

Proving Disability in Workers' Compensation Cases

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This paper discusses the concept of "disability," the principal determinant of monetary compensation under the Workers' Compensation Act. Disability is primarily a function of wage-earning capacity — instead of physical limitation — due to a compensable condition. In most cases, it will be the claimant's burden to prove disability that is either partial or total, and either temporary or permanent.

In June 2011, the General Assembly made significant changes to the Act, which affect both claims of total disability and partial disability. This paper discusses these amendments in detail, though some of this analysis is still tentative because the new provisions have yet to be interpreted by the Industrial Commission or the courts.

I. STATUTORY PROVISIONS

"Disability" is defined in the Workers' Compensation Act as follows: "The 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). The meaning of disability, burden of proving disability, and presumptions that come into play are discussed in Section II. The general standards for proving disability are discussed in Section III.

Disability falls into four categories: "temporary total," "permanent total," "temporary partial," and "permanent partial." Total disability compensation is awarded pursuant to N.C. Gen. Stat. § 97-29. Proving total disability is discussed in Section IV. Temporary partial disability compensation is awarded under N.C. Gen. Stat. § 97-30. Permanent partial disability compensation refers to benefits payable under N.C. Gen. Stat. § 97-31. Both types of partial disability are discussed in Section V. The 2011 amendments significantly changed section 97-29, and modified sections 97-30 and 97-31. These changes are discussed in detail in Section VI.

II. MEANING, PRESUMPTIONS, AND THE BURDEN OF PROOF

The courts have consistently emphasized that disability is related to loss of wage-earning capacity and not to physical infirmity. *See, e.g., Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 764, 487 S.E.2d 746, 750 (1997). Disability is "the event of being incapacitated from the performance of normal labor." *See Morrison v. Burlington Indus.*, 304 N.C. 1, 31, 282 S.E.2d 458, 477 (1981) (quoting *Pruitt v. Knight Publishing Co.*, 27 N.C. App. 254, 256, 218 S.E.2d 876, 878 (1975)). "It is more than mere physical injury and is markedly different from technical or functional disability." *Id.* (quoting same). If there is no loss of earning capacity, then there is no disability within the meaning of the Act, except for the scheduled benefits under N.C. Gen. Stat. § 97-31. *See Dail v. Kellex Corp.*, 233 N.C. 446, 449, 64 S.E.2d 438, 440 (1951).

The general rule is that the employee seeking compensation under the Act bears the burden of proving the existence of her disability and its extent. *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 493 (2005) (quoting *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986)). The employee is relieved of this burden by a presumption of continuing disability in only very narrow circumstances.

In *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 599 S.E.2d 508 (2004), the Supreme Court expressly stated that “a presumption of disability in favor of an employee arises only in limited circumstances.” *Id.* at 706, 599 S.E.2d at 512. Those limited circumstances are: (1) when there has been an executed Form 21, “Agreement for Compensation for Disability;” (2) when there has been an executed Form 26, “Supplemental Agreement as to Payment of Compensation;” or (3) when there has been a prior disability award from the Industrial Commission. *Id.* Otherwise, “the burden of proving disability remains with plaintiff, even if the employer has admitted compensability.” *Clark*, 360 N.C. at 44, 619 S.E.2d at 493 (emphasis added).

This last point is crucial, and bears repeating. Although the contrary seems plausible, the law in North Carolina is well settled that an employer’s admission of the “compensability” of a worker’s compensation claim does not give rise to a presumption of “disability” in favor of the employee. *Id.*

A Form 21 or Form 26 compensation agreement by which the injured worker would be paid “for necessary weeks,” once approved by the Commission, is an award of the Commission and gives rise to a “presumption of continuing disability.” *Johnson*, 358 N.C. at 706, 599 S.E.2d at 512. The use of these forms, however, has declined dramatically since the 1994 amendments to the Act. Employers and insurance carriers instead use a Form 60 or Form 63 procedure to admit liability for a claim and pay weekly benefits, without giving rise to any presumption of disability. *See Sims v. Charms/Arby’s Roast Beef*, 142 N.C. App. 154, 159-60, 542 S.E.2d 277, 281-82 (2001) (holding that a filed Form 60 does not create a presumption of disability); *Johnson*, 358 N.C. at 706, 599 S.E.2d at 512 (holding that a filed Form 63 does not create a presumption of disability); *see also Treat v. Mecklenburg County*, 194 N.C. App. 545, 551, 669 S.E.2d 800, 804 (2008) (holding that a filed Form 62 reinstating compensation does not create a presumption of disability). Thus, the presumption of continuing disability, while it still exists, is increasingly irrelevant.

A presumption of disability does arise when the Industrial Commission awards ongoing weekly disability payments under either N.C. Gen. Stat. § 97-29 or § 97-30. *See Simmons v. Kroger Co.*, 117 N.C. App. 440, 443, 451 S.E.2d 12, 14 (1994) (“Once the burden of disability is met, there is a presumption that disability continues until the employee returns to work at wages equal to those he was receiving at the time his injury occurred.” (quoting *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971))). But, one is unlikely to have this presumption available without a final Opinion and Award that provides for ongoing benefits. In other words, it will only arise once the employee has prevailed at hearing the first time and faces ongoing disputes.

Employees thus generally have the burden of proving disability at each and every stage of the case. Even if the presumption of continuing disability exists, it can be rebutted by the defendants and the employee will still have to prove injury-related loss of earning capacity. *See, e.g., Snead v. Carolina Pre-Cast Concrete*, 129 N.C. App. 331, 336, 499 S.E.2d 470, 473 (1998) (concluding that defendants successfully rebutted presumption of disability by showing that plaintiff had been medically released without restrictions and obtained employment at greater than his pre-injury wages).

III. STANDARDS FOR PROVING DISABILITY

In order to obtain disability benefits under either N.C. Gen. Stat. § 97-29 or § 97-30, an employee must prove by the greater weight of the evidence that he has suffered a loss of earning capacity due to the compensable injury. In *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982), the Supreme Court set forth a three-part test for proving disability. To support a conclusion of disability, the Industrial Commission must find these three elements:

- (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment;
- (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment; and
- (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. at 595, 290 S.E.2d at 683. The Supreme Court recently reaffirmed the *Hilliard* standard in *Medlin v. Weaver Cooke Const., LLC*, ___ N.C. ___, 760 S.E.2d 732, 737 (2014).

