job at a retail store.[17] Similarly, West had "a fifth grade education and no significant training outside the cotton textile industry."[18] Both claimants sought lifetime compensation under section 97-29 for total and permanent disability. The Industrial Commission, however, made a lump sum award to both claimants. The Commission awarded Cook 3000 dollars under section 97-31(24), which provides compensation not to exceed 10,000 dollars for permanent injury to any important internal organ for which no scheduled compensation is otherwise payable.[19] West received a 6000 dollar lump sum award. Although the Commission did not specify the statutory basis for the judgment, the court of appeals assumed that the award was pursuant to the same section.[20]

The court of appeals remanded both cases to the Industrial Commission with instructions to reconsider claimants' arguments that they were disabled[21] within the meaning of section 97-29.[22] The court interpreted section 97-29 as an alternative basis for compensation for workers who suffered an injury also compensable under section 97-31. The *West* court, citing the North Carolina Supreme Court decision in *Perry v. Hibriten Furniture Co.*,[23] concluded that the "in lieu of other compensation" clause of section 97-31 would permit a recovery under either section 97-31 or section 97-29, but not both.[24]

Although the *West* decision cited the supreme court as authority, the *Perry* court actually adopted a broader view of the "in lieu of" clause than that attributed to it. In *Perry*, decided unanimously in 1978, the supreme court had held that the "in lieu of" clause did not merely prohibit double recovery under section 97-31 and another section, but that it compelled recovery under only section 97-31.[25] The claimant in *Perry* had suffered a work-related injury while employed by the Hibriten Furniture Company. Medical experts agreed that he lost between twenty-five and seventy-five percent of the use of his back.

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17. *Id.* at 565, 300 S.E.2d at 854.

18. *West*, 62 N.C. App. at 268, 302 S.E.2d at 646.

19. *Cook*, 61 N.C. App. at 563-65, 300 S.E.2d at 853-55.

20. *West*, 62 N.C. App. at 269-70, 302 S.E.2d at 645-66.

21. "Disability" is a term of art. It does not refer to physical injury as such, but rather to loss of earning ability. N.C. GEN. STAT. § 97-2(9) (1979). Total disability is a prerequisite to compensation under section 97-29. *Id.* § 97-29 (Cum. Supp. 1983).

22. The court's language in *West* illustrates the policy considerations that caused it to depart from the supreme court's decision in Perry v. Hibriten Furniture Co., 296 N.C. 88, 249 S.E.2d 397 (1978). In *West* the court stated:

> Upon remand, if the Commission finds plaintiff has a disability because of the occupational disease, then the statutory basis for compensation should be specified. An award for damage to the lungs may be made under G.S. 97-31(24). . . . But such an award, by the express terms of the statute, would be in lieu of all other compensation. *Perry v. [Hibriten] Furniture Co.*, 296 N.C. 88, 249 S.E.2d 397 (1978). Such an award may also be based on G.S. 97-29 . . . . In many instances, an award under G.S. 97-29 better fulfills the policy of the Workers' Compensation Act than an award under G.S. 97-31 because it is a more favorable remedy and is more directly related to compensating inability to work.

West, 62 N.C. App. at 270-71, 302 S.E.2d at 648.

23. 296 N.C. 88, 249 S.E.2d 397 (1978).

24. *West*, 62 N.C. App. at 271, 302 S.E.2d at 648.

25. *Perry*, 296 N.C. at 93-94, 249 S.E.2d at 401.

Their testimony indicated that Perry was "probably unable to carry out gainful employment" and "probably disabled from any useful occupation."[26] Perry testified that he continued to suffer pain in his back and legs and could no longer lift or bend without hurting.[27] The Industrial Commission concluded that Perry sustained a fifty percent loss of the use of his back and awarded him 150 weeks' compensation under section 97-31(23). Perry alleged that he was totally disabled and should have been awarded compensation under section 97-29.[28] The supreme court quoted section 97-31, emphasizing the phrase "in lieu of all other compensation."[29] It then held that section 97-31 was claimant's exclusive remedy:

> The language of G.S. 97-31 . . . compels the conclusion that if by reason of a compensable injury an employee is unable to work and earn *any* wages he is totally disabled, G.S. 97-2(9), and entitled to compensation for permanent total disability under G.S. 97-29 *unless all his injuries are included in the schedule set out in G.S. 97-31*. In that event the injured employee is entitled to compensation exclusively under G.S. 97-31 regardless of his ability or inability to earn wages in the same or any other employment.[30]

