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NO. COA13-150
NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2013

WALTER STEVENS, Employee,
Plaintiff

v.

N.C. INDUSTRIAL COMMISSION
I.C. No. 661260

UNITED STATES COLD STORAGE, INC.
Employer, and N.C. INSURANCE
GUARANTY ASSOCIATION, Carrier,
Defendants

Appeal by plaintiff from Opinion and Award entered 2
November 2012 by the North Carolina Industrial Commission.
Heard in the Court of Appeals 13 August 2013.

*Smith, James, Rowlett & Cohen, L.L.P., by Margaret Rowlett,
for Plaintiff.*

*McAngus, Goudelock & Courie, P.L.L.C., by Laura Carter,
Layla T. Santa Rosa, and Cassie M. Keen, for Defendants.*

ERVIN, Judge.

Plaintiff Walter Stevens appeals from an order entered by
the Commission awarding him permanent total disability
compensation pursuant to N.C. Gen. Stat. § 97-29 on the grounds
that the Commission failed to comply with a previous decision of
this Court remanding this case to the Commission for further

proceedings. In his brief, Plaintiff contends that, given the facts revealed by the present record, he was entitled to receive both weekly total permanent disability payments pursuant to N.C. Gen. Stat. § 97-29 and a scheduled payment pursuant N.C. Gen. Stat. § 97-31 and that the Commission erred by failing to award both types of compensation to him. After careful consideration of Plaintiff's challenge to the Commission's order in light of the record and the applicable law, we hold that the Commission erred by failing to make the findings needed to permit a determination of whether Plaintiff was entitled to receive workers' compensation benefits pursuant to both N.C. Gen. Stat. §§ 97-29 and 97-31, so that the Commission's order must be reversed and this case must be remanded to the Commission for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

1. Nature of Plaintiff's Initial Injury

Plaintiff, who is now in his late fifties and who had worked as a truck driver for twenty-five years, was employed as a truck driver by Defendant United States Cold Storage, Inc.¹ On 18 March 1996, while attempting to pull a tarp over the load in

¹Plaintiff was actually employed by Jack Gray Transport, Defendant United States Cold Storage's predecessor, at the time of his injury.

his truck, Plaintiff sustained a compensable injury by accident to his lower back and began receiving temporary total disability compensation. In the fifteen years since his injury, Plaintiff has only been able to work for two months and continues to suffer from back pain which radiates into his legs, daily groin pain, and other conditions.

2. Analysis of Plaintiff's Injuries

a. Plaintiff's Back Injury

Although Plaintiff returned to work a short time after his injury, he could not continue to work and resumed receiving temporary total disability payments as the result of his ongoing back pain. During May of 1996 and July of 1998, Plaintiff underwent a number of surgical procedures which were intended to address the lower back problems from which he continued to suffer. In March 1999, Dr. Charles Branch of Wake Forest University Baptist Hospital allowed Plaintiff to return to work subject to certain restrictions deemed appropriate as the result of a functional capacity evaluation.

On 16 June 2005, Plaintiff saw Dr. Edward Hanley of CMC Orthopaedics in order to obtain an evaluation of his continuing back pain. At that time, Dr. Hanley concluded that Plaintiff exhibited signs of disc degeneration just above the site of a previous procedure and recommended that Plaintiff's fusion be

extended to the site of the new degenerative condition. On 5 February 2007, Dr. Hanley performed the recommended fusion procedure. On 16 April 2008, Dr. Hanley surgically removed a pedicle screw from the area affected by the 5 February 2007 procedure in an attempt to relieve the pain that Plaintiff was continuing to experience. On 11 September 2008, Dr. Hanley determined that Plaintiff's back had reached maximum medical improvement and concluded that Plaintiff had a 30% permanent back disability. As of the date of the evidentiary proceedings before the Commission, Dr. Hanley believed that Plaintiff was unable to work and would be unable to resume working for the foreseeable future.

b. Plaintiff's Foot Injury

In June 2005, Plaintiff began receiving treatment for left foot pain. On 20 June 2008, Dr. Robert Anderson of OrthoCarolina determined that Plaintiff had reached maximum medical improvement and that he had a 60% permanent impairment of his left foot.

c. Plaintiff's Erectile Dysfunction and Groin Injury

In 1998, Plaintiff began receiving treatment from Dr. Paul Coughlin of Piedmont Urological Associates for erectile dysfunction, a condition which, according to Dr. Coughlin, resulted from Plaintiff's work-related back injury. In 2002,

Dr. Coughlin performed a successful penile implant procedure. After Plaintiff complained of increasing right groin pain on 11 March 2009, Dr. Coughlin noted tenderness consistent with nerve entrapment and nerve root irritation in that region. On 18 May 2009, Dr. Coughlin performed an exploratory procedure during which he discovered and released extensive scar tissue in an effort to provide Plaintiff with relief from his pain.