The much more frequently utilized standard for disability was set out by the Court of Appeals' decision in *Russell v. Lowes Products Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993). The court there held that an employee may meet his burden of proof for disability in one of the following four ways:

- (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment;
- (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment;
- (3) the production of evidence that he is capable of some work but that it would be futile because of pre-existing conditions, i.e., age, inexperience, lack of education, to seek other employment; or
- (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Id. at 765, 425 S.E.2d at 457 (internal citations omitted). However, in *Medlin*, the Supreme Court made clear that meeting the *Russell* test only satisfies the first two parts of *Hilliard*'s three-part test. *Medlin*, 760 S.E.2d at 737. "In addition, a claimant must also satisfy the third element, as articulated in *Hilliard*, by proving that his inability to obtain equally well-paying work is because of his work-related injury." *Id.* (emphasis added).

Because the *Russell* framework has been predominantly used, this paper discusses each part of the test in turn. The first three prongs of the test demonstrate total disability, and are each discussed in Section IV. The fourth prong of the test demonstrates temporary partial disability, and is discussed in Section V. Note, however, that the *Russell* methods are not "exhaustive," and thus do not preclude other means of satisfying the ultimate disability standard. *See Medlin*, 760 S.E.2d at 737.

Once the employee meets the burden of demonstrating disability, "the defendant who claims that the plaintiff is capable of earning wages must come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990).

IV. TOTAL DISABILITY

A. *Russell* Part One

The first of the four prongs of the *Russell* standard for disability entails purely medical evidence. By contrast, the second and third prongs encompass both medical facts and vocational evidence. Under the first prong, a plaintiff must show "that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Satisfying this test clearly also satisfies the causation part of the *Hilliard* standard.

This determination is made particularly with respect to the plaintiff, and is not more generally based on the physical impairments he suffers. Thus, the Supreme Court has held that the "relevant inquiry under G.S. 97-29 is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity." *Little v. Anson Cty. Schs. Food Serv.*, 295 N.C. 527, 531-32, 246 S.E.2d 743, 746 (1978) (finding statement from physician that "there are some gainful occupations that someone with plaintiff's degree of neurological problem could pursue" to be irrelevant); *see also Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 391, 656 S.E.2d 608, 614 (2008) (holding same), *aff'd per curiam* by 362 N.C. 676, 669 S.E.2d 319 (2008).

Under the first *Russell* prong, the most straightforward way to prove disability is to present medical evidence that clearly states the injured worker is unable to work in any capacity. This could take the form of a detailed out-of-work note from the authorized treating physician or, more likely, deposition testimony in which the physician asserts that the worker is not able to do any kind of work due to the injury. These cases are the simplest in which to prove total disability.

Note, however, that a finding that a doctor never released a plaintiff to return to work is insufficient itself to establish disability under the first prong of *Russell*. *Newnam v. New Hanover Reg'l Med. Ctr.*, 212 N.C. App. 271, 284, 711 S.E.2d 194, 203 (2011); *see also Parker v. Wal-Mart Stores, Inc.*, 156 N.C. App. 209, 212, 576 S.E.2d 112, 114 (2003) (holding Commission's findings were insufficient to support determination of disability where "the Full Commission merely found that [plaintiff's doctor] had not released plaintiff to return to work after her surgery even though she retained the ability to perform a range of activities that may or may not have allowed her to earn her pre-injury wages").

It is also possible to combine expert and lay testimony to satisfy the first *Russell* test. "Medical evidence that a plaintiff suffers from genuine pain as a result of a physical injury, combined with the plaintiff's own credible testimony that [the] pain is so severe that [the plaintiff] is unable to work, may be sufficient to support a conclusion of total disability by the Commission." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 8, 562 S.E.2d 434, 440 (2002), *aff'd per curiam* by 357 N.C. 44, 577 S.E.2d 620 (2003); *see also Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 380-81, 607 S.E.2d 348, 351 (2005); *Webb v. Power Circuit, Inc.*, 141 N.C. App. 507, 512, 540 S.E.2d 790, 793 (2000).

Some medical evidence is always necessary, however, and lay testimony alone will not suffice. *See Terasaka v. AT&T*, 174 N.C. App. 735, 740, 622 S.E.2d 145, 149 (2005), *aff'd per curiam and disc. review improvidently allowed*, 360 N.C. 584, 634 S.E.2d 888 (2006). The absence of medical proof of total disability, though, "does not preclude a finding of disability under one of the other three [*Russell*] tests." *White v. Weyerhaeuser Co.*, 167 N.C. App. 658, 672, 606 S.E.2d 389, 399 (2005).

Total disability can commence right after the end of employment. For instance, a plaintiff whose condition worsens to the point that they can no longer perform their job or any other, and who is then laid off or terminated, would be entitled to disability benefits. *See Williams v. Bank of Am.*, ___ N.C. App. ___, 742 S.E.2d 227, 237-38 (2013) (rejecting argument that plaintiff could not have become disabled just after ceasing to work); *Joyner v. Mabrey Smith Motor Co.*, 161 N.C. App. 125, 130, 587 S.E.2d 451, 455 (2003) (same).

B. *Russell* Part Two

Under the second prong of the *Russell* test, a plaintiff must show "that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. Thus, a plaintiff must prove that (1) he has some physical limitation due to a compensable condition that partially limits his ability to work; and (2) evidence of a "reasonable," but unsuccessful job search.

The necessary medical evidence is usually provided primarily by medical testimony or documentation, and is perhaps supplemented with lay testimony, as under the first prong. Evidence of a reasonable job search is primarily provided by testimony from the plaintiff himself, and is a question of fact for the Commission. Relevant facts for the adequacy of a job search include how many potential employers are contacted, what types of employers are contacted, the means used to contact them (in person, by mail, by internet), how the plaintiff

follows up applications, how many interviews are obtained, etc. However, there are no specific minimum criteria for a reasonable job search. Note also that a vocational expert can testify as to the reasonableness of a job search, but such testimony is not necessary.

