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Remedies provided under the North Carolina Workers' Compensation Act[1] are directed toward quick recovery, limited litigation, and relatively ascertainable awards.[2] For total incapacity and partial incapacity, sections 97-29 and 97-30 compensate employees based on a percentage of weekly wages for the period they are disabled.[3] For injuries falling within a particular schedule, section 97-31 requires recovery in the form of limited, legislatively-created amounts without considering the employees' inability to earn future wages.[4] Section 97-31 states that recovery provided under this schedule "shall be in lieu of all other compensation."[5] The North Carolina Supreme Court has interpreted this clause to mean that if a specific injury is included in the schedule, the employee must take the recovery dictated under section 97-31 without considering total or par-

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1. N.C. GEN. STAT. §§ 97-1 to -122 (1985).

2. *See* Taylor v. J.P. Stevens and Co., 59 N.C. App. 643, 645, 292 S.E.2d 277, 279 (1982), *modified and aff'd*, 307 N.C. 392, 298 S.E.2d 681 (1983) (citing Barnhardt v. Yellow Cab Company, 266 N.C. 419, 423, 146 S.E.2d 479, 484 (1966)).

3. N.C. GEN. STAT. §§ 97-29 to -30 (1985). Section 97-29 reads in part:

> 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 (66 2/3%) 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.

Id. § 97-29. Section 97-30 reads in part:

> 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 (66 2/3%) 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.

Id. § 97-30.

4. *Id.* 97-31. Section 97-31 reads in part:

> 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 (66 2/3%) of the average weekly wages during 75 weeks.
>
> (2) For the loss of a first finger, commonly called the index finger, sixty-six and two-thirds percent (66 2/3%) of the average weekly wages during 45 weeks.
>
> . . . .
>
> (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).

Id. § 97-31.

5. *Id.* § 97-31.

tial incapacity.[6] Application of this interpretation has produced some incongruous and inequitable results.[7]

In *Whitley v. Columbia Lumber Mfg. Co.*[8] the North Carolina Supreme Court addressed whether a worker whose injuries are included in section 97-31 may instead recover under section 97-29 when those injuries result in permanent total disability.[9] In a 4-3 decision, the court overruled previous cases which had held that section 97-31 was designed to operate exclusively if the injury was enumerated within its provisions.[10] This Note examines the reasoning that led the court to such a drastic reinterpretation of the "in lieu of" provision. The Note then considers the results of the decision and whether these results parallel the purposes of the Workers' Compensation Act. The Note concludes by questioning the power of the court to transform completely the interpretation of a statute which had been undisputed by the courts and the North Carolina General Assembly since the adoption of the statute in 1943.[11]

Plaintiff in *Whitley* was employed by defendant as a cabinet maker.[12] He was injured when a piece of wood flew from a saw and struck his left hand and right arm.[13] As a result, plaintiff experienced partial permanent disability of 75% in his right hand and 30% in his left hand.[14] The Industrial Commission found that the employee could neither read nor write, was too old for job retraining, and because of loss of strength and dexterity, could not return to manual labor.[15] Consequently, the Commission held that plaintiff was permanently and totally disabled and entitled to recover under section 97-29.[16]

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6. Perry v. Hibriten Furniture Co., 296 N.C. 88, 93-94, 249 S.E.2d 397, 401 (1978) (employee who suffered a 50 percent permanent partial disability of the back must recover under section 97-31 although his injury and background rendered him unable to find work). For a discussion of the exclusiveness of scheduled allowances and a related survey of state case law throughout the country, see 2 A. LARSON, WORKMEN'S COMPENSATION LAW, §§ 58.20 to .23, at 10-344.44 to .86 (1987).

7. The exclusivity of the scheduled section is especially difficult on uneducated, elderly workers because their recovery is inevitably low and their age and education precludes job retraining. *See, e.g.*, West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 302 S.E.2d 645 (1983) (plaintiff had a fifth grade education and worked thirty-five years in cotton mills where he was exposed to high levels of cotton dust. When his employer's plant closed down, he was denied rehire elsewhere because testing showed impairment in his lungs; the Industrial Commission awarded him six thousand dollars.); Cook v. Bladenboro Cotton Mills, Inc., 61 N.C. App. 562, 300 S.E.2d 852 (1983) (plaintiff, 62, who worked for most of her adult life in a cotton mill exposed to cotton dust, was unable to find another job when her employer's plant closed; the Industrial Commission awarded her three thousand dollars for lung impairment.).

8. 318 N.C. 89, 348 S.E.2d 336 (1986).

