

THE USE OF MEDICAL IMPAIRMENT, FUNCTIONAL LOSS, AND VOCATIONAL FACTORS TO DETERMINE LOSS OF WAGE EARNING CAPACITY UNDER THE 2012 GUIDELINES FOR PERMANENT IMPAIRMENT

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INTRODUCTION

Workers' compensation in New York State is a no-fault system that is intended to provide wage loss and medical benefits to workers who are injured on the job.¹ An injured worker may receive up to two-

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1. See, e.g., *Richardson v. Fiedler Roofing, Inc.*, 493 N.E.2d 228, 230-31 (N.Y. 1986).

thirds of his average weekly wage² in addition to coverage for any necessary medical treatment.³ The system provides benefits for four types of disability: temporary total, temporary partial, permanent total, and permanent partial.⁴ Permanent partial disability (“PPD”) is further divided into awards for “schedule loss” and “non-schedule loss.”⁵ Schedule loss awards are payable for loss or permanent loss of function of limbs, vision, hearing, or facial disfigurement.⁶ Such awards may be made in the absence of actual loss of earnings, because the statute recognizes the effect of functional loss on wage earning capacity.⁷ Non-schedule loss awards, however, are payable only for actual loss of earnings based on the difference between the worker’s average weekly wage and his post-injury wages, or in the absence of actual wages, his wage earning capacity as found by the New York State Workers’ Compensation Board (“the Board”).⁸

On November 2, 2011, the Board published the *New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity* (“the 2012 Guidelines”).⁹ The 2012 Guidelines

In 1913, the Bill of Rights of the 1894 New York State Constitution was amended to give the Legislature the power to enact workers’ compensation legislation and the next year the Legislature did so. The resulting statute provided that employees were to be compensated on a “no-fault” basis, regardless of any negligence on their own part, for all injuries “arising out of and in the course of” their employment. . . . The statute was enacted for humanitarian purposes, framed, in the words of Chief Judge Cardozo, to insure that injured employees might “be saved from becoming one of the derelicts of society, a fragment of human wreckage[.]” . . . We have previously emphasized that the Workers’ Compensation Law is remedial in nature and must be “construed liberally to accomplish the economic and humanitarian objects of the act[.]”

Id. (internal citations omitted); see also N.Y. WORKERS’ COMP. LAW §§ 10, 13, 39 (McKinney 2005 & Supp. 2012).

2. For statutory authority on how to calculate an average weekly wage, see section 14 of the New York Workers’ Compensation Law. The calculation can become complicated in certain situations (a discussion of which is beyond the scope of this Article), but is generally the average earnings before tax and other withholdings in a given week in the fifty-two weeks prior to the injury. N.Y. WORKERS’ COMP. LAW § 14.

3. See generally *id.* § 13.

4. *Id.* § 15(1)-(3), (5). Total disability means a worker currently cannot perform any work; partial disability means a worker currently can perform only certain kinds of work (for example, light duty). *Id.*

5. *Id.* § 15(3). The provisions for scheduled losses are in sub-sections 15(3)(a)-(t); non-scheduled losses are in section 15(3)(w) of the Workers’ Compensation Law. N.Y. WORKERS’ COMP. LAW § 15(3).

6. See *id.* § 15(3)(a)-(t).

7. See, e.g., *LaCroix v. Syracuse Exec. Air Serv., Inc.*, 866 N.E.2d 1004, 1006 (N.Y. 2007); *Burns v. Varriale*, 879 N.E.2d 140, 146 (N.Y. 2007).

8. N.Y. WORKERS’ COMP. LAW § 15(5), (5-a).

9. N.Y. STATE WORKERS’ COMP. BD., OFFICE OF THE CHAIR, SUBJECT NO. 046-472,

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became effective on January 1, 2012, and were intended to replace the Board's *Medical Guidelines*, published in 1996 ("1996 Guidelines").¹⁰ The new *2012 Guidelines* are the focus of this Article.