The number of employers contacted is probably the most important factor. *See Gilberto v. Wake Forest Univ.*, 152 N.C. App. 112, 117, 566 S.E.2d 788, 792 (2002) (holding the submission of twenty-six job applications in five years was not a reasonable vocational effort); *Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457 (rejecting as “not credible” plaintiff’s testimony he had been refused employment upon “seven or eight” job applications where plaintiff “was unable to name the exact names of employers to whom he had made application nor the dates upon which he had made application nor for what jobs he had applied. . . .”). Actual attempts at employment are helpful too. *See, e.g., Beard v. WakeMed*, ___ N.C. App. ___, 753 S.E.2d 708, 712 (2014) (noting that the plaintiff had to resign from a new position due to her back pain, in addition to the extent of her job search).

It can be detrimental for a plaintiff to go to school full-time instead of searching for a job, even though this can help him in the long-term. In one case, the Court of Appeals affirmed a finding that a plaintiff “could have earned the same wages that she earned at the time of the accident, [but] she instead chose to attend school full-time,” and thus concluded plaintiff was not disabled. *Cross v. Falk Integrated Techs., Inc.*, 190 N.C. App. 274, 281, 661 S.E.2d 249, 255 (2008).

If a plaintiff is receiving unemployment benefits, this should help in proving a reasonable job search because proof of a job search must be submitted on a weekly basis. For example, in *Hooker v. Stokes-Reynolds Hosp./N.C. Baptist Hosp., Inc.*, 161 N.C. App. 111, 117, 587 S.E.2d 440, 445 (2003), the plaintiff’s efforts included applying for at least fifty-two other jobs through the Employment Security Commission (“ESC”) as part of the unemployment program. *Id.* at 117, 587 S.E.2d at 445 (citing North Carolina Employment Security Commission Regulation § 10.25). Plaintiff’s compliance with his unemployment obligations constituted “reasonable efforts” as required to prove disability under *Russell*. *See id.*

Contesting this evidence, defendants may argue that being employable for purposes of receiving unemployment benefits show that a plaintiff is not disabled. The Court of Appeals, however, has held that receipt of unemployment benefits standing alone may not bar receipt of workers’ compensation benefits. *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 699, 308 S.E.2d 335, 337 (1983).

Once the employee has shown a disability, the burden then shifts to the employer to “produce evidence that suitable jobs are available for the employee and that the employee is capable of getting one, taking the employee’s physical and vocational limitations into account.” *Franklin v. Broyhill Furniture Indus.*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386 (1996). “A job is suitable if the employee is capable of performing the job, given her age, education, physical limitations, vocational skills, and experience.” *Id.*; *see* N.C. Gen. Stat. § 97-2(22). “An employee is capable of getting a job if there is a reasonable likelihood that she would be hired if she diligently sought the job.” *Id.* Defendants submit this type of rebuttal evidence through a vocational expert, or with lay testimony of particular jobs that the plaintiff allegedly rejected.

If the latter approach is used, “The burden is on the employer to show that the plaintiff refused suitable employment, and once the employer establishes that the plaintiff was offered suitable work, the burden shifts to the plaintiff to show that the employee’s refusal was justified.” See *Byrd v. Ecofibers, Inc.*, 182 N.C. App. 728, 731, 645 S.E.2d 80, 82 (2007).

1. Working with Restrictions

A common scenario occurs when the plaintiff has suffered a significant injury and the treating doctor has placed work restrictions on his activities. If the current employer can accommodate those restrictions with a restricted-duty job that is not “unsuitable,” then the plaintiff will be required to accept that position or face losing his benefits. See *Peoples v. Cone Mills*, 316 N.C. 426, 440, 342 S.E.2d 798, 807 (1986) (holding that a “proffered job [] generally available in the market, . . . may well be strong, if not conclusive, evidence of the employee’s earning capacity”); *Philbeck v. Univ. of Michigan*, ___ N.C. App. ___, 761 S.E.2d 668, 675 (2014) (holding that period of disability ended when the plaintiff refused suitable employment from former employer); see also N.C. Gen. Stat. § 97-2(22) (as amended) (including in definition of suitable employment “rehabilitative or other noncompetitive employment with the employer of injury” prior to reaching maximum medical improvement).

If the employer is unable to accommodate the restrictions, two possibilities arise. If the claim has been accepted and the insurance carrier pays temporary total disability benefits, then the parties have essentially agreed informally that the plaintiff is disabled and that benefits are due and payable. Absent an award of the Commission, however, the presumption of continuing disability does not arise.

This situation becomes considerably more difficult when the insurance carrier has denied the claim. Being restricted to light duty, for instance, with an employer that will not accommodate the restrictions and an insurance carrier that will not pay indemnity benefits, standing alone may not be enough to prove disability. See *Perkins v. U.S. Airways*, 177 N.C. App. 205, 214, 628 S.E.2d 402, 408 (2006) (denying disability where employer did not offer light duty position and plaintiff did not make any other attempts to obtain employment).

2. Lay-Off From Original Employment

Another tricky situation arises when a plaintiff with some work restrictions is laid off from his former position, which he could still perform. The Court of Appeals has held that a plaintiff was not disabled where the plaintiff was physically able to perform his former job and his inability to earn wages was due to a layoff resulting from a downturn in the economy and the employee’s lack of interest in returning to work. *Segovia v. J.L. Powell & Co.*, 167 N.C. App. 354, 356-57, 608 S.E.2d 557, 558-59 (2004).

In this situation, a plaintiff should be able to maintain benefits by conducting a reasonable job search after being laid off. See *Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 683, 648 S.E.2d 917, 921 (2007) (holding that the fact that plaintiff was laid off does not preclude a finding of total disability if, because of plaintiff’s injury, he was incapable of obtaining a job in the competitive labor market, and relying on plaintiff’s diligent job search). The same should

hold true even during an economic downturn. Thus, the Court of Appeals had held “that an employee who suffers a work-related injury is not precluded from workers’ compensation benefits when that employee, while employable within limitations in certain kinds of work, cannot after reasonable efforts obtain employment due to unavailability of jobs.” *Fletcher v. Dana Corp.*, 119 N.C. App. 491, 499, 459 S.E.2d 31, 37 (1995).