9. *Id.* at 95, 348 S.E.2d at 339.

10. *Id.* at 96, 348 S.E.2d at 340. Justices Billings, Branch, and Meyer dissented.

11. *See* Act of March 5, 1943, ch. 502, § 2, 1943 N.C. Sess. Laws 556, 556-88 (codified at N.C. GEN. STAT. § 97-31 (1985)) (*amending* Act of March 11, 1929, ch. 120, § 31, 1929 N.C. Pub. Laws 117, 130-31).

12. *Whitley*, 318 N.C. at 90, 348 S.E.2d at 337.

13. *Id.*

14. *Id.* Although the injury was to plaintiff's right arm, the Industrial Commission awarded compensation according to the percentage of disability of plaintiff's right hand. *Id.* at 90-91, 348 S.E.2d at 337-38.

15. *Id.* at 91, 348 S.E.2d at 337.

16. *Id.* at 92, 348 S.E.2d at 338.

The North Carolina Court of Appeals reversed the Commission's award.[17] The court held that past decisions of the North Carolina Supreme Court dictated the conclusion that section 97-31 was the sole remedy for workers with scheduled injuries.[18] Looking primarily at *Perry v. Hibriten Furniture Co.*,[19] the court of appeals cited the unambiguous holding of the higher court that recovery cannot be made under section 97-29 "[w]hen all . . . injuries are included in the schedule set out in G.S. 97-31, the injured employee is entitled to compensation exclusively under G.S. 97-31 regardless of his ability or inability to work."[20] Because the Commission had found no disability resulting from the accident except for the hand injuries, the court of appeals felt that section 97-31 compensation was mandatory.[21]

The North Carolina Supreme Court, believing that the phrase "in lieu of all other compensation" should be reconsidered, granted certiorari.[22] In reaching a decision that overrules *Perry*, the North Carolina Supreme Court relied heavily on the general assembly's adoption of the clause after the court's 1942 ruling in *Stanley v. Hyman-Michaels Co.*[23] In that case the court allowed an employee who had lost the use of his left leg and right foot to recover under section 97-29.[24] The *Stanley* court also held that if an employee suffered both disfigurement and loss of use of a bodily part, he may recover twice under separate provisions of section 97-31.[25] In the next session, the general assembly amended section 97-31 to include the phrase, "shall be in lieu of all other compensation, including disfigurement".[26] The court in *Whitley* argued that the phrase was adopted to preclude double recovery for disfigurement rather than to make section 97-31 operate as an exclusive remedy.[27] Additionally, the *Whitley* Court felt that subsequent actions of the general assembly to strike the time limitations on section 97-29 indicated that the general assembly intended "to address the plight of a worker who suffers an injury permanently abrogating his earning

17. Whitley v. Columbia Lumber Mfg. Co., 78 N.C. App. 217, 336 S.E.2d 642 (1985), *rev'd*, 318 N.C. 89, 348 S.E.2d 336 (1986).

18. *Whitley*, 318 N.C. at 218, 336 S.E.2d at 643.

19. 296 N.C. 88, 249 S.E.2d 397 (1978), *overruled by* Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E.2d 336 (1986).

20. *Whitley*, 78 N.C. App. at 218, 336 S.E.2d at 642-43 (citing *Perry*, 296 N.C. at 93-94, 249 S.E.2d at 401).

21. *See Whitley*, 78 N.C. App. at 218, 336 S.E.2d at 643.

22. *Whitley*, 318 N.C. at 95, 348 S.E.2d at 339.

23. 222 N.C. 257, 22 S.E.2d 570 (1942); *see Whitley*, 318 N.C. at 95-96, 348 S.E.2d at 340-41.

24. *Stanley*, at 260-61, 22 S.E.2d at 572-73.

25. *Id.* at 265, 22 S.E.2d at 576.

26. Act of March 5, 1943, ch. 502, § 2, 1943 N.C. Sess. Laws 556, 556-58 (codified at N.C. GEN. STAT. § 97-31 (1985)) (amending Act of Mar. 11, 1929, ch. 120, § 31, 1929 N.C. Pub. Laws 117, 130-31). Before this amendment, the pertinent part of Section 97-31 read: "In cases included by the following schedule, the disability in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein . . . ." 1929 N.C. Sess. Laws ch. 120, § 31. The amended statute reads: "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 periods specified, and *shall be in lieu of all other compensation*, including disfigurement . . . ." 1943 N.C. Sess. Laws ch. 502, § 2 (emphasis added).