As of 31 December 2009, Plaintiff reported improvement in his right groin pain. According to Dr. Coughlin, Plaintiff has reached maximum medical improvement for his erectile dysfunction. Although Plaintiff's penile implant was purportedly successful, evidence indicated that injuries associated with erectile dysfunction can be emotionally devastating, particularly to a man of Plaintiff's age. Similarly, although Dr. Coughlin believed that Plaintiff had reached maximum medical improvement for his right groin injury, he opined that Plaintiff would need ongoing treatment for this condition.

d. Plaintiff's Psychiatric and Psychological Condition

On 22 February 2005, Plaintiff consulted with Dr. Marlene Brogan of North Carolina Neuropsychiatry concerning his mental condition, which the Commission described as "major depression with anxiety." At that time, Plaintiff reported "a drop in

concentration, poor mood, poor energy, and fragmented sleep." Plaintiff remained under Dr. Brogan's care until 16 May 2005, at which point she determined that Plaintiff had reached maximum medical improvement.

On 29 June 2007, Plaintiff came under the care of Dr. John Barkenbus of North Carolina Neuropsychiatry, who diagnosed Plaintiff as suffering from depression and dyspepsia. On 28 September 2009, Dr. Barkenbus noted no change in Plaintiff's depression and reported that Plaintiff did not believe that he could ever return to work. As the result of testing performed on 30 November 2009, Dr. Barkenbus concluded that Plaintiff's depression and anxiety were disabling, resulting in "a marked interference with concentration and pace, social functioning, and interpersonal stress tolerance." In addition, Dr. Barkenbus concluded in 2009 that, despite five years of treatment, Plaintiff's depression and anxiety symptoms were "disabling"; that these conditions interfered with his "concentration and pace, social functioning, and interpersonal stress tolerance"; and that Plaintiff's symptoms had persisted despite five years of treatment with medication and intermittent counseling. According to Dr. Barkenbus, Plaintiff continues to suffer from chronic leg and back pain, depression, and anxiety; would, as the result of his psychological condition, have difficulty with

any vocational retraining; and remains, and likely will remain, unable to work.

e. Plaintiff's Chronic Pain

On 10 November 1999, Plaintiff came under the treatment of Dr. T. Kern Carlton, who provided pain management care. In November 1999, Dr. Carlton recommended that Plaintiff obtain the assistance of a vocational rehabilitation professional. After working with Plaintiff from May 2003 until December 2006 and after noting that Plaintiff had failed to obtain employment, Bernard Moore, a certified rehabilitation counselor, concluded that Plaintiff was "unable to return to work as a result of his physical and neuropsychological conditions." Similarly, Dr. Carlton believed that Plaintiff's chronic pain had reached the point of maximum medical improvement and that Plaintiff did not have the ability to return to work.

B. Procedural Facts

On 15 January 1997, Plaintiff filed a Form 18 notifying Defendant United States Cold Storage that he had suffered a work-related injury. On 18 March 1998, Defendants filed a Form 19 admitting the compensability of Plaintiff's injury. On 26 February 1998, Plaintiff and Defendants filed a Form 21 acknowledging the compensability of Plaintiff's injury and providing that Plaintiff would receive \$356.56 in weekly

compensation benefits. On 15 November 2006, Deputy Commissioner Chrystal Redding Stanback entered an order granting Plaintiff's request that Defendants be ordered to pay for a surgical procedure to be performed by Dr. Hanley.

On 27 March 2009, Defendants filed a Form 33 requesting that a hearing be held for the purpose of determining the extent of Plaintiff's disability. On 27 September 2010, Deputy Commissioner Kim Ledford entered an order determining that Plaintiff remained totally incapacitated, that Plaintiff had reached maximum medical improvement, that Plaintiff was entitled to ongoing medical treatment for his work-related injuries and to reimbursement for certain mileage and hotel expenses, that Plaintiff was entitled to receive weekly temporary total disability compensation in the amount of \$356.56 for the remainder of his lifetime, and that Plaintiff's request for an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1 should be denied.