However, these principles were recently thrown into doubt by the Court of Appeals in *Medlin*. In that case, the court held that an injured plaintiff was not disabled where he was laid off for economic reasons and was physically able to perform his former job, even though he had physical limitations and his apparently diligent job search after his termination was unsuccessful. The court found he was not disabled because his “inability to earn his pre-injury wages is not attributable to his injury but is based solely on the large-scale economic downturn affecting the construction industry as a whole.” *Medlin v. Weaver Cooke Const., LLC*, ___ N.C. App. ___, 748 S.E.2d 343, 347 (2013) (emphasis added). The court seemed to be holding that if an employee could perform his original job, then an economic downturn could preclude him from proving disability, even if that job is unavailable.

The Supreme Court affirmed in *Medlin*, but using different reasoning. The Court rejected the concept that an economic downturn alone could preclude a finding of disability. “Whether in a boom or bust economy, a claimant’s inability to find equally lucrative work is a function of both economic conditions and his specific limitations.” *Medlin*, 760 S.E.2d at 738 (emphasis added). Therefore, even in a downturn, an employee can show that his inability to find work is causally related to his workplace injury. In *Medlin*, however, the plaintiff’s claim failed because his post-termination physical limitations were not actually due to his workplace injury. *Id.*

C. *Russell* Part Three

Under the third test, the plaintiff must prove that “he is capable of some work but that it would be futile because of pre-existing conditions, i.e., age, inexperience, lack of education, to seek other employment.” *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457; *see also Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986) (“Where . . . an employee’s effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.”).

A finding of futility usually results from a combination of factors such as age, lack of qualifications, and physical impairment. *See, e.g., Peoples*, 316 N.C. at 444, 342 S.E.2d at 809 (relying on factors that plaintiff was 57 years old, had limited education and work experience, and his injury was caused by over 25 years of performing same duties for defendant); *Matthews v. City of Raleigh*, 160 N.C. App. 597, 612-13, 586 S.E.2d 829, 841 (2003) (holding evidence that plaintiff was “limited by lack of education, neurological and cognitive damage, and inability to sustain the degree of attention necessary to hold a job” was sufficient to prove disability); *Adams v. Kelly Springfield Tire Co.*, 123 N.C. App. 681, 684-85, 474 S.E.2d 793, 796 (1996) (upholding conclusion of disability where evidence showed that “although plaintiff is capable of some work, most employment would be futile due to plaintiff’s pre-existing conditions, i.e., his lack of education, manic depressive disorder, limitations on lifting due to his back and lack of

rehabilitative success). If futility is based in part on the employee's impairments due to the workplace injury, then meeting this test also satisfies the causation part of the *Hilliard* standard.

Usually, the primary evidence for the third prong of *Russell* is a vocational assessment performed by a vocational rehabilitation expert. The expert should review all of the plaintiff's medical evidence (including deposition testimony), educational history, and work history in order to credibly render an opinion on the futility of a job search.

However, the Commission and Court of Appeals have on occasion found plaintiffs disabled under the third *Russell* prong even without expert vocational evidence. *See, e.g., Thompson v. Carolina Cabinet Co.*, ___ N.C. App. ___, 734 S.E.2d 125, 128-29 (2012) (noting that a plaintiff is not required to present medical evidence or the testimony of a vocational expert on the issue of futility and upholding disability finding based on age, lack of education, prior work history, and physical limitations of plaintiff); *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 391, 656 S.E.2d 608, 615 (2008) (noting findings that plaintiff only had high school education, had worked as custodian most of his life, had numerous physical problems, and was not offered and had not received vocational rehabilitation services); *Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 383, 607 S.E.2d 348, 352-53 (2005) (finding sufficient that plaintiff had GED, had worked only in maintenance positions, had no office skills or training, had severe pain in his knees, and had doctor's restrictions on bending, stooping, squatting, or walking more than few minutes at a time); *Rivera v. Trapp*, 135 N.C. App. 296, 303, 519 S.E.2d 777, 781 (1999) (upholding determination of disability based on plaintiff's testimony that his arm was "no good" and on his limited ability to understand English, coupled with his exclusive background in construction work, which made him unemployable). *But see Hutchens v. Lee*, ___ N.C. App. ___, 729 S.E.2d 111, 115 (2012) (rejecting disability determination because the record contained almost no evidence about the plaintiff's work history and no evidence about his vocational skills).

Like the first *Russell* test, the third test of disability turns on the plaintiff's particular circumstances, and is not generally based on his impairments. *See Little v. Anson Cty. Schs. Food Serv.*, 295 N.C. 527, 532, 246 S.E.2d 743, 746 (1978) (holding that "the employee must be compensated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health."). "Furthermore, the fact that Plaintiff can perform light-duty work does not in itself preclude the Full Commission from making an award for total disability if the evidence shows that, because of preexisting limitations, Plaintiff is not qualified to perform the kind of light-duty jobs that might be available in the marketplace." *Johnson*, 188 N.C. App. at 391, 656 S.E.2d at 615.

D. Using Multiple Tests

An employee should put on as much evidence as he can for each of the three separate *Russell* disability tests and pursue a decision on each prong. Failure to do so can be fatal, as demonstrated by *Terasaka v. AT&T*, 174 N.C. App. 735, 740, 622 S.E.2d 145, 149 (2005), *aff'd per curiam and disc. review improvidently allowed*, 360 N.C. 584, 634 S.E.2d 888 (2006).

In this case, the Commission had held that the plaintiff, a clerical employee, developed compensable bilateral carpal tunnel syndrome and was disabled from all employment following her surgery. *Id.* at 737-38, 622 S.E.2d at 148. The Commission found that the plaintiff was unable to work in any capacity due to her carpal tunnel syndrome, based on the plaintiff's testimony about her physical impairments. *Id.* at 739, 622 S.E.2d at 148-49. The Court of Appeals concluded that the Commission's findings were supported by competent evidence. *Id.* at 739-40, 622 S.E.2d at 148-49.