27. *Whitley*, 318 N.C. at 97, 348 S.E.2d at 340.

ability."[28] The court believed that these actions revealed an obvious intent by the general assembly for the worker to be able to choose the most favorable remedy.[29]

The court also wrote that its new interpretation of the "in lieu of" clause was supported by policy considerations.[30] The goal of the Workers' Compensation Act is to compensate for the inability to earn wages.[31] The statute represents a trade-off between the employee and employer.[32] The employee gets certain, though limited, compensation, while the employer loses the right to deny liability, but is only liable for the loss of earning capacity.[33] Thus, the court reasoned, "[a]llowing a totally and permanently disabled employee lifetime compensation effectuates the purpose of the Act to compensate for lost earning ability."[34]

Finally, the *Whitley* court based its decision on certain well-accepted principles of statutory construction.[35] First, legislative intent controls and to determine that intent the court should examine "the language of the statute, the spirit of the act, and what the statute seeks to accomplish."[36] The Workers' Compensation Act, the court reasoned, must not be narrowly construed so as to deny benefits.[37] Also, if any ambiguity exists in the statute, courts should resolve the inconsistency to effectuate the legislative intent.[38] The supreme court therefore concluded that the intent of the general assembly, the policy considerations, and the inequity of restricting the employee's recovery required that section 97-31 not function as an exclusive remedy when the employee is totally and permanently disabled.[39]

This issue has a long history. The North Carolina Industrial Commission Reports for the years 1929 through 1932 show that the full Commission wrestled with whether the general assembly intended to restrict the awards of workers with scheduled injuries.[40] In the beginning of that period, the Act had only been adopted for one year, and the section with schedules did not include the

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Larson has commented:

> [The use of scheduled provisions] is not, however, to be interpreted as an erratic deviation from the underlying principle of compensation law—that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience.

2 A. LARSON, *supra* note 6, § 58.11, at 10-323 to -324 (footnotes omitted).

32. *Whitley*, 318 N.C. at 98, 348 S.E.2d at 341.

33. *Id.* at 98, 348 S.E.2d at 341.

34. *Id.* at 99, 348 S.E.2d at 342.

35. *Id.* at 98, 348 S.E.2d at 341.

36. *Id.*

37. *Id.* (citing Stevenson v. City of Durham, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)).

38. *Id.*; *see also* Taylor v. Stevens and Co., 300 N.C. 94, 102, 265 S.E.2d 144, 148 (1980) (must construe ambiguous statute to ascertain true legislative intent).

39. *Whitley*, 318 N.C. at 98, 348 S.E.2d at 341.

40. The North Carolina Industrial Commission Advance Sheets were initially published only from October 1929 to July 1932.

phrase "in lieu of all other compensation."[41] In *Adams v. Buffalo Snowbird Co.*,[42] plaintiff lost the distal phalange of his right index finger and was unable to work for three months.[43] In determining whether plaintiff could recover under sections 97-29 and 97-31, the Commission noted that section 97-30 included words that made it obvious that he could not receive compensation under both sections 97-30 and 97-31. The statute, however, contained no language that clearly indicated section 97-29 and section 97-31 could not provide double compensation.[44] Thus, the Commission granted section 97-29 compensation for three months and thereafter section 97-31 compensation for the loss of the finger.[45] In *Kennedy v. Collins Granite Co., Inc.*[46] the Commission further noted that at the time the general assembly adopted the North Carolina Workmen's Compensation Act it had before it the Virginia Workers' Compensation Act.[47] The Virginia act was identical to the bill originally presented to the North Carolina general assembly and included the language, "and shall be in lieu of all other compensation."[48] The general assembly left out the clause when it adopted the North Carolina Act.[49] Thus, in *Rice v. Denny Role & Panel Co.*,[50] the Commission concluded that the general assembly had recognized that to provide an adequate remedy it was necessary to compensate for the potential loss of earning power through the scheduled section and the actual wage loss through the total incapacity section.[51] A different interpretation would mean that in some instances, the worker would have to pay "in direct loss of wages . . . for the privilege of losing [a part of his body]."[52]

Rice was ultimately appealed to the North Carolina Supreme Court,[53] which noted that the Commission had always unanimously ruled that the sections do not function exclusively, and that the Commission's line of reasoning best supported the purpose of the Act—to compensate injured workers.[54] If a worker loses a finger and returns to work immediately, section 97-31 fully compensates for his loss. If he is kept from his job by the injury, however, he cannot be compensated adequately unless he can recover under section 97-29 for total

41. For the text of the original statute, see *supra* note 26.

42. 1 N.C. Indus. Comm'n 232 (1930).