The court of appeals' decisions in *Cook* and *West* circumvented the *Perry* holding. If the court of appeals had followed the *Perry* rule, it would not have allowed West and Cook the opportunity to recover compensation under section 97-29, the disability section of the Workers' Compensation Act, because under *Perry*, an "injured employee is entitled to compensation exclusively under section 97-31 regardless of his ability or inability" to work.[31]

Because more than one reasonable interpretation of the "in lieu of" clause exists, the legislature's intent in ratifying this clause is important. Unfortunately, the clause's legislative history is inconclusive. The circumstances surrounding the adoption of the clause may be viewed as supporting either the *Perry* or the *Cook-West* rule.

The legislature apparently adopted the "in lieu of" clause in response to the North Carolina Supreme Court's decision in the case of *Stanley v. Hyman-Michaels Co.*[32] In *Stanley* the supreme court considered an earlier version of section 97-31 that did not contain the "in lieu of" clause.[33] Plaintiff had suffered two scheduled injuries, the loss of his left leg and the loss of the use of fifty percent of his right foot, in an industrial accident. The Industrial Commission noted that section 97-31 explicitly provided that the loss of both arms or hands, or vision in both eyes " 'shall be deemed permanent total disabil-

26. *Id.* at 90-91, 249 S.E.2d at 399-400.
27. *Id.* at 92, 249 S.E.2d at 400.
28. *Id.* at 89, 249 S.E.2d at 398-99.
29. *Id.* at 93, 249 S.E.2d at 401.
30. *Id.* at 93-94, 249 S.E.2d at 401 (emphasis in original).
31. *Id.*
32. 222 N.C. 257, 22 S.E.2d 570 (1942).
33. North Carolina Workmen's Compensation Act, ch. 120, § 31, 1929 N.C. Sess. Laws 117, 130 (current version at N.C. GEN. STAT. § 97-1 to -122 (1979 & Cum. Supp. 1983)).

ity,' "[34] and shall be compensated under section 97-29, but did not state that the loss of a leg and the partial loss of the other foot would constitute such disability.[35] Thus, the Commission concluded that claimant's exclusive remedy was the scheduled payments provided by section 97-31.[36] The supreme court reversed the Commission, recognizing that although the combinations of injuries specified in section 97-31 were conclusively presumed to cause total and permanent disability, other injuries also were capable of causing such disability.[37] The court held that the Commission had "power to find that other injuries or combination of injuries occurring in the same accident may result in permanent total disability and when the Commission so finds, the injured employee should be compensated as provided in [the predecessor to section 97-29]."[38] Thus, *Stanley* allowed claimant to prove permanent and total disability and receive compensation under section 97-29 even though his injuries would have been compensable under section 97-31. When the legislature convened the following spring, however, it amended section 97-31 to include the "in lieu of" clause.[39]

Although the holding discussed above may have elicited this prompt legislative response, a closer reading of *Stanley* suggests that the legislature amended section 97-31 because of the court's disposition of a different issue in that case. When *Stanley* was decided, section 97-31 included a provision authorizing the Commission "to make and award a reasonable compensation for any serious bodily disfigurement received by any employee within the meaning of this Act, not to exceed twenty-five hundred ($2,500) dollars."[40] The Commission had stated that, as a matter of law, plaintiff was not entitled to recover scheduled compensation for loss of particular bodily parts and then recover additional compensation under the disfigurement section, when the disfigurement resulted from the same loss of bodily parts for which compensation already had been awarded.[41] On appeal defendants urged the supreme court to affirm the Commission's decision. The supreme court reviewed the legislative history of section 97-31, and noted that the "in lieu of" clause had appeared in the original workers' compensation bill. The clause was deleted, however, before the General Assembly adopted the Act.[42] Relying on the fact that the legislature had deleted the "in lieu of" clause during its debate, the court stated: "We think the statute does authorize the Commission to award compensation for serious disfigurement resulting from the loss or partial loss

34. *Stanley*, 222 N.C. at 260, 22 S.E.2d at 572 (quoting the North Carolina Workmen's Compensation Act, ch. 120, § 31(t), 1929 N.C. Sess. Laws 117, 131) (current version at N.C. GEN. STAT. § 97-1 to -122 (1979 & Cum. Supp. 1983)).