However, the court also held that since the Commission conclusively found plaintiff was unable to work in any capacity due to her carpal tunnel syndrome, the only *Russell* prong applicable on these facts is the first prong. *Id.* at 740, 622 S.E.2d at 149. The court conceded that a plaintiff can ordinarily prove disability under any of the four *Russell* prongs, but held that on the particular facts of this case, the finding discussed above is conclusively established and precludes us from considering any of the other *Russell* prongs. *Id.*

The court then held that because the plaintiff had failed to offer *medical evidence* to satisfy the first prong, she failed to prove total disability. *Id.* Because the medical evidence only showed that the plaintiff could not return to any job which required repetitive motion of the hands and wrist she failed to offer medical evidence sufficient to prove that she could not work in any employment. *Id.* (emphasis in original). Finally, the court concluded that we cannot remand for additional findings because the transcripts reveal no medical evidence that could support a finding that plaintiff was incapable of work in any employment. *Id.* at 741, 622 S.E.2d at 149. This harsh result was then affirmed without opinion by the Supreme Court. 360 N.C. 584, 634 S.E.2d 888 (2006).

The appellate courts also require the Commission to make detailed findings to support the conclusion that a plaintiff is disabled under *Russell* prongs two or three. *Carr v. Dep't of Health & Human Servs. (Caswell Ctr.)*, 218 N.C. App. 151, 157-58, 720 S.E.2d 869, 874-75 (2012).

V. PARTIAL DISABILITY

A. Benefits Under Section 97-30

For injuries occurring before June 24, 2011, section 97-30 provides up to 300 weeks of temporary partial disability benefits. For injuries occurring on or after June 24, 2011, section 97-30 provides up to 500 weeks of temporary partial disability benefits. When an employee suffers a diminution of the power or capacity to earn, he or she is entitled to benefits under N.C.G.S. § 97-30. *Gupton v. Builders Transport*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987) (quoting *Branham v. Panel Co.*, 223 N.C. 233, 237, 25 S.E. 2d 865, 868 (1943)). In order to secure an award under N.C.G.S. § 97-30, the plaintiff has the burden of showing not only permanent partial disability, but also its degree. *Id.* at 43, 357 S.E.2d at 678 (quoting *Hall v. Chevrolet Co.*, 263 N.C. 569, 575, 139 S.E. 2d 857, 861 (1965)). The compensation is to be computed upon the basis of the difference in the average weekly earnings before the injury and the average weekly wages he is able to earn thereafter. *Id.* (quoting *Branham*, 223 N.C. at 236, 25 S.E. 2d at 867)). As discussed above, the employee must also prove that the reduction in earning ability is causally connected to the workplace injury.

The fourth prong of *Russell* deals with partial disability payable under N.C. Gen. Stat. § 97-30, and requires the plaintiff to prove that he has obtained other employment at a wage less than that earned prior to the injury. *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457. This test will only apply when the plaintiff has returned to work following a compensable injury, but is making less money than the pre-injury average weekly wage. *See McGee v. Estes Express Lines*, 125 N.C. App. 298, 300, 480 S.E.2d 416, 418 (1997) (‘‘If the employee has the capacity to earn some wages, but less than he was earning at the time of the injury, he is entitled to partial disability benefits under section 97-30.’’).

When proceeding under section 97-30, the first consideration is to make sure the pre-injury and post-injury average weekly wages are accurately calculated. Second, make sure that the new job, whether with the same employer or another, is a job available in the competitive market place and for which the plaintiff is qualified and capable of doing given his limitations and restrictions. *See Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805 (1986) (‘‘An injured employee’s earning capacity must be measured not by the largesse of a particular employer, but rather by the employee’s own ability to compete in the labor market.’’). In other words, it must be ‘‘suitable employment.’’ Finally, bear in mind that for claims arising before June 24, 2011, these benefits are only available during the 300 weeks following the date of injury.

Once the plaintiff has satisfied those considerations, the post-injury earnings at this new position will be considered ‘‘strong but not conclusive evidence’’ of the plaintiff’s post-injury earning capacity. *See Hendrix v. Linn-Corriher*, 317 N.C. 179, 189, 345 S.E.2d 374, 380 (1986). ‘‘Such evidence, while not dispositive of disability, shifts the burden to the employer to establish that the employee could have obtained higher earnings.’’ *Larramore v. Richardson Sports, Ltd. Partners*, 141 N.C. App. 250, 259-60, 540 S.E.2d 768, 773 (2000), *aff’d per curiam*, 353 N.C. 520, 546 S.E.2d 87 (2001).

Defendants’ burden in this situation is like its burden to rebut proof of disability under the second *Russell* test. *See Britt v. Gator Wood, Inc.*, 185 N.C. App. 677, 685, 648 S.E.2d 917, 922 (2007) (‘‘Although defendants challenge the sincerity of plaintiff’s job search and make various arguments regarding plaintiff’s educational and vocational background, they presented no evidence to the Commission to show that plaintiff could, in fact, have obtained employment at higher earnings.’’); *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 131, 532 S.E.2d 583, 588 (2000) (‘‘Defendant presented no evidence that plaintiff could obtain employment earning more than this amount.’’).

It is important to recognize that the plaintiff too can, and sometimes will need to, rebut the presumption regarding post-injury wages, and show that ‘‘that such wages are an unreliable basis for determining the employee’s actual earning capacity.’’ *Harris v. North American Products*, 125 N.C. App. 349, 355, 481 S.E.2d 321, 325 (1997); *see also Peoples*, 316 N.C. at 436, 342 S.E.2d at 805 (‘‘Also to be taken into consideration is whether the post-injury earnings are a proper index of the employee’s earning capacity or whether the amount of such earnings truly reflects other considerations which may exaggerate such capacity and be only of a temporary nature’’).

For instance, a plaintiff can have a loss of earning capacity even if he seems to be making his pre-injury earnings, if his post-injury earnings are exaggerated by an increase in the hours he is required to work. *See Harris*, 125 N.C. App. at 356, 481 S.E.2d at 326. Or a post-injury job may be so temporary as to misrepresent post-injury earning capacity. *See Daughtry v. Metric Construction Co.*, 115 N.C. App. 354, 358, 446 S.E.2d 590, 593 (1994).