43. *Id.* at 233.

44. *Id.* at 234.

45. *Id.* at 235.

46. 1 N.C. Indus. Comm'n 346 (1930).

47. *Id.* at 347; *see* Act of Mar. 21, 1918, ch. 97A, 1918 Va. Acts 637 (codified at VA. CODE ANN. § 65.1-56 (1950)).

48. *Kennedy*, 1 N.C. Indus. Comm'n at 347; Rice v. Denny Roll and Panel Co., 1 N.C. Indus. Comm'n 341, 342 (1930).

49. *Rice*, 1 N.C. Indus. Comm'n at 342-43. For the text of the original statute, see *supra* note 26.

50. 1 N.C. Indus. Comm'n at 341 (1930). Plaintiff suffered an injury by accident of his left hand which required the amputation of the distal phalange of the second finger, and more than half of the distal phalange of the third and fourth finger. *Id.* at 342.

51. *Id.* at 343.

52. *Id.* at 345.

53. Rice v. Denny Role & Panel Co., 199 N.C. 154, 154 S.E. 69 (1930).

54. *Id.* at 156, 154 S.E. at 70.

disability.[55] The court reasoned that the general assembly carefully chose the language of section 97-31. Therefore, the omission of the phrase, "and shall be in lieu of all other compensation," clearly indicated that the general assembly intended to avoid a strict, exclusive interpretation.[56] The court thus affirmed the Commission's holding.[57]

In 1943, however, section 97-31 was amended to include the "in lieu of" phrase, and thereafter the courts held that the exclusivity provision of 97-31 was clear and mandatory.[58] Scheduled injuries were compensated under the scheduled section only. In the following years, a growing number of states began to allow employees with scheduled injuries further compensation under the "odd lot" doctrine.[59] The basis of the theory was that the employer should compensate the worker fully if her injuries were so debilitating that she could not find work, whether those injuries were scheduled or not.[60]

North Carolina courts, however, rejected the application of the doctrine.[61] In 1972, in two similar cases, *Dudley v. Downtowner Moter Inn*,[62] and *Loflin v. Loflin*,[63] the North Carolina Court of Appeals held that even if employees were completely unable to work because of age, education, or other reasons, they are restricted to section 97-31 recovery.[64] In *Loflin* the court stated that the language of the statute was clear, and "[t]he fact that an injury is one of those enumerated in the schedule of payments set forth under [section] 97-31 precludes the Commission from awarding compensation under any other provision of the Act."[65] Evidence of personal characteristics which resulted in total capacity for a particular worker was irrelevant.

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55. *Id.* at 158, 154 S.E. at 71.

56. *Id.* at 158-59, 154 S.E. at 72.

57. *Id.* at 159, 154 S.E. at 72.

58. *See, e.g.*, Watts v. Brewer, 243 N.C. 422, 424, 90 S.E.2d 764, 767 (1956); Loflin v. Loflin, 13 N.C. App. 574, 578-79, 186 S.E.2d 660, 663 (1972); Dudley v. Downtowner Motor Inn, 13 N.C. App. 474, 479, 186 S.E.2d 188, 191 (1972).

59. For a discussion of the "odd lot" doctrine and its application in other states, see 2 A. LARSON, *supra* note 6, § 57.51(a), at 10-164.65.

60. 2 A. LARSON, *supra* note 6, § 57.51(a), at 10-164.66.

61. *See, e.g.*, *Loflin*, 13 N.C. App. at 578-79, 186 S.E.2d at 663; *Dudley*, 13 N.C. App. at 477-78, 186 S.E.2d at 191; *see* Teague, *Is a Scheduled Injury a Scheduled Injury?*, 1979 INST. ON WORKERS' COMP. § 6, at 4 stating:

> [T]he introductory language of G.S. 97-31 positively precludes the use of the "odd lot" doctrine, or the finding of permanent and total disability, where the medical evidence shows that the workers' injury is limited to a percentage disability of some portion of the body listed in the 24 subsections of G.S. 97-31.

Id.

62. 13 N.C. App. 474, 186 S.E.2d 188 (1972).

63. 13 N.C. App. 574, 186 S.E.2d 660 (1972).

64. Plaintiff in *Dudley* was a 53-year-old woman with a seventh grade education who had worked all her life as a cook. Although a compensable accident left her 55% disabled in her left hand and unable to work, she was restricted to section 97-31 recovery. *See Dudley*, 13 N.C. App. at 475, 477-78, 186 S.E.2d at 189, 191.