The *2012 Guidelines* fundamentally change the method the Board uses to determine benefits in cases involving non-schedule permanent partial disability claims.¹¹ Under the *1996 Guidelines* and in practice for decades before, the amount of benefits in PPD claims was determined almost exclusively by the severity of the medical impairment, which was generally categorized as "mild," "moderate," "marked," or "total."¹² Although the *1996 Guidelines* provided that a Workers' Compensation Law Judge ("WCL Judge") could "take[] into account a variety of non-medical factors such as age, education, language skills, etc. which may impact on a claimant's ability to work," this seldom occurred in practice.¹³

The *2012 Guidelines* were the result of a group of major statutory amendments to the Workers' Compensation Law that became effective on March 13, 2007.¹⁴ One amendment increased the statutory maximum benefit rate and "indexed" the rate to the State average weekly wage, thus providing for automatic future adjustments.¹⁵ The

WORKERS' COMPENSATION BOARD ANNOUNCES 2012 NYS GUIDELINES FOR DETERMINING PERMANENT IMPAIRMENT AND LOSS OF WAGE EARNING CAPACITY (Nov. 3, 2011), available at http://www.wcb.ny.gov/content/main/SubjectNos/sn046_472.jsp [hereinafter WCB SUBJECT NO. 046-472]; N.Y. STATE WORKERS' COMP. BD., NEW YORK STATE GUIDELINES FOR DETERMINING PERMANENT IMPAIRMENT AND LOSS OF WAGE EARNING CAPACITY (Jan. 2012), available at <http://www.wcb.ny.gov/content/main/hcpp/ImpairmentGuidelines/2012ImpairmentGuide.pdf> [hereinafter 2012 GUIDELINES].

10. WCB SUBJECT NO. 046-472, *supra* note 9. See generally N.Y. STATE WORKERS' COMP. BD., MEDICAL GUIDELINES (June 1996), available at <http://www.wcb.ny.gov/content/main/hcpp/mdguide.pdf> [hereinafter 1996 GUIDELINES].

11. As discussed in footnotes 5-6, section 15(3) of the New York Workers' Compensation Law provides a list of "schedule loss" awards for permanent injuries to extremities. N.Y. WORKERS' COMP. LAW § 15(3). Permanent injuries to other parts of the body are not subject to schedule loss and are thus defined as "non-schedule permanent partial disabilities." 2012 GUIDELINES, *supra* note 9, at 44. In some instances injuries for which schedule loss may be given are also rated as "non-schedule permanent partial disabilities" where the nature of the injury precludes schedule loss evaluation. *Id.*

12. 1996 GUIDELINES, *supra* note 10, at 26-27.

13. *Id.* at 2. A LEXIS/NEXIS search of the term "total industrial disability" revealed only twenty-five reported decisions involving the issue between 1920 and 2011. The Board has received over 120,000 new claims each year for at least the past decade (with the exception of 2009, totaling at least 119,122 claims), as reflected in the Board's 2011 Annual Report. See N.Y. STATE WORKERS' COMP. BD., 2011 ANNUAL REPORT, A-3 (Feb. 2012), available at <http://www.wcb.ny.gov/content/main/TheBoard/2011AnnualReport.pdf>.

14. See generally WCB SUBJECT NO. 046-472, *supra* note 9.

15. Essentially, if the average weekly wage measured by all workers in New York

impact of that provision was to increase the maximum benefit from \$400 per week in July 2006 to \$772.96 per week in July 2011.¹⁶ Another amendment imposed, for the first time, a range of time limitations (or caps) on PPD benefits, which were previously payable for the entire duration of the disability (often the injured worker's lifetime).¹⁷ Other significant provisions included the sunset of the Second Injury Fund¹⁸ and a requirement that private insurers commute payments in PPD claims into lump sums for deposit into the Aggregate Trust Fund.¹⁹