On 7 October 2010, Plaintiff noted an appeal from Deputy Commissioner Ledford's order to the Commission. On 2 May 2011, the Commission entered an order by Commissioner Linda Cheatham, which was joined by Commissioners Staci T. Meyer and Christopher Scott, affirming Deputy Commissioner Ledford's order with minor

modifications. Plaintiff noted an appeal to this Court from the Commission's order.

On 17 July 2012, this Court filed an opinion affirming the Commission's order in part and reversing and remanding the Commission's order in part. In response to Plaintiff's contention that "the Commission erred in failing to allow plaintiff to elect compensation for both total incapacity under N.C. Gen. Stat. § 97-29 and scheduled injury under N.C. Gen. Stat. § 97-31," we noted that, although "[t]he general rule is that stacking of benefits covering the same injury for the same time period is prohibited," "our Supreme Court has held that recovery under both N.C. Gen. Stat. §§ 97-29 and 97-31 is available under certain circumstances," since "[a]n employee may be compensated for both a scheduled compensable injury under N.C. Gen. Stat. § 97-31 and total incapacity for work under N.C. Gen. Stat. § 97-29 'when the total incapacity is caused by a psychiatric disorder brought on by the scheduled injury.'" *Stevens v. U.S. Cold Storage*, 2012 N.C. App. LEXIS 827, at *3-4 (2012) (quoting *Dishmond v. Int'l Paper Co.*, 132 N.C. App. 576, 577, 512 S.E.2d 771, 772, *disc. review denied*, 350 N.C. 828, 537 S.E.2d 820 (1999), and *Hill v. Hanes Corp.*, 319 N.C. 167, 174, 353 S.E.2d 392, 397 (1987)). "The reason for this exception is that psychological injuries are not covered by the schedule in

N.C. Gen. Stat. § 97-31 and therefore are compensable, if at all, under N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-30.” *Id.* at *4 (citing *McLean v. Eaton Corp.*, 125 N.C. App. 391, 395, 481 S.E.2d 289, 291 (1997)). As a result, we noted that this Court held in *McLean*, in which “the plaintiff suffered hand injuries, major depressive disorder, and post-traumatic stress disorder,” that the plaintiff “‘should be given the opportunity to elect the section or sections which provides him with the best monetary remedy’” and that “[a]ny recovery [the plaintiff] obtain[ed] under [N.C. Gen. Stat. §] 97-29 or 97-30 may be in addition to any recovery he elect[ed] to receive under [N.C. Gen. Stat. §] 97-31 for the scheduled injury.’” *Id.* at *4-5 (quoting *McLean*, 125 N.C. App. at 392-95, 481 S.E.2d at 290-91). After noting that, “[i]n the instant case, plaintiff suffered a [scheduled] back injury, which was rated at 30% permanent impairment” and that Dr. Barkenbus had “diagnosed plaintiff with depression and dyspepsia” which would have made vocational training difficult for Plaintiff, we held that this case should be remanded to the Commission for “findings and conclusions as to whether N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-31 [would] provide[] plaintiff with a more munificent remedy, in accordance with our holding in *McLean*.” *Id.* at *6.

On remand, the Commission entered an order dated 2 November 2012 by Commissioner Linda Cheatham, which was joined by Chair Pamela T. Young and Commissioner Staci T. Meyer, concluding that Plaintiff was permanently and totally disabled, that Plaintiff had reached the point of maximum medical improvement, that Plaintiff had a 30% permanent partial impairment rating to his back and a 60% permanent partial impairment to his left foot, that the most munificent compensation award available to Plaintiff consisted of permanent total disability compensation in the amount of \$356.56 per week pursuant to N.C. Gen. Stat. § 97-29, that Plaintiff needed ongoing medical treatment for his work-related injuries, that Plaintiff was entitled to be reimbursed for certain mileage and hotel expenses, and that Plaintiff was not entitled to an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. In reaching the conclusion that Plaintiff had reached the point of maximum medical improvement and was disabled, the Commission noted that:

26. Based upon all of the competent, credible evidence of record, the Full Commission finds that Plaintiff has reached maximum medical improvement for all of his compensable injuries, with the exception of his groin injury. However, Plaintiff's groin injury is not a determinative factor in his incapacity to work. As established by the testimony of the physicians and the vocational specialist, due to his back injury and ongoing pain and the psychological impact of the same, and

considering his age, education and work experience, Plaintiff has sustained a permanent and complete loss of wage earning capacity such that he will not be able to earn the same wages he earned prior to his injury by accident.