Plaintiff in *Loflin*, a carpenter, suffered a 50% disability of his back as a result of a fall from scaffolding. Although he could not remain in the same position for long without extreme pain and was unable to return to his job, plaintiff nonetheless was forced to recover under section 97-31 only. *See Loflin*, 13 N.C. App. at 575, 186 S.E.2d at 661.

65. *Loflin*, 13 N.C. App. at 578, 180 S.E.2d at 663 (citing Watts v. Brewer, 243 N.C. 422, 424, 90 S.E.2d 764, 767 (1956)).

In *Little v. Anson County Schools Food Service*,[66] decided in 1978, the same year in which the court reaffirmed its exclusivity holding through *Perry*,[67] the North Carolina Supreme Court recognized that such characteristics as age, education, and physical infirmities must be addressed to determine the worker's actual incapacity.[68] The worker must be compensated for the real degree of disability, not for the incapacity a twenty-year-old worker with the same injury would experience.[69] In later cases North Carolina courts began to allow additional compensation if the scheduled injury caused further disability elsewhere, such as through pain, numbness, or paralysis.[70] In 1983, for example, the North Carolina Court of Appeals allowed two cotton mill employees with lung injuries to recover under section 97-29 based on their age, education, and work experience.[71] Generally, however, the court of appeals followed the supreme court's rule of exclusivity.[72] Increasingly, situations of extreme hardship were forcing the court to realize the inequity of restricting all workers to the provisions of section 97-31, and the court struggled to allow flexibility in the Commission's decision-making process without totally overruling the exclusivity of 97-31.

In *Fleming v. K-Mart Corp.*,[73] the supreme court granted total incapacity recovery under section 97-29 to a worker with back and leg injuries. Plaintiff sustained a compensable back injury which required surgery. As a result, he had chronic back and leg pains which left him unable to remain in the same position for any period of time.[74] Even though the court reversed the Commission's original section 97-31 award, it still did not use *Fleming* to overrule *Perry* and the exclusivity rule. Instead, the court qualified the *Perry* decision by saying that when the employee has lost both legs, section 97-31 specifically allows for section 97-29 recovery anyway.[75] Still, the court made a sound assertion that if

66. 295 N.C. 527, 246 S.E.2d 743 (1978).

67. *See supra* notes 19-20 and accompanying text.

68. *Id.* at 531-33, 246 S.E.2d at 746-47. For a more complete discussion of *Little* and its anticipated impact on North Carolina Workers' Compensation law pre-*Whitley*, see Teague, *supra* note 61, at 5-6.

69. *See Little*, 295 N.C. at 531, 246 S.E.2d at 746.

70. *See, e.g.*, Jones v. Murdoch Center, 74 N.C. App. 128, 327 S.E.2d 294 (1985) (employee with back injury that resulted in severe pain and numbness in extremities recovered under section 97-29); Davis v. Edgecomb Metals Co., 63 N.C. App. 48, 303 S.E.2d 612 (1983) (employee who suffered posttraumatic neurosis with depressive reaction resulting from leg injury allowed to recover outside of scheduled provision).

71. *See* West v. Bladenboro Cotton Mills, Inc., 62 N.C. App. 267, 270, 302 S.E.2d 645, 647 (1983); Cook v. Bladenboro Cotton Mills, Inc., 61 N.C. App. 562, 565, 300 S.E.2d 852, 854 (1983). For a discussion of these two cases and the issue of section 97-31 exclusivity, see Note, *North Carolina General Statutes Section 97-31: Must it provide Exclusive Compensation for Workers Who Suffered Scheduled Injuries?*, 62 N.C.L. REV. 1462 (1984).

72. *See, e.g.*, Kendrick v. City of Greensboro, 80 N.C. App. 183, 341 S.E.2d 122 (1986) (citing Perry v. Hibriten Furniture Co., 296 N.C. 88, 249 S.E.2d 397 (1978), *overruled by* Whitley v. Columbia Lumber Mfg. Co., 318 N.C. 89, 348 S.E. 2d 336 (1986)).

73. 312 N.C. 538, 324 S.E.2d 214 (1985).

74. *Id.* at 540, 324 S.E.2d at 215.

75. *Id.* at 543, 324 S.E.2d at 219. The pertinent part of section 97-31 reads:

> The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability, to be compensated according to provisions of G.S. 97-29.