The overall outcome of the statutory amendments was to increase the amount of temporary disability payments to injured workers while reducing costs for employers by limiting permanent partial disability payments. The changes resulted in a reduction of over 20% in workers' compensation insurance premiums in the State.²⁰

Recognizing that the PPD benefit caps could result in harsh consequences for injured workers, Former Governor of New York, Eliot Spitzer, and the New York State Legislature took steps to ensure that

State increases, the maximum workers' compensation benefit an injured worker receives will increase to two-thirds of the new State average weekly wage. For example, for accidents occurring between July 1, 2010 and June 30, 2011, the maximum benefit was \$739.83; for accidents between July 1, 2011 and July 1, 2012, the maximum benefit was \$772.96 per week. Before the rate was indexed to the State average, each year had seen an increase to a set maximum amount: from \$400 to \$500 to \$550 to \$600. *See* N.Y. WORKERS' COMP. LAW § 15(6).

16. *See id.*

17. *See id.* § 15(3)(w).

18. *See id.* § 15(8)(d). The Second Injury Fund concerns workers with a permanent impairment who have another accident and develop another disability (a second injury). *About Us*, SPECIAL FUNDS CONSERVATION COMMITTEE, http://www.specialfunds.org/about_bot.htm (last visited Oct. 2, 2012). *See also* Saletta v. Allegheny Ludlum Steel Corp., 404 N.Y.S.2d 896, 897 (N.Y. App. Div. 1978). Legislation passed in 2007 declared that the Fund would not apply to any accident occurring on or after July 1, 2007. *NY Workers' Compensation Reform Impact on Second Injury Fund*, INS. RECOVERY GROUP. (Mar. 9, 2007, 10:52 AM), <http://www.irgfocus.com/mt/archives/2007/03/09/>.

19. *See* N.Y. WORKERS' COMP. LAW § 27(2). The Aggregate Trust Fund pays out benefits in PPD and death cases. Moses Egbon, *Report on Examination of the Aggregate Trust Fund as of December 31, 2009*, N.Y. ST. INS. DEP'T, 3 (Dec. 15, 2010), http://www.dfs.ny.gov/insurance/exam_rpt/01555f09.pdf. Insurance companies deposit a computed present value of awards into the Fund, and the Fund assumes the risks if the deposited value ends up being too low (the Fund would make up for any such deficit). *Id.* The 2007 amendments require deposits into the Fund in any case where the claimant is classified with a permanent partial disability after July 1, 2007, which means even cases where the accident occurred years before 2007 are subject to this rule. *Id.*; *see also* Raynor v. Landmark Chrysler, 959 N.E.2d 1011, 1014 (N.Y. 2011).

20. *Worker's Compensation Rates to Drop by Record 20.5%*, N.Y. ST. INS. DEP'T (July 11, 2007), <http://www.dfs.ny.gov/insurance/press/2007/p0707111.htm>.

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benefits were awarded fairly. The statutory amendments included a “safety net” provision authorizing the Board to remove the caps for workers who lost more than 80% of their wage earning capacity in cases of hardship, and the Commissioner of Labor was directed to report annually regarding the utilization of the safety nets and the return-to-work rate of PPD claimants.²¹ In addition, a Task Force and Advisory Committee were created in the New York State Insurance Department to study the method by which PPD benefits were awarded and to recommend improvements.²²

On September 15, 2010, the Insurance Department transmitted its recommendation to the Board in a 108-page document entitled *Disability Duration Guidelines*.²³ The Insurance Department proposed a three-part structure to determine loss of wage earning capacity. First, the worker’s medical impairment(s) related to the accident would be identified, described, categorized, and assigned a severity ranking.²⁴ Second, the functional limitations (ability to perform physical activities) associated with the medical impairment would be assessed.²⁵ Third, the extent to which the functional limitations affected the worker’s ability to engage in gainful employment would be determined.²⁶ To the extent that the post-injury wage earning capacity was less than the pre-injury wage earning capacity, the difference was the “loss of wage earning capacity” upon which an award of compensation would be based and the associated cap figure applied.²⁷