35. *Id.*

36. *Id.* at 260, 22 S.E.2d at 572.

37. *Id.* at 260-61, 22 S.E.2d at 572-73.

38. *Id.* at 260, 22 S.E.2d at 572-73.

39. Act of March 5, 1943, ch. 502, § 2, 1943 N.C. Sess. Laws 556, 556 (current version at N.C. GEN. STAT. § 97-31 (1979)).

40. North Carolina Workmen's Compensation Act, ch. 120, § 31(t), 1929 N.C. Sess. Laws 117, 131 (current version at N.C. GEN. STAT. § 97-1 to -122 (1979 & Cum. Supp. 1983)).

41. *Stanley*, 222 N.C. at 262, 22 S.E.2d at 573.

42. *Id.* at 263, 22 S.E.2d at 574.

of a member for which compensation is provided in the schedules."[43] Thus, *Stanley* authorized two awards under section 97-31 for one injury—one award for the injury itself, and another award for disfigurement arising out of the injury.

It is entirely possible that the General Assembly added the "in lieu of" clause to section 97-31 to make clear its intention not to allow double compensation within section 97-31. Significantly, the amended version of section 97-31 provides: "In cases included by the following schedule, the compensation in each case . . . shall be in lieu of all other compensation including disfigurement . . . ."[44] By appending the "in lieu of" clause to section 97-31, the General Assembly may not have intended to change the portion of *Stanley* permitting disabled claimants to recover under section 97-29 rather than under section 97-31. The circumstances surrounding this amendment, therefore, do not compel the interpretation of section 97-31 expressed in *Perry* and, in fact, support the interpretation that views the "in lieu of" clause as a measure to prevent double recovery. Because neither the language of section 97-31 nor its legislative history compel the *Perry* interpretation, the supreme court should consider the merits of the *Cook* and *West* interpretations of the section.

Three strong policy factors support the interpretation of section 97-31 offered by *Cook* and *West*. Those factors are: (1) the earning impairment principle of workers' compensation law, (2) the goal of achieving equitable results in individual cases, and (3) the necessity of construing section 97-31 in a manner that will not vitiate section 97-29. The earning impairment principle recognizes that workers' compensation disability benefits are predicated on the extent of earning impairment that a worker sustains as a result of injury, rather than the degree of physical impairment.[45] This principle represents a compromise between the employer's and employee's interests. The employee surrenders his right to common-law damages in return for guaranteed, fixed compensation. The employer foregoes his right to deny liability altogether, in return for liability limited to the employee's loss of earning capacity.[46] Thus,

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43. *Id.* at 264, 22 S.E.2d at 575.

44. N.C. GEN. STAT. § 97-31 (1979) (emphasis added).

45. *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 57.11 (1983). There are essentially two views concerning the type of disability that workers' compensation should redress. Benefits should compensate for economic loss—lost wages or the impairment of the ability to earn wages—or compensate for physical loss or the functional impairment of muscles, tendons, and bones with their attendant psychological effects. Most workers' compensation statutes reflect the earning impairment viewpoint. For example, in North Carolina's Act, "[t]he term 'disability' means 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) (1979). *Cf.* Hall v. Thomason Chevrolet, Inc., 263 N.C. 569, 574-75, 139 S.E.2d 857, 861 (1965) ("Under the Workmen's Compensation Act *disability* refers not to physical infirmity but to a diminished capacity to earn money."). For a thorough discussion of these viewpoints and the influence of the earning impairment principle in compensation law, see 2 A. LARSON, *supra*, § 57-14(a)-(j).

46. New York Cent. R.R. v. White, 243 U.S. 188, 203-04 (1917). *Cf.* Conrad v. Cook-Lewis Foundry Co., 198 N.C. 723, 725-26, 153 S.E. 266, 268 (1930) (quoting Stertz v. Industrial Ins. Comm'n of Wash., 91 Wash. 588, 590, 158 P. 256, 258 (1916)):

> [T]he act under consideration contains elements of a mutual concession between the employer and the employee . . . . "Both had suffered under the old system; the employers by heavy judgements, . . . the workmen through the old defenses or exhaustion in

the earning impairment principle eliminates the practical problems of a subjective measurement of evaluating disability.[47] By requiring the Industrial Commission to reevaluate claimants' section 97-29 claims in *Cook* and *West*, the court of appeals attempted to tie the awarding of compensation to the actual earning disability incurred. As the court observed in *West*, "[i]n many instances, an award under G.S. 97-29 better fulfills the policy of the Workers' Compensation Act than an award under G.S. 97-31 because it is a more favorable remedy and is more directly related to compensating inability to work."[48] *Cook* and *West*, therefore, adhere to the earning impairment principle of compensation.