N.C. GEN. STAT. § 97-31(17) (1985).

a worker is injured such that her wage-earning capacity is impaired, she should be compensated accordingly. The implication was that this result should be the case whether the injuries were included in section 97-31 or not. The *Fleming* decision highlighted the direction the court had chosen and provided the groundwork on which the *Whitley* court abolished the rule of exclusivity.

Whitley mirrors the trend of other state courts to interpret scheduled injury sections so as not to limit recovery.[76] Yet, the decision is a major departure from North Carolina precedent. The reason behind the court's change seems best explained by one line in *Whitley*: "Equity strongly supports the result we reach in this case."[77] The court apparently was so swayed by the desire to compensate the injured worker fully that it reinterpreted events surrounding a forty-four-year-old session law to create a major new precedent in North Carolina workers' compensation law.[78] The *Whitley* court's explanation of the general assembly's intent is merely one of several logical readings of why the general assembly adopted the "in lieu of" clause.[79] It is difficult to assume that when the general assembly adopted the "in lieu of" clause in 1943, it did not expect the Industrial Commission and the courts to take this as an indication that the legislature was intentionally adopting the rule of exclusivity which those words surely created. This conclusion is supported by the fact that in 1930 the Industrial Commission interpreted the omission of those exact words from the North Carolina act to mean that double recovery was possible for total incapacity and scheduled loss, and, consequently, if the general assembly had included the clause, it would mean the sections could not operate together.[80] Furthermore, in the same year the North Carolina Supreme Court affirmed this reasoning in *Rice*.[81] Therefore, the general assembly should have been aware that if it intended a result other than exclusivity, it should adopt different language. Certainly, the fact that the general assembly added the words "including disfigurement" to the clause implies that the legislature meant to preclude double recovery for disfigurement. But if the general assembly only wanted to address the disfigurement issue, it would not have adopted words it knew by case law and by comparable statutes to have an entirely different effect.[82] The most probable interpretation of the intent of the general assembly is that it meant to

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76. *See* 2 A. LARSON, *supra* note 6, § 58.23, at 10-344.86.

> Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exclusive.

Id. at § 58.32, at 10-344.86; *see, e.g.*, Jacks v. Banister Pipelines Am., 418 So.2d 524 (La. 1982); Donahue v. Thomas H. Bradley, Inc., 90 A.D.2d 611, 456 N.Y.S.2d 170 (1982).

77. *Whitley*, 318 N.C. at 89, 348 S.E.2d at 342.

78. *See id.* at 96-97, 348 S.E.2d at 340-41.

79. *See* Note, *supra* note 71, at 1465 ("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 [*Whitley*] rule.").

80. *See supra* notes 42-52 and accompanying text.

81. *See supra* notes 53-57 and accompanying text.

82. *See supra* notes 53-57 and accompanying text.

prevent double recovery under sections 97-29 and 97-31 *and* to prevent double recovery for disfigurement. By adopting the words "shall be in lieu of all other compensation," it achieved the former, and by adopting the words "including disfigurement," it expressly achieved the latter. The supreme court initially adopted the exclusivity interpretation, but the inequitable results of limited recovery compelled the court to alter its decision.

The Workers' Compensation Act, however, was never intended to be equitable in all situations.[83] The statute as adopted is a trade-off between the worker and the employer to ensure faster and more definite recovery and to eliminate litigation as much as possible.[84] Inequities are inherent in such a system, and especially so in section 97-31. Through the schedule, the general assembly has enumerated specific instances in which the amount of recovery is dictated in the statute itself. Compensation in those particular cases is even more certain and rapid than with other injuries. Some workers, however, have a good chance of not being fully compensated, but this is part of the trade-off for the certain recovery.[85] The general assembly, measuring the costs and benefits of such a system, adopted it knowing full well that such inequities would result.[86] Therefore, those inequities should not influence a court when interpreting the Act.

The *Whitley* decision will result in more litigation as injured employees try to get section 97-29 recovery while employers try to limit the decision. North Carolina Court of Appeals cases decided since *Whitley* indicate that the standard necessary to allow an employee with a scheduled injury to recover under section 97-29 will not be strict.[87] The Commission must find only that the plaintiff is incapable of earning the wages earned before the injury in the same or other employment, and that the plaintiff's incapacity is caused by his injury.[88] " 'The relevant inquiry . . . is not whether all or some persons with the plaintiff's degree of injury are capable of working and earning wages, but whether the plaintiff herself has such capacity.' "[89] Thus, the tests for total incapacity are

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83. *See* Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept of Labor, 449 U.S. 268, 281 (1980).