The Insurance Department gave the Board specific recommendations regarding medical impairment and functional loss, but offered only limited guidance as to how to decide the ultimate issue of loss of wage earning capacity, explaining that its Task Force “was not able to achieve consensus” on that issue.²⁸

The *2012 Guidelines* are based almost exclusively on the Insurance Department’s *Disability Duration Guidelines* with regard to medical impairment and functional loss. In the *Subject Number* that

21. See N.Y. WORKERS’ COMP. LAW § 35(4).

22. Letter from James J. Wrynn, Superintendent, N.Y. State Ins. Dep’t, to Robert E. Beloten, Chair, N.Y. State Workers’ Comp. Bd. (Sept. 15, 2010), available at <http://www.dfs.ny.gov/insurance/wc/wc-Beloten.pdf>.

23. N.Y. STATE DEP’T OF INS., DISABILITY DURATION GUIDELINES (Sept. 2010), available at <http://www.dfs.ny.gov/insurance/wc/wc-guidelines.pdf>.

24. *Id.* at 4-5.

25. *Id.*

26. *Id.*

27. See *id.* at 4-7.

28. DISABILITY DURATION GUIDELINES, *supra* note 23, at 4-5.

accompanied the release of the *2012 Guidelines*, the Board specifically stated that it would “adopt the recommended three part analysis for determining loss of wage earning capacity,” particularly in the areas of medical impairment and functional loss.²⁹ In the area of wage earning capacity, the Board stated that

[t]he 2012 Guidelines . . . set forth relevant medical factors (impairment and functional ability/loss) and vocational factors (education, skills, English language proficiency, age, etc.) that the Board should consider in evaluating the impact of a permanent impairment on a claimant’s wage earning capacity. They provide general guidance regarding the impact of medical and vocational factors on an injured worker’s earning capacity.³⁰

The Board did not, however, provide any method or structure to assign weight to medical and vocational factors.

Part I of this Article will consider the distinction between medical impairment and loss of wage earning capacity. Part II will review the *2012 Guidelines* and consider the concepts that the Insurance Department and the Board have stated are relevant to the determination of wage earning capacity. Part III proposes a mechanism for assigning relative weight to each factor in order to achieve an equitable and consistent adjudication of the issue of loss of wage earning capacity in cases of occupational injury and illness.

I. LOSS OF WAGE EARNING CAPACITY, NOT MEDICAL IMPAIRMENT, IS THE BASIS FOR WORKERS’ COMPENSATION AWARDS

Section 15 of the Workers’ Compensation Law uses the word “disability” in the sense that a worker is “disabled” if the injury adversely impacts his or her ability to earn a living.³¹ Section 15(5) specifically states that in cases of “temporary partial disability,” “the compensation shall be two-thirds of the difference between the injured employee’s average weekly wages before the accident and his *wage earning capacity* after the accident in the same or other employment.”³² Thus, the term “disability” in workers’ compensation practice refers to

29. WCB SUBJECT NO. 046-472, *supra* note 9.

30. *Id.*

31. Section 37 of the Workers’ Compensation Law, relating to occupational disease, defines “disability” as “the state of being disabled from earning full wages at the work at which the employee was last employed.” N.Y. WORKERS’ COMP. LAW § 37 (McKinney 2005).

32. N.Y. WORKERS’ COMP. LAW § 15(5) (McKinney 2005 & Supp. 2012) (emphasis added).

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loss of wage earning capacity, not medical impairment.³³

The worker's average weekly wage is intended to reflect his pre-injury earning capacity.³⁴ If the injury results in a medical impairment (a disease or condition) that limits the worker's ability to function, the Board must determine what effect the loss of function has had on the worker's earning capacity.³⁵ Compensation must then be awarded based on the difference between the pre-accident earning capacity (the average weekly wage) and the post-accident earning capacity.³⁶

It is therefore inappropriate to use medical impairment as the sole basis for awards of compensation in a system that defines disability based on loss of wage earning capacity. For example, a construction worker and an accountant who suffer identical back injuries may have identical medical impairments that result in identical functional losses. When the nature of their respective occupations and educational levels are taken into consideration, however, it becomes clear that the construction worker has a greater "disability" than the accountant because the injury results in a far greater reduction of the construction worker's earning capacity.