If the plaintiff was engaged in concurrent employment at the time of his compensable injury, then the wages from the secondary employment are not factored into either the pre-injury or post-injury average weekly wage calculations for purposes of § 97-30 benefits. *Tunell v. Res. MFG/Prologistix*, ___ N.C. App. ___, 731 S.E.2d 844, 848 (2012) (noting that this holding may not apply in situations where the secondary employment is enlarged or used as a substitute for the loss of earnings in the primary employment).

B. Benefits Under Section 97-31

Under N.C. Gen. Stat. § 97-31, a plaintiff can receive a “scheduled benefit” that is determined from a “permanent partial impairment rating” typically assigned by a treating or evaluating physician. Unlike all other types of disability benefits, the plaintiff does not need to prove loss of wage-earning ability under section 97-31. *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 250, 335 S.E.2d 327, 334 (1985) (“To obtain an award of benefits under any subsection of G.S. Sec. 97-31, a specific showing that the claimant has undergone a diminution in wage-earning capacity is not required.”). “Instead, disability is presumed from the fact of injury.” *Id.* at 251, 335 S.E.2d at 334.

Most of the schedule of benefits in section 97-31 is phrased in terms of the total loss of an extremity, use of the back, hearing, or vision. Much more common, though, are injuries that result in a partial impairment, for which a physician then assigns an impairment rating. Such injuries are compensated by multiplying the rating percentage by the total-loss benefit. § 97-31(19) (“The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye or for partial loss of hearing shall be such proportion of the periods of payment above provided for total loss as such partial loss bears to total loss. . . .”). For example, an elbow injury that causes a 20% impairment to a plaintiff’s right arm would result in benefits of 48 weeks (20% of 240 weeks) of the plaintiff’s compensation rate, which is two-thirds of the average weekly wage. *See* § 97-31(13).

There are two separate provisions for scarring and disfigurement, subsections 21 and 22. The former covers “serious facial or head disfigurement,” and compensation up to \$20,000 must be awarded. § 97-31(21). The latter covers “serious bodily disfigurement for which no compensation is payable under any other subdivision of this section,” and compensation up to \$10,000 may be awarded in the Commission’s discretion. *See* § 97-21(22).

In order to qualify as “serious,” disfigurement “must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power.” *Liles v. Charles Lee Byrd Logging Co.*, 309 N.C. 150, 154, 305 S.E.2d 523, 526 (1983); *see also id.* (“To warrant compensation for disfigurement it must be so permanent and serious

that it, in some manner, hampers or handicaps the person in his earning or in securing employment, or it must be such as to make the person repulsive to other people.ö). In evaluating whether a plaintiff's disfigurement will impact a plaintiff's earning capacity, and in deciding the amount of an award, the Commission is to consider öthe natural physical handicap resulting from the disfigurement, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment.ö *Id.* at 155, 305 S.E.2d at 526; see *Blackwell v. Multi Foods Management, Inc.*, 126 N.C. App. 189, 484 S.E.2d 815 (1997) (applying factors to foot scar that, though not usually visible, limited the plaintiff's employment options).

The final subsection in section 97-31 is a catch-all provision, which provides up to \$20,000 in compensation for öthe 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....ö N.C. Gen. Stat. § 97-31(24). The Commission has discretion whether to award compensation under this provision. *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986). No proof of diminished wage-earning capacity is required under section 97-31(24). *Stanley v. Gore Bros.*, 82 N.C. App. 511, 517, 347 S.E.2d 49, 52 (1986). However, there must be evidence of the body part's importance, which is usually provided by a medical expert. See *Aderholt v. A.M. Castle Co.*, 137 N.C. App. 718, 723, 529 S.E.2d 474, 478 (2000). Compensation for permanent damage to many different body parts has been awarded under this provision. See, e.g., *id.* at 723-24, 529 S.E.2d at 478-79 (approving awards of \$20,000 for pancreas, \$20,000 for each lung, \$15,000 for abdominal wall, \$10,000 for omentum, \$12,000 for intestines, \$5,000 for stomach, and \$15,000 for reproductive organs); *Stanley*, 82 N.C. App. at 517, 347 S.E.2d at 52 (approving award for damage to nerves and muscle in face).

1. Maximum Medical Improvement

The term ömaximum medical improvementö or öMMIö is not defined in the Act, but it is commonly used and bears on the application of section 97-31. The concept is sometimes thought to have more relevance than the law provides, and the courts have had to cabin its application. The 2011 amendments to the Act, however, extend the use of MMI into the definition of ösuitable employment.ö See N.C. Gen. Stat. 97-2(22) (as amended).

Section 97-31 states that compensation for temporary disability can be paid during the öhealing periodö (under either sections 97-29 or 97-30) and then provides for additional compensation to be paid for a period afterward fixed by the section's schedule. See *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 11-12, 562 S.E.2d 434, 442 (2002), aff'd, 357 N.C. 44, 577 S.E.2d 620 (2003). The scheduled benefits are only due once the öhealing periodö ends. *Id.* at 12, 562 S.E.2d 442. The öhealing periodö has been defined by the Court of Appeals:

The healing period of the injury is the time when the claimant is unable to work because of his injury, is submitting to treatment, which may include an operation or operations, or is convalescing. This period of temporary total disability contemplates that eventually there will be either complete recovery, or an impaired bodily condition which is stabilized. The healing period ends when, after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established.

Carpenter v. Industrial Piping Co., 73 N.C. App. 309, 311, 326 S.E.2d 328, 329-30 (1985) (quoting *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288-89, 229 S.E.2d 325, 328-29 (1976)).

Maximum medical improvement marks the end of the healing period and is “the point at which an injury has stabilized.” *Cross v. Falk Integrated Techs., Inc.*, 190 N.C. App. 274, 282, 661 S.E.2d 249, 255 (2008). “Thus, before an employee may receive scheduled benefits pursuant to N.C. Gen. Stat. § 97-31, it must be established that the employee has reached the point of MMI with regard to the employee’s specific physical impairment and, therefore, that the healing period has ended and the employee’s physical impairment has become permanent.” *Knight.*, 149 N.C. App. at 13, 562 S.E.2d at 443.