> Respondents . . . argue that the Act should be interpreted in a manner which provides a complete and adequate remedy, to an injured employee. Implicit in this argument, however, is the assumption that the sole purpose of the Act was to provide disabled workers with a complete remedy for their industrial injuries. The inaccuracy of this implicit assumption undercuts the validity of respondents' argument.

Id.

84. *See supra* note 2 and accompanying text.

85. "The schedule brings a windfall to the worker in some cases and gross hardship to the worker in others." Graves v. Eagle Iron Works, 331 N.W.2d 116, 120 (Iowa 1983); *see* Note, *Permanent Partial Disability Under Worker's Compensation: Schedule Exclusivity Versus Impaired Earning Capacity*, 33 DRAKE L. REV. 885, 888 (1984).

86. *Fleming*, 312 N.C. at 548, 324 S.E.2d at 222 (Meyer, J., dissenting).

87. *See* Mitchell v. Fieldcrest Mills, Inc., 84 N.C. App. 661, 353 S.E.2d 638 (1987); Wilder v. Barbour Boat Works, 84 N.C. App. 188, 352 S.E.2d 690 (1987); Cockman v. PPG Indus., 84 N.C. App. 101, 351 S.E.2d 771 (1987); Taylor v. Margaret R. Pardee Memorial Hosp., 83 N.C. App. 385, 350 S.E.2d 148 (1986).

88. *See, e.g., Taylor*, 83 N.C. App. at 389, 350 S.E.2d at 151 (1986).

89. *Wilder*, 84 N.C. App. at 194, 352 S.E.2d at 693 (quoting Little v. Anson County Schools Food Serv., 295 N.C. 527, 531, 246 S.E.2d 743, 746 (1978)).

now used to examine scheduled injury accidents.[90] The tests reverse the usual method of inquiry for worker's compensation cases. Instead of first looking to see if the injury is included in section 97-31 and then stopping if the injury is in the schedule, the Commission must now examine all serious injuries as possible total incapacity cases. Certainly this new method will increase litigation because advocates will try to establish the details needed to prove disability and earn recovery under section 97-29.[91] The court in *Whitley*, for example, allowed total incapacity recovery for a sixty-year-old man with a fourth grade education who had lost substantial use of his hands.[92] A twenty-year-old man with the same injury and similar background could be placed in special training and probably would be restricted to section 97-31 recovery. But what about a forty-five-year-old man, a fifty-year-old man, or a fifty-five-year-old man in the same circumstances? These examples would have to be decided on a case-by-case basis and would depend on subjective particulars that necessarily would require expert testimony and intensified litigation, thus resulting in delayed recovery.

The costs and increased delays may be justified by the more equitable results. But, is it within the province of the courts to reinterpret this statute? The dissenters argue that it is not.[93] A plain reading of the statute, they maintain, is that recovery under the scheduled section operates in lieu of recovery under any other section.[94] The interpretation given the statute had stood for over forty years.[95] If this interpretation was in error, it was the general assembly's duty to correct the error, but it had not done so.[96] "In the absence of legislation amending a statute following the court's interpretation of it, the conclusion is inescapable that the interpretation is consistent with legislative intent."[97] Yet, the majority has changed a major component of the Worker's Compensation Act through the process of judicial legislation.[98]

The United States Supreme Court also frowns on judicial legislation. In

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90. *See id.*; *Taylor*, 83 N.C. App. at 389, 350 S.E.2d at 151.

91. *See Taylor*, 83 N.C. App. at 388, 350 S.E.2d at 151. "Whether a disability exists is a conclusion of law which must be based on findings of fact supported by competent evidence." *Id.* (quoting Hilliard v. Apex Cabinet Co., 305 N.C. 593, 594-95, 290 S.E.2d 682, 683 (1982)).

92. *See Whitley*, 318 N.C. at 90, 348 S.E.2d at 337.

93. *See id.* at 100-01, 348 S.E.2d at 342-43 (Meyer, J., dissenting); *id.* at 101, 348 S.E.2d at 343 (Billings, J., dissenting, Branch, C.J., and Meyer, J., concurring in the dissent).

94. *Id.* at 101, 348 S.E.2d at 343 (Billings, J., dissenting).

95. The "in lieu of" clause was adopted in 1943. *See supra* note 26. The language was held to require exclusivity until *Whitley*. *See supra* notes 58, 61-75 and accompanying text.

96. *See Whitley*, 318 N.C. at 100, 348 S.E.2d at 343 (Billings and Meyer, J.J., and Branch, C.J., dissenting).