Assessing loss of wage earning capacity is a more complex task than determining medical impairment. Medical impairment may be determined based solely on evidence about diagnosis and clinical findings, without regard to any non-medical factors personal to the injured worker.³⁷ To determine loss of wage earning capacity, however, consideration of the nature of the worker's past employment, as well as his or her functional limitations, age, education, skills, language proficiency ability, literacy, and other factors is required.³⁸ The *2012 Guidelines* were developed with these concepts in mind, but do not address all of the factors in a comprehensive manner. Moreover, while the *2012 Guidelines* identify the relevant factors, they do not offer guidance regarding their respective weight, as explained *infra* Part II.

33. See, e.g., *Marhoffer v. Marhoffer*, 116 N.E. 379, 380 (N.Y. 1917) ("The word 'disability' in the law as we read it, therefore, means 'impairment of earning capacity,' and not 'loss of a member.'" (quoting *Limron v. Blair*, 147 N.W. 546 (Mich. 1914))).

34. See N.Y. WORKERS' COMP. LAW § 14. This is emphasized by the provisions of section 14 of the Workers' Compensation Law that authorize the Board to adjust the average weekly wage using statutory formulas, to use the earnings of a "similar worker" if the injured worker was only with the employer for a short time, or to increase the average weekly wage of workers under the age of twenty-five in cases of permanent disability. *Id.*

35. See *supra* text accompanying note 8.

36. See *supra* text accompanying notes 2, 8.

37. See 2012 GUIDELINES, *supra* note 9, at 48.

38. See *id.* at 48-49.

II. THE STRUCTURE OF THE 2012 GUIDELINES

While the 2012 Guidelines contain an exhaustive mechanism for the determination of medical impairment, as well as some discussion of functional evaluation and categorization of functional capacity, they include only minimal commentary about the vocational factors that contribute to loss of wage earning capacity.³⁹ Regrettably (and ironically), the most developed section of the 2012 Guidelines (medical impairment) is ultimately the least relevant to the ultimate determination, while the least developed section (vocational factors) is arguably the most important. The structure and content of the 2012 Guidelines are reviewed here, and Part III proposes a mechanism to weigh the factors identified by the 2012 Guidelines.

The 2012 Guidelines process begins with a finding of maximum medical improvement (MMI), which is:

based on a medical judgment that (a) the claimant has recovered from the work injury to the greatest extent that is expected and (b) no further improvement in his/her condition is reasonably expected. The need for palliative care or symptomatic treatment does not preclude a finding of MMI. In cases that do not involve surgery or fractures, MMI cannot be determined prior to 6 months from the date of injury or disablement, unless otherwise agreed to by the parties.⁴⁰

Under the 2012 Guidelines, the worker cannot be classified PPD—and the caps cannot be implemented—until MMI is reached,⁴¹ and, as a result, the postponement of the MMI finding will extend the payment of temporary (uncapped) disability benefits to the injured worker.⁴² Thus, it is often beneficial for the claimant to avoid a MMI finding, but not for the insurance carrier. It is therefore likely that the question of whether an individual worker has achieved MMI will be the subject of litigation in many cases.

A. Medical Impairment

Once MMI has been found, the physician must “document the injured worker’s diagnosis(es) and impairment ranking, including the body part(s) or system(s), the primary impairment table(s) used to rank the severity of the impairment, and the severity ranking(s).”⁴³ From a

39. See *id.* at 7.

40. *Id.* at 8.