The Commission further noted in its conclusions of law that:

4. As a result of his March 18, 1996 compensable injury by accident, [P]laintiff retains a thirty percent permanent partial impairment rating to his back and a sixty percent permanent partial impairment rating to his left foot. N.C. Gen. Stat. § 97-31.

5. Plaintiff is unable to earn the same wages he was receiving at the time of his injury by accident in any employment due to the combination of all his compensable injuries, including his back injury, left foot injury and ongoing pain and the psychological impact of the same. As such, Plaintiff is permanently and totally disabled pursuant to N.C. Gen. Stat. § 97-29.

6. Although pursuant to N.C. Gen. Stat. § 97-31 Plaintiff is entitled to compensation for his thirty percent permanent partial impairment rating to his back and his sixty percent permanent partial impairment rating to his left foot, his most munificent remedy is benefits under N.C. Gen. Stat. § 97-29. Plaintiff is entitled to compensation for permanent total disability in the amount of \$356.56 per week for the rest of his life, absent a change in his condition. N.C. Gen. Stat. § 97-29. While Plaintiff contends that he is entitled to both ongoing permanent and total disability benefits and payment for the permanent partial impairment ratings to his back and foot, absent the award of a credit to defendants for payment of the permanent partial impairment ratings, this would

result in an impermissible [stacking] of benefits covering the same injury for the same time period. *Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E.2d 674 (1987).

Plaintiff noted an appeal to this Court from the Commission's order on remand.

II. Legal Analysis

A. Standard of Review

Appellate review of an order entered by the Commission is "limited to [determining] whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law," with the Commission having the sole responsibility for evaluating the weight and credibility to be given to the record evidence. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). To the extent that the Commission's findings of fact are supported by competent evidence, they are binding for purposes of appellate review even if the record contains evidence which would support a contrary determination. *Johnson v. Herbie's Place*, 157 N.C. App. 168, 171, 579 S.E.2d 110, 113, *disc. review denied*, 357 N.C. 460, 585 S.E.2d 760 (2003). "[F]indings of fact which are left unchallenged by the parties on appeal are 'presumed to be supported by competent evidence' and are, thus 'conclusively established on appeal.'"

Chaisson v. Simpson, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009) (quoting *Johnson*, 157 N.C. App. at 180, 579 S.E.2d at 118). Although "the Industrial Commission is not required to make specific findings of fact on every issue raised by the evidence, it is required to make findings on crucial facts upon which the right to compensation depends." *Lawton v. County of Durham*, 85 N.C. App. 589, 592, 355 S.E.2d 158, 160 (1987) (citing *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977)). In the event that "the findings are insufficient to enable the court to determine the rights of the parties, the case must be remanded to the Commission for proper findings of fact." *Id.* (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59, 283 S.E.2d 101, 109-10 (1981)). The "Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

B. Amount of Benefits to Which Plaintiff is Entitled

In his sole challenge to the Commission's order on remand, Plaintiff argues that the Commission erred by failing to comply with the remand instructions set out in our opinion overturning the Commission's initial order in this matter. More specifically, Plaintiff contends that the Commission erred by failing to order that Plaintiff receive both weekly disability payments pursuant to N.C. Gen. Stat. § 97-29 and scheduled

payments for the partial impairment of Plaintiff's back and foot pursuant to N.C. Gen Stat. § 97-31 on the grounds that such a result, which conflicts with the usual prohibition against the stacking of workers' compensation benefits, is required by this Court's decision in *McLean*. As a result of the fact that the Commission failed to make the determinations necessary to permit a proper application of the principles enunciated in *McLean* in its decision on remand, we conclude that the Commission's order must be reversed and that this case must be remanded to the Commission for the entry of a new order containing the additional findings and conclusions necessary to permit a proper determination of the validity of Plaintiff's contention that he is entitled to both a weekly disability payment pursuant to N.C. Gen. Stat. § 97-29 and a scheduled payment pursuant to N.C. Gen. Stat. § 97-31.