The equitable results achieved in *Cook* and *West* attest to the validity of the earning impairment principle and provide further support for the court of appeals' interpretation of section 97-31. Although Cook and West suffered only a partial loss of respiratory function as a result of their injuries,[49] they were unemployable in the industry in which they had labored for most of their adult lives. With several years remaining before they reached retirement age, their 3000 dollar[50] and 6000 dollar[51] awards would not have sustained them. Thus, there was a substantial likelihood that they would become wards of the State. The court of appeals' decision to afford Cook and West an opportunity to prove total and permanent disability was in their best interests and the best interests of society.

The final factor favoring the court of appeals' interpretation of the "in lieu of" clause is that the decisions in *Cook* and *West* were necessary to ensure the continued vitality of section 97-29. The subsection of 97-31 under which the Commission awarded Cook and West compensation, section 97-31(24), provides compensation for an indefinite range of injuries including permanent injury "to any important external or internal organ or part of the body" for which no scheduled compensation is otherwise payable.[52] Since every disa-

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wasteful litigation. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in [the] future, where in the past there had been no liability at all. The servant was willing not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it."

47. *See* 2 A. LARSON, *supra* note 45, § 57-14(h). How does one meaningfully compare the loss of a hand with the loss of a foot and assign a value to each without taking into account the extent of a worker's earning impairment? The medical impairment approach, *see supra* note 45, has influenced the award of scheduled compensation for loss of members. For example, scheduled benefits must be paid even if a worker suffers no decrease in earning ability as a result of injury. *See supra* text accompanying note 5. Despite the influence of the medical impairment approach, however, the amount of scheduled compensation payable for the loss of a hand or foot is determined on the basis of former income. *See, e.g.*, N.C. GEN. STAT. § 97-31(12), (14) (1979).

48. *West*, 62 N.C. App. at 271, 302 S.E.2d at 648. In contrast to *West*, the *Perry* approach did not attempt to relate compensation to a worker's actual earning impairment. Under *Perry* if a worker suffered a scheduled injury, he received the limited compensation available there "regardless of his ability or inability to earn wages." *Perry*, 296 N.C. at 94, 249 S.E.2d at 401.

49. *West*, 62 N.C. App. at 268, 302 S.E.2d at 646; *Cook*, 61 N.C. App. at 563, 300 S.E.2d at 853.

50. *Cook*, 61 N.C. App. at 564, 300 S.E.2d at 854.

51. *West*, 62 N.C. App. at 268, 302 S.E.2d at 646.

52. N.C. GEN. STAT. § 97-31(24) (1979).

bling injury arguably affects some important "part" of the body, requiring disabled claimants to recover only under section 97-31 would eliminate the possibility that any claimant ever would be able to recover under section 97-29. All permanently injured claimants would receive only the limited compensation available under section 97-31's schedule. A claimant, however, should not be foreclosed from the opportunity to prove permanent and total disability, and to obtain an award under section 97-29, just because his injury may be described as an injury to an "important organ or part of the body."

In the *West* and *Cook* cases the court of appeals fashioned an interpretation of section 97-31 that departed from the *Perry* rule established by the North Carolina Supreme Court. The court of appeals' approach, however, serves the policies underlying the Workers' Compensation Act better than the *Perry* approach. The *West* and *Cook* decisions are consistent with the earning impairment principle of compensation. They set a precedent that will produce equitable results in cases of workers who suffer injuries compensable under the schedule, but who nevertheless are unable to resume working as a result of their injuries. Furthermore, the construction of section 97-31 proffered by *Cook* and *West* was necessary to prevent emasculation of section 97-29 of the Act. Given these considerations, the supreme court should reevaluate *Perry* and adopt the *West-Cook* construction of section 97-31.

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