Resolving some confusion regarding MMI, the Court of Appeals “concluded that the primary significance of the concept of MMI is to delineate a crucial point in time *only within the context of a claim for scheduled benefits under N.C. Gen. Stat. § 97-31*, and that the concept of MMI does not have any direct bearing upon an employee’s right to continue to receive temporary disability benefits once the employee has established a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30.” *Id.* at 13-14, 562 S.E.2d at 443 (emphasis in original). “An employee who establishes a total or partial loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or § 97-30 is entitled to continue to receive benefits for as long as the loss of wage-earning capacity continues . . . , regardless of whether the employee’s physical injury has reached a point of maximum medical improvement or not.” *Id.* at 16, 562 S.E.2d at 445. Thus, “a finding of [MMI] is not the equivalent of a finding that the employee is able to earn the same wage earned prior to injury.” *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 120, 598 S.E.2d 185, 190-91 (2004).

2. Double Recovery

The Supreme Court has held that the “in lieu of” clause in section 97-31 was intended to “prevent[] double recovery without making the schedule [provided by section 97-31] an exclusive remedy.” *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 98, 348 S.E.2d 336, 341 (1986). Thus, “[w]here an employee can show both a disability pursuant to G.S. §§ 97-29 or 97-30 and a specific physical impairment pursuant to G.S. § 97-31, he may not collect benefits pursuant to both schemes, but rather is entitled to select the statutory compensation scheme which provides the more favorable remedy.” *Collins v. Speedway Motor Sports Corp.*, 165 N.C. App. 113, 119, 598 S.E.2d 185, 190 (2004).

As a general rule, “stacking of benefits covering the same injury for the same time period is prohibited.” *Gupton v. Builders Transport*, 320 N.C. 38, 43, 357 S.E.2d 674, 678 (1987). Therefore, “a plaintiff entitled to select a remedy under either N.C.G.S. § 97-31 or N.C.G.S. § 97-30 may receive benefits under the provisions offering the more generous benefits, less the amount he or she has already received.” *Id.* at 43, 357 S.E.2d at 677; see *Lewis v. N.C. Dep’t of Correction*, ___ N.C. App. ___, 760 S.E.2d 15, 17 (2014) (approving award where amount of temporary total disability benefits is deducted as offset from payment under section 97-31).

VI. 2011 AMENDMENTS

The 2011 amendments to the Act make significant changes to disability compensation under sections 97-29 and 97-30 that are both procedural and substantive. Although the most important changes do not affect the first several years of benefits, the changes immediately alter one's analysis of a claim. The first question for any claim, though, is whether the 2011 amendments apply, or whether pre-existing law continues to govern.

A. Effective Date

The changes to sections 97-29 and 97-30 are effective only for claims arising on or after June 24, 2011. N.C. Session Law 2011-287, § 23. A claim arises on the date of injury for an injury by accident or specific traumatic incident. For occupational disease claims, the claim generally arises on the date of first disability. *See Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 103, 265 S.E.2d 144, 149 (1980) (holding that the better rule in cases involving occupational disease is to apply the law in effect at the time the employee becomes disabled, at least where the statute does not dictate a contrary result). Accordingly, claims arising prior to June 24, 2011, will be governed by the law as it was before June 2011, and claims arising on and after June 24, 2011, will be governed by the new amended statute.

B. The First 500 Weeks Following Disability

Section 97-30, as amended, continues to provide for temporary partial disability benefits, but now provides that in no case shall the employee receive more than 500 weeks of payments under this section. Any weeks of payments made pursuant to G.S. 97-29 shall be deducted from the 500 weeks of payments available under this section.

The changes to section 97-30 are relatively straightforward: (1) the 300-week cap has been increased to 500 weeks; (2) the number of weeks of temporary partial disability benefits is no longer tied to the date of injury; and (3) only weeks during which the employee receives either temporary partial disability or total disability benefits count toward the 500 weeks of benefits payable under this section. Thus, the amendments can significantly increase the amount of temporary partial disability benefits for a plaintiff, and will alter the calculation of whether to choose these benefits or those under section 97-31.

The 2011 amendments do not change the existing law for proving and maintaining the right to compensation for total disability for the period extending 500 weeks from the first date of the injured employee's disability. However, except in cases of permanent and total disability, the injured employee will now not be entitled to compensation for total disability for a period in excess of this 500 week period unless the employee qualifies for extended compensation under subsection (c) of the new § 97-29.

The employer thus is entitled to stop total disability benefits it is paying at the end of the 500-week period in the absence of a Commission order qualifying the employee for extended compensation. In order to do so, the employer will still need to comply with the existing Form 24 procedure because N.C. Gen. Stat. § 97-18.1 was not amended. Even in these circumstances, this is not simply an academic requirement. There may be factual conditions for the Commission

to address, for example, relating to the employee's first date of disability or qualification for benefits for catastrophic injuries.

Note that the new "cap" on total disability compensation does not limit the period during which an employee may receive temporary partial disability benefits under § 97-30, as newly amended. The partial disability benefits may extend beyond 500 weeks from the date of first disability if there were some weeks where no benefits were paid.

It is also significant that the new "cap" and procedures for obtaining "extended compensation" do not affect the plaintiff's right to payment of medical compensation. The limitations on the payment of medical compensation continue to be governed by N.C. Gen. Stat. 97-25.1, which was not amended.

C. Procedure to Qualify for Extended Benefits

A plaintiff seeking "extended compensation" for total disability beyond the initial 500-week period must apply to the Commission for this compensation after a period of 425 weeks has passed from the first date of disability. § 97-29(c) (as amended). In the absence of agreement by the employer, the injured employee must then prove at a formal Commission hearing "by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity." *Id.* Following a Commission award of "extended compensation," this Award will not be stayed unless and until the Full Commission or an appellate court reviews and reverses this award. *Id.*

After there is an award for "extended compensation" for total disability, the Commission may later review this award and, on such review, "make an award ending or continuing the extended compensation." *Id.* In the review of the prior award, the employer has the burden of proving "by a preponderance of the evidence that the employee no longer has a total loss of wage-earning capacity." *Id.*

While the statutory procedure for seeking "extended compensation" cannot be initiated until 425 weeks have passed from the date of disability, there is no statutory time limit for doing so. The plaintiff thus should be entitled to file his application for "extended compensation" for a period of at least two years from the last payment of disability compensation even if this is, for example, 600 weeks from the date of first disability. *See* N.C. Gen. Stat. § 97-47.