The extent to which a workers' compensation claimant may be entitled to compensation under both N. C. Gen. Stat. § 97-29, which provides for permanent weekly disability payment, and N.C. Gen. Stat. § 97-31, which provides for the payment of certain levels of compensation for a number of specific injuries, has been the subject of considerable litigation before both this Court and the Supreme Court. As a general proposition, a workers' compensation claimant is not entitled to collect

multiple forms of compensation arising from the same injury. N.C. Gen. Stat. § 97-31 (stating, in pertinent part, that "[i]n cases included [in] 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."). However, "[b]ecause stacking of benefits covering the same injury for the same time period is prohibited" and "because the prevention of double recovery, not exclusivity of remedy, is patently the intent of the 'in lieu of all other compensation' clause in N.C. [Gen. Stat.] § 97-31, a plaintiff entitled to select a remedy under either N.C. [Gen. Stat.] § 97-31 or N.C. [Gen. Stat.] § 97-30 may receive benefits under the provisions offering the more generous benefits, less the amount he or she has already received." *Gupton v. Builders Transp.*, 320 N.C. 38, 43, 357 S.E.2d 674, 678 (1987) (citing *Whitley v. Columbia Mfg. Co.*, 318 N.C. 89, 95-96, 348 S.E.2d 336, 340 (1986); *Smith v. American & Efird Mills*, 51 N.C. App. 480, 490, 277 S.E.2d 83, 89-90 (1981), *mod. on other grounds and aff'd*, 305 N.C. 507, 290 S.E.2d 634 (1982)).

The Supreme Court has, however, allowed the simultaneous recovery of benefits pursuant to both N.C. Gen. Stat. § 97-31

and either N.C. Gen. Stat. § 97-30 or § 97-29 under certain circumstances. For example, in *Little v. Anson County Schools Food Serv.*, 295 N.C. 527, 533, 246 S.E.2d 743, 747 (1978), the Supreme Court held that, in the event that an employee is partially disabled, he "is entitled to an award under [N.C. Gen. Stat. §] 97-31 for such of [his] injuries as are listed in that section, and to an additional award under [N.C. Gen. Stat. §] 97-30 for the impairment of wage earning capacity which is caused by any injuries *not listed* in the schedule." Similarly, in *Hill v. Hanes Corp.*, 319 N.C. 167, 353 S.E.2d 392 (1987), the Court upheld the Commission's decision to "award[] [the plaintiff] compensation under N.C. [Gen. Stat.] § 97-29 for temporary total disability due to his back injury; under the scheduled injury statute, N.C. [Gen. Stat.] § 97-31(15), for a 20 percent loss of use of both legs; and under N.C. [Gen. Stat.] § 97-29 for total disability caused by depression for so long as the depression persisted." *Hill*, 319 N.C. at 168, 353 S.E.2d at 393. The Supreme Court noted that the "question [before the Court raised by the defendant's appeal from the Commission's order was] whether an employee may be compensated for both a scheduled compensable injury under N.C. [Gen. Stat.] § 97-31 and total incapacity for work under N.C. [Gen. Stat.] § 97-29 when the total incapacity is caused by a psychiatric disorder brought

on by the scheduled injury." *Id.* at 174, 353 S.E.2d at 397. In answering this question in the affirmative, the Supreme Court stated that, because "all of [the plaintiff's] injuries were not covered under the statutory schedule[,] . . . [the] statute's 'in lieu of' provision is no bar to [his] recovery under both the schedule and N.C. [Gen. Stat.] § 97-29," so that there "are no double payments for the same injury." *Id.* at 176-77, 353 S.E.2d at 398. As a result, the Supreme Court specifically authorized a plaintiff who was totally disabled as the result of a work-related psychiatric or psychological disorder to recover both weekly disability payments pursuant to N.C. Gen. Stat. § 97-29 and scheduled payments pursuant to N.C. Gen. Stat. § 97-31.

This Court had the opportunity to address essentially the same issue which is before us in this case in *McLean*, in which the plaintiff suffered from major depressive disorder and post-traumatic stress disorder which were "causally related" to a work-related injury which he had sustained to his hand. *McLean*, 125 N.C. App. at 392-93, 481 S.E.2d at 290. After recognizing that an employee is entitled to select between receiving compensation pursuant to N.C. Gen. Stat. § 97-31 and receiving compensation pursuant to N.C. Gen. Stat. § 97-29 or § 97-30, depending upon which provides the most munificent remedy, we