97. *Id.* (Billings and Meyer, J.J., and Branch, C.J., dissenting).

98. The North Carolina Supreme Court has long recognized that judicial legislation is forbidden. *See* Rice v. Denny Roll and Panel Co., 199 N.C. 154, 154 S.E. 69 (1930).

> There is a marked distinction between liberal construction of statutes by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial.

Id. at 157, 154 S.E. at 70 (quoting 25 RULING CASE L. 963, 964 (1919)).

Potomac Electric Power Co. v. United States Dept of Labor[99] the Court held that under the Longshoremen and Harbor Workers' Compensation Act, an injured employee could not recover through the section compensating for wage earning incapacity if he had a scheduled injury.[100] The Court found nothing in the Act to indicate that the legislature intended a different meaning other than the plain language of the statute.[101] The Court recognized that Workers' Compensation Acts are designed as a trade-off between the employer and worker, and that "[i]t therefore is not correct to interpret the Act as guaranteeing a completely adequate remedy for all covered disabilities."[102] The statute produces incongruities, but "the federal courts may not avoid them by rewriting or ignoring" the language of the Act.[103] If inequities are to be avoided in the Longshoremen's Compensation Act, only Congress, the Supreme Court wrote, can address them.[104]

Yet in *Whitley*, the North Carolina Supreme Court found the power to drastically reinterpret the "in lieu of" clause, even though the general assembly knew of the court's previous interpretation and did not find it necessary to clarify the statute.[105] The court held that the statute was simply misinterpreted throughout its history.[106] A better explanation is that the present justices believe the inequitable results of section 97-31 are not justified by speedy and certain compensation. This reasoning may be valid. Cases in which injured workers are not highly compensated are easy to find.[107] But, the general assembly adopted the system and is the only body that can change it.[108] The court reasoned around the problem by concentrating on the events surrounding the adoption of the "in lieu of" clause in 1943.[109] But two facts make their argument unpersuasive. First, the interpretation allowing section 97-29 recovery in section 97-31 situations is at best merely one of several equally possible interpretations.[110] Second, the interpretation restricting recovery has been on record for over thirty years without provoking action from the general assembly.[111] The most reasonable explanation for this decision is that the inequities have swayed the court.

Whitley represents a major change in North Carolina Workmen's Compen-

99. 449 U.S. 268 (1980).

100. *Id.* at 271.

101. *Id.* at 276.

102. *Id.* at 282.

103. *Id.* at 283.

104. *Id.* at 284.

105. *See Whitley*, 318 N.C. at 100, 348 S.E.2d at 343 (Billings and Meyer, J.J., and Branch, C.J., dissenting).

106. *See id.* at 95-97, 348 S.E.2d at 340-41.

107. *See, e.g.*, Gupton v. Builders Transp., 83 N.C. App. 1, 348 S.E.2d 601 (1987) (employee who lost seven percent of vision in right eye which made him ineligible under Interstate Commerce Commission rules to continue his vocation, truck driving, must recover only under scheduled provision).

108. *See Potomac Elec. Power Co.*, 449 U.S. at 284.

109. *See Whitley*, 318 N.C. at 95-97, 348 S.E.2d at 340-41.

110. *See supra* notes 77-81 and accompanying text.

111. *See, e.g.*, Watts v. Brewer, 243 N.C. 422, 90 S.E.2d 764 (1956).

sation Law. The decision will allow the Industrial Commission to fashion more equitable recoveries for workers with serious scheduled injuries.[112] In order to make these recoveries possible, the North Carolina Supreme Court completely reinterpreted a statute whose plain language supported a totally different interpretation.[113] But the issue is not settled. The general assembly, which should have been the first to take up the issue, should still address the uncertainty in the statute. If it does not, the right of permanently injured workers with scheduled injuries to recover an amount proportionate to their wage-loss is supported only by a 4-3 decision. The general assembly should decide whether the benefits gained by abolishing the exclusivity of section 97-31 outweigh the costs of doing so. Only through its action will the ambiguity of section 97-31 be resolved.

J. CAMERON FURR, JR.

112. *See Whitley*, 318 N.C. 89 at 348 S.E.2d at 342. The majority wrote,

> Equity strongly supports the result we reach in this case. Plaintiff was fifty-eight years old at the time he was injured. He enjoys no prospect of gainful employment. He will continue to require benefits for a period long after [section 97-31] becomes depleted. We do not believe the legislature, as evidenced by the expansion of section [97-29], intended such an inequitable result to prevail.

Id.

113. *See supra* notes 58-65 and accompanying text.