41. *Id.*

42. 2012 GUIDELINES, *supra* note 9, at 8, 44; N.Y. WORKERS’ COMP. LAW § 15(3)(w) (McKinney Supp. 2012).

43. 2012 GUIDELINES, *supra* note 9, at 44.

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practical standpoint, the physician must first identify the affected body part, which directs the physician to the appropriate chapter in the *2012 Guidelines*.⁴⁴ For example, injuries to the spine and pelvis are covered by Chapter 11.⁴⁵

The physician must next identify the nature of the injury to that body part, which directs him or her to the appropriate table within the chapter.⁴⁶ Continuing with the previous example, a soft-tissue injury to the spine without surgical intervention would require the physician to use Table 11.1.⁴⁷

Within the Table, the physician must then identify the injured worker's clinical findings, which results in the assignment of a "Medical Impairment Class."⁴⁸ For example, a medically documented spinal injury without surgery, but with recurrence and persistence of symptoms, no objective clinical findings, and correlative imaging findings would be a Class 3 injury.⁴⁹ Pursuant to Table 11.1, this injury would receive a severity ranking of "B" whether it occurred in the cervical, thoracic, or lumbar spine.⁵⁰

In some instances, the Medical Impairment Class is associated with a range of potential severity rankings. For example, a medically documented spinal injury without surgery, but with recurrence/persistence of symptoms, reflex changes, and correlative imaging findings would be a Class 4 injury.⁵¹ For a Class 4 lumbar spinal injury, the *2012 Guidelines* require the physician to refer to sub-tables (in this example, S11.4, S11.6, and S11.7) in order to determine the appropriate severity ranking.⁵² Depending on the outcome of the physician's reference to the sub-tables, the severity ranking may fall anywhere between "D" and "J."⁵³

In using the sub-tables, the physician is required to answer a series of questions, each of which results in a "point score."⁵⁴ The points are then totaled and a Point Table (for example, S11.7(b) for the lumbar

44. *Id.* at 9.

45. *See generally id.* at 51-81.

46. *Id.*

47. *See id.* at 51.

48. 2012 GUIDELINES, *supra* note 9, at 51.

49. *Id.*

50. *Id.*

51. *Id.* at 52.

52. *See id.*

53. 2012 GUIDELINES, *supra* note 9, at 52.

54. *See id.* at 65-70.

spine) identifies the severity ranking represented by the point total.⁵⁵

In order to permit severity rankings for different body parts to be compared, the *2012 Guidelines* include a Medical Impairment Severity Crosswalk that translates the severity ranking (denoted by a letter) into a Relative Severity Class.⁵⁶ The Relative Severity Class assigns a number between zero and six to the medical impairment, with zero representing no medical impairment and six representing total medical impairment.⁵⁷ It is noteworthy, however, that the *2012 Guidelines* provide no mechanism for combining the severity rankings of multiple body parts injured in the same accident; instead, “one must consider the impact of each impairment on function and wage earning capacity to determine their cumulative effect.”⁵⁸ This is consistent with the general principle of the *2012 Guidelines*, that in determining loss of wage earning capacity, the Relative Severity Class is of little significance; rather, the relevant inquiry relates to functional loss and vocational information.⁵⁹

In the *Subject Number* released with the *2012 Guidelines*, the Chair wrote that “it is important to note that impairment alone does not equate to loss of wage earning capacity.”⁶⁰ This caution is reiterated in the introduction to the *2012 Guidelines* (Chapter 1),⁶¹ the sections of the *2012 Guidelines* addressing non-schedule PPDs and loss of wage earning capacity (Chapters 9.1 and 9.3),⁶² the general principles for evaluation of medical impairment (Chapter 10),⁶³ and in the table applicable to each and every condition covered by the *2012 Guidelines*.⁶⁴ In all, the *2012 Guidelines* state, in fourteen places, that medical impairment is not to be used as a direct translation to loss of wage earning capacity.⁶⁵ The primary purpose of the medical impairment ranking is merely to serve as a foundation for the assessment of functional loss, discussed below.