held that an employee may, under certain circumstances, collect workers' compensation benefits under both N.C. Gen. Stat. § 97-31 and N.C. Gen. Stat. § 97-29 or § 97-30. *Id.* at 394-95, 481 S.E.2d at 291. We reached this result on the grounds that the plaintiff's "psychological injuries are compensable, if at all, under" N.C. Gen. Stat. § 97-29 or § 97-30 rather than under N.C. Gen. Stat. § 97-31. *Id.* at 395, 481 S.E.2d at 291. Thus, we specifically held that, "[w]hen the Commission again considers the issue of plaintiff's permanent disability, [the plaintiff] should be given the opportunity to elect the section or sections which provides him with the best monetary remedy" and that "[a]ny recovery [the plaintiff] obtains under [N.C. Gen. Stat. § 97-29 or § 97-30] may be in addition to any recovery he elects to receive under [N.C. Gen. Stat. §] 97-31 for the scheduled injury to his hand." *Id.* As a result, given the Supreme Court's decision in *Hill* and this Court's decision in *McLean*, it is clear that, in spite of the general prohibition against the stacking of workers' compensation benefits, a plaintiff who is totally disabled as the result of a work-related psychiatric or psychological condition and who has also sustained a scheduled injury is entitled to receive both weekly disability payments pursuant to N.C. Gen. Stat. § 97-29 and scheduled benefit payments pursuant to N.C. Gen. Stat. § 97-31.

At the time of our earlier decision in this case, we held that the Commission had failed to adequately consider Plaintiff's argument that he was entitled to receive benefits under both N.C. Gen. Stat. §§ 97-29 and 97-31 and ordered the Commission on remand to "make findings and conclusions as to whether N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-31 provides plaintiff with a more munificent remedy, in accordance with our holding in *McLean*." *Stevens*, 2012 N.C. App. LEXIS 827 *6-7. Although the Commission did determine on remand that Plaintiff's "most munificent remedy is benefits under N.C. Gen. Stat. § 97-29," the Commission does not appear to have made the findings necessary to permit a consideration of whether Plaintiff's most munificent remedy in light of *Hill* and *McLean* would be the payment of weekly disability benefits pursuant to N.C. Gen. Stat. § 97-29 based upon Plaintiff's work-related psychiatric or psychological condition or scheduled benefits pursuant to N.C. Gen. Stat. § 97-31 based upon the permanent partial impairment to Plaintiff's lower back and foot. As a result, the Commission erred by failing to comply with both our earlier decision in this case and with the decisions in *Hill* and *McLean*.

Although Plaintiff contends that we should simply remand this case to the Commission with orders to award Plaintiff

benefits pursuant to both N.C. Gen. Stat. §§ 97-29 and 97-31, we do not believe that we have the authority to act in accordance with Plaintiff's request. A decision to award Plaintiff benefits pursuant to both N.C. Gen. Stat. §§ 97-29 and 97-31 would require a Commission determination that Plaintiff was totally and permanently disabled as the result of his work-related psychiatric or psychological condition considered separate and apart from his other injuries. Although the Commission did find that, "[a]s established by the testimony of the physicians and the vocational specialist, due to his back injury and ongoing pain and the psychological impact of the same, and considering his age, education and work experience, Plaintiff has sustained a permanent and complete loss of wage earning capacity such that he will not be able to earn the same wages he earned prior to his injury by accident" and concluded that, since "Plaintiff is unable to earn the same wages he was receiving at the time of his injury by accident in any employment due to the combination of all of his compensable injuries, including his back injury, left foot injury and ongoing pain and the psychological impact of the same," he is "permanently and totally disabled pursuant to N.C. Gen. Stat. § 97-29," the Commission never determined whether Plaintiff was or was not totally and permanently disabled solely as a result of

his psychiatric or psychological condition. In other words, although the Commission recited evidence tending to establish that, "[d]ue to his psychological condition," "Plaintiff remains unable to work, a condition that is unlikely to change," the Commission never explicitly addressed the validity of Plaintiff's contention that he was entitled to receive total permanent disability payments solely because of his psychological or psychiatric condition. For that reason, we are unable to hold that Plaintiff is entitled, as a matter of law, to receive both weekly total permanent disability payments pursuant to N.C. Gen. Stat. § 97-29 and scheduled payments relating to his back and foot impairments pursuant to N.C. Gen. Stat. § 97-31. However, given that the Commission's failure to explicitly address the extent to which Plaintiff was totally and permanently disabled solely because of his psychiatric or psychological problems constituted a failure to make findings and conclusions concerning a material issue upon which the right to compensation depends, we are required to reverse the Commission's order and to remand this case to the Commission for the entry of a new order.