D. Standard to Qualify for Extended Benefits

The amended section 97-29 does not expand on the definition of "total loss of wage earning capacity." This was unnecessary. This is the same standard applied by the Commission and the courts in the past in determining whether an injured employee is entitled to compensation under section 97-29 for total disability. In fact, before the recent amendment, the statute provided in the first line as a condition for receiving total disability benefits that "the incapacity for work resulting from the injury is total." § 97-29 (pre-amendment).

A "total loss of wage-earning capacity" has been the consistent legal standard for payment of compensation for total disability. *See, e.g., Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 10, 562

S.E.2d 434, 441 (2002) *aff'd*, 357 N.C. 44, 577 S.E.2d 620 (2003) (‘‘A loss of wage-earning capacity may either be total, in which case the employee is entitled to benefits pursuant to N.C. Gen. Stat. § 97-29. . . .’’); *Trivette v. Mid-South Mgmt., Inc.*, 154 N.C. App. 140, 147, 571 S.E.2d 692, 697 (2002) (‘‘Based on this evidence, the Commission found that plaintiff’s disability or loss of wage-earning capacity during the period ending 7 January 1997 was total, meaning that she was entitled to receive benefits for as long as the total loss of wage-earning capacity lasts.’’); *Bridwell v. Golden Corral Steak House*, 149 N.C. App. 338, 346, 561 S.E.2d 298, 304 (2002) (‘‘We conclude that the Commission’s findings, which are supported by competent evidence, show that plaintiff has satisfied his burden of proving total loss of wage earning capacity and that defendant has failed to rebut plaintiff’s evidence by showing that plaintiff possessed wage earning capacity.’’); *Zimmerman v. Eagle Elec. Mfg. Co.*, 147 N.C. App. 748, 752, 556 S.E.2d 678, 680-81 (2001) (‘‘As the plaintiff points out, the Court has clearly outlined different methods that a plaintiff may employ to prove total loss of wage-earning capacity, and thus, entitlement to total disability benefits under N.C. Gen. Stat. § 97-29 (1999).’’ (citing *Russell*)).

One important question is the date on which the Commission must find that the plaintiff has proven by ‘‘a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity.’’ It is most reasonable to infer that the General Assembly intended that the plaintiff qualify for ‘‘extended compensation’’ at a time after the employee applies 425 weeks or later after the date of first disability. The Commission, following a formal hearing, awards the plaintiff ‘‘extended compensation’’ if he sustains his burden of proof without regard to the date of expiration of the 500 weeks. The language nowhere suggests that the ‘‘total loss of wage-earning capacity’’ necessarily is at the very point when the 500 weeks expire.

E. Credit for Social Security Retirement Benefit

The 2011 amendments for the first time introduce a credit for a plaintiff’s Social Security retirement benefits. This credit is only against ‘‘extended compensation’’ for total disability. There thus is no Social Security retirement benefit credit against compensation paid for total disability within the 500 weeks following the date of first disability. This credit also applies only after a plaintiff is receiving retirement benefits under the Social Security Act after reaching full retirement age. N.C. Gen. Stat. § 97-29(c) (as amended). The full retirement age is now 66 years and will increase to 67 years over time under the present Social Security law. *See* 42 U.S.C. § 416(l).

In addition, there is no credit for: (1) Social Security disability benefits, (2) Social Security widow or widower’s survivor benefits, or (3) reduced early retirement benefits for which an employee may qualify presently at age 62. This credit also is limited to the plaintiff’s primary social security benefit, without taking into account cost-of-living increases, and does not include any dependent or auxiliary benefits paid on the injured employee’s social security account. § 97-29(c) (as amended). Finally, there is no credit for social security retirement benefits against permanent and total disability compensation.

F. Permanent and Total Disability Compensation

The only circumstances in which an employee injured on and after June 24, 2011, can be entitled to compensation for "permanent and total disability" are defined specifically in the new subsection 97-29(d). These circumstances are:

- (1) The loss of both hands, both arms, both feet, both legs, both eyes, or any two thereof, as provided by G.S. 97-31(17).
- (2) Spinal injury involving severe paralysis of both arms, both legs, or the trunk.
- (3) Severe brain or closed head injury as evidenced by severe and permanent:
 - a. Sensory or motor disturbances;
 - b. Communication disturbances;
 - c. Complex integrated disturbances of cerebral function; or
 - d. Neurological disorders.
- (4) Second-degree or third-degree burns to thirty-three percent (33%) or more of the total body surface.

§ 97-29(d) (as added). Permanent and total disability for these injuries, however, is only presumed, because the employer may rebut the conclusion of total disability by demonstrating, "by a preponderance of the evidence that the employee is capable of returning to suitable employment as defined in G.S. § 97-2(22)." *Id.* Note that this provision incorporates the amended definition of suitable employment.

Catastrophically injured employees in these categories are still entitled to medical compensation for their injuries during their lifetime, even if their permanent total disability is rebutted. Also, by separately addressing this distinct group of injuries in subsection (d), employees with these injuries are not subject to the 500-week statutory cap or the credit for Social Security retirement benefits against "extended compensation" in subsection (c).

G. Bar on Double Recovery

The 2011 amendments codify the bar on double recovery, which was discussed in Section V.B.ii, *supra*. New subsection 97-29(e) states: "An employee shall not be entitled to benefits under this section or G.S. 97-30 and G.S. 97-31 at the same time." New subsection 97-29(f) states: "Where an employee can show entitlement to compensation pursuant to this section or G.S. 97-30 and a specific physical impairment pursuant to G.S. 97-31, the employee shall not collect benefits concurrently pursuant to both this section or G.S. 97-30 and G.S. 97-31, but rather is entitled to select the statutory compensation which provides the more favorable remedy."