55. *See id.* at 71.

56. *See id.* at 120-21.

57. *See id.*

58. 2012 GUIDELINES, *supra* note 9, at 48.

59. *Id.*

60. WCB SUBJECT NO. 046-472, *supra* note 9.

61. 2012 GUIDELINES, *supra* note 9, at 8.

62. *Id.* at 44, 48.

63. *Id.* at 50.

64. *See id.* at 51, 53, 55, 72, 78, 82, 87, 106, 107, 111.

65. *See id.* at 51, 53, 55, 56, 59, 62, 72, 78, 82, 87, 106, 107, 111. The *2012 Guidelines* state the same general principle in the pages cited *supra* notes 62-64.

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In contrast to the prohibition against translating medical impairment into loss of wage earning capacity, the 2012 *Guidelines* state that “residual functional abilities and losses [are] a key component in a judge’s determination of loss of wage earning capacity.”⁶⁶ The Board prescribes the use of *Form C-4.3*⁶⁷ for the physician’s use in reporting the workers’ residual functional capacity, which is the level of activity the worker can perform given the effects of the injury.⁶⁸

The first question the physician must answer is whether “the injured worker is capable of performing the work activities of the at-injury job.”⁶⁹ The physician is expected to “request a job description or other similar documentation from the employer and speak with the claimant about the job requirements” in arriving at an opinion.⁷⁰

If the worker cannot return to the at-injury job, then the physician must measure the worker’s residual functional capacity in sixteen categories that can be loosely grouped into three areas: exertional, non-exertional, and hybrid.⁷¹ Exertional activities are those which involve the “primary strength categories” of (1) lifting and carrying; (2) pushing and pulling; (3) sitting; (4) standing; and (5) walking.⁷² Non-exertional impairments are any restrictions outside of the primary strength categories and include (1) climbing; (2) kneeling; (3) bending, stooping, squatting; (4) grasping; (5) fine manipulation; (6) reaching overhead; (7) reaching at or below shoulder level; (8) temperature and humidity; and (9) environmental.⁷³ The Board’s form also includes two items that involve a combination of exertional and non-exertional abilities: (1) driving a vehicle; and (2) operating machinery.⁷⁴ If there are additional psychological or other behavioral impairments (which would be classified as non-exertional impairments), the physician is instructed to attach documentation.⁷⁵

66. 2012 GUIDELINES, *supra* note 9, at 44-45.

67. N.Y. STATE WORKERS’ COMP. BD., DOCTOR’S REPORT OF MMI/PERMANENT IMPAIRMENT, available at http://www.wcb.ny.gov/content/main/forms/c4_3.pdf [hereinafter FORM C-4.3].

68. See, e.g., Soc. Sec. Rul. 96-9p, 1996 WL 374185 (July 2, 1996), available at http://www.ssa.gov/OP_Home/rulings/di/01/SSR96-09-di-01.html [hereinafter SSR 96-9p].

69. 2012 GUIDELINES, *supra* note 9, at 45.

70. *Id.*

71. FORM C-4.3, *supra* note 67, at 3.

72. Soc. Sec. Rul. 83-10, 1983 WL 31251 (1983), available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR83-10-di-02.html [hereinafter SSR 83-10].

73. *Id.*

74. FORM C-4.3, *supra* note 67, at 3.

75. See *id.*

The form requires the physician to state whether the worker can engage in each activity “never,” “occasionally,” “frequently,” or “constantly,” and to include weight tolerances for lifting/carrying and pushing/pulling.⁷⁶ “Occasionally” is defined as up to one-third of the time; “frequently” is defined as one-third to two-thirds of the time; and “constantly” is defined as more than two-thirds of the time.⁷⁷

There are several notable omissions from *Form C-4.3*'s list of functional abilities and losses. The absence of an option for “rarely” may cause physicians to either overstate or understate a worker's abilities by choosing “occasionally” or “never.” The form draws no distinction between weight that can be handled with maximum effort and that which can be handled regularly, as required in many workplace settings; for example, when a job requires occasional lifting versus continually lifting. The form also fails to distinguish between the length of time a worker can sit or stand, or the distance he can walk, intermittently during an eight-hour period as compared to how much can be tolerated consecutively during an actual workday. From the standpoint of employability, there is a substantial difference between a worker who can sit for six hours at a time in the course of a workday and one who can sit for six hours in an eight-hour shift but must stand for at least fifteen minutes each hour.⁷⁸ In addition, the need to take unscheduled breaks, unreliability of attendance, the need to lie down on occasion, and restriction to part-time work are all functional losses that may substantially erode a worker's employability, but are not considered on *Form C-4.3*.⁷⁹

These omissions take on additional significance because the physician is ultimately asked to offer an opinion as to the worker's “exertional ability” to perform work in categories drawn from the United States Department of Labor: “very heavy,” “heavy,” “medium,” “light,” and “sedentary.”⁸⁰ Each category is defined in terms of its requirements in the primary strength activities of sitting, standing, lifting, carrying, pushing, pulling, and walking; although in some instances elaboration is provided, such as that light work is often

76. *Id.*

77. *See id.*; *see also* SSR 83-10, *supra* note 72.

78. *See, e.g.*, SSR 96-9p, *supra* note 68.

79. *See generally id.*

80. *See* U.S. DEP'T OF LABOR, THE REVISED HANDBOOK FOR ANALYZING JOBS, 12-2 to 12-4 (1991); *see also* SSR 83-10, *supra* note 72; U.S. DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES, app. C (4th ed. 1977, rev. 1991), *available at* www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOTAPPC.HTM [hereinafter DICTIONARY OF OCCUPATIONAL TITLES].

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production-pace industrial work, and sedentary jobs are primarily sitting jobs.⁸¹ If the worker does not retain the exertional ability to perform even sedentary work, *Form C-4.3* provides an option for “less than sedentary work.”⁸²

The Department of Labor definitions do not include the impact of non-exertional impairments (which in any given case may be more significant than the exertional impairments), nor do they include the various items that were omitted from *Form C-4.3*. Instead, the physician is provided with a single line to identify “[o]ther medical considerations which arise from this work related injury (including the use of pain medication such as narcotics).”⁸³

It is therefore clear that proper evaluation of an injured worker’s residual functional capacity requires consideration of: (1) the level of work that can be performed from an exertional standpoint; (2) the degree to which the worker’s ability to perform jobs at the exertional level is eroded or eliminated by non-exertional and hybrid limitations identified on *Form C-4.3*; and (3) the degree to which the worker’s ability to perform jobs at the exertional level is eroded or eliminated by non-exertional and hybrid limitations *not* identified on *Form C-4.3*.

For example, a worker’s exertional capacity in the primary strength categories may meet the requirements for medium work because he may be able to lift thirty pounds occasionally and fifteen pounds frequently. However, if the worker is unable to lift overhead due to a shoulder injury, and is limited in driving and operating machinery due to a neck injury (factors included on *Form C-4.3*), those non-exertional restrictions would limit the number and type of medium work jobs available within his restrictions. If the worker’s medical history demonstrates that his or her symptoms have been subject to periods of exacerbation that vary with activity and which may impact the reliability of the worker’s attendance (factors not specifically included on *Form C-4.3*), this would further limit employability.

A worker’s overall functional abilities and losses, including both exertional and non-exertional impairments, are therefore a key component in addressing the question of loss of wage earning capacity.

81. DICTIONARY OF OCCUPATIONAL TITLES, *supra* note 80, app. C, § IV.

82. FORM C-4.3, *supra* note 67, at 3.

83. *Id.* It is noteworthy that while the Social Security Administration makes extensive use of the *Dictionary of Occupational Titles*, it also requires Administrative Law Judges to consider and weigh the impact of non-exertional impairments