In its order on remand, the Commission must first determine whether Plaintiff is totally and permanently disabled by reason of his psychiatric or psychological condition, considered

separate and apart from the other components of his work-related injury. In the event that the Commission answers this question in the affirmative, it must, given the unchallenged determinations made in the order under review in this case, award Plaintiff both weekly disability payments pursuant to N.C. Gen. Stat. § 97-29 and payments relating to the permanent partial impairment of his back and foot pursuant to N.C. Gen. Stat. § 97-31. On the other hand, in the event that the Commission determines that Plaintiff is not totally and permanently disabled solely because of his psychiatric or psychological condition, the Commission should award Plaintiff total permanent disability benefits pursuant to N.C. Gen. Stat. § 97-29 as it did in the order under consideration in this opinion given that Plaintiff has not challenged the Commission's determination that such benefits represent the most munificent remedy available to Plaintiff in the event that he is not entitled to receive compensation pursuant to both N.C. Gen. Stat. §§ 97-29 and 97-31.

In attempting to persuade us to affirm the Commission's order, Defendants advance two basic arguments. First, Defendants argue that the principle enunciated in *McLean* has no application to the present case given the Commission's determination that Plaintiff was totally and permanently

disabled as a result of the combined effects of all of his injuries. As we understand this portion of Defendants' argument, we should read the Commission's order as embodying a determination that Plaintiff was not totally and permanently disabled solely as a result of his psychiatric or psychological condition and that, instead, his disability resulted from the combined effect of multiple scheduled and unscheduled factors, a result which would necessarily preclude application of the principle enunciated in *McLean* in this case. Although the Commission may have intended to make the determination upon which Defendants' argument relies, we are not persuaded that the Commission actually made a determination of the nature suggested by Defendants and believe that an explicit resolution of the impact of Plaintiff's psychiatric or psychological condition upon his wage-earning capacity must be made given the Commission's obligation to make all findings necessary for a determination of the extent to which a claimant is entitled to receive workers' compensation benefits.

Secondly, Defendants argue that "the *Hill* case and its progeny are not applicable to the issue of whether plaintiff is entitled to receive payment for scheduled injuries concurrently to receiving lifetime benefits as a result of becoming permanently and totally disabled" on the grounds that the weekly

benefit payments were not determined to be appropriate until after the payments for the plaintiff's scheduled injury had already been approved. The fundamental problem with this argument is that this Court in *McLean* found the principle enunciated in *Hill* to be applicable to situations like that at issue here, a determination which we are not at liberty to disregard. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"). In other words, the temporally based interpretation of *Hill* advanced by Defendants in this case is contrary to the result which we reached, in reliance upon that decision, in *McLean*. Thus, we conclude that the second argument that Defendants have advanced in support of their request that we affirm the Commission's order lacks merit as well.²

²Defendants claim that N.C. Gen. Stat. § 97-29 prohibits the "collection of concurrent benefits." Although N.C. Gen. Stat. § 97-29(f) does provide that, "[w]here an employee can show entitlement to compensation pursuant to [N.C. Gen. Stat. § 97-29] or [N.C. Gen. Stat. §] 97-30 and a specific physical impairment pursuant to [N.C. Gen. Stat. §] 97-31, the employee shall not collect benefits concurrently pursuant to both [N.C. Gen. Stat. § 97-29] or [N.C. Gen. Stat. §] 97-30 and [N.C. Gen. Stat. §] 97-31, but rather is entitled to select the statutory compensation which provides the more favorable remedy," this language has no application to the proper resolution of this

III. Conclusion

Thus, for the reason set forth above, we conclude that the Commission erred by failing to make sufficient findings to permit a proper determination of the extent to which Plaintiff is entitled to recover both total and permanent disability benefits pursuant to N.C. Gen. Stat. § 97-29 and scheduled benefits pursuant to N.C. Gen. Stat. § 97-31. As a result, the Commission's order should be, and hereby is, reversed, and this case should be, and hereby is, remanded to the Commission for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges MCGEE and STEELMAN concur.

Report per Rule 30(e).

case given that N.C. Gen. Stat. § 97-29(f) only applies to "claims arising on or after the effective date of this [2011] act." 2011 N.C. Sess. L. c. 287, s. 23; see also 2011 N.C. Sess. L. c. 287, s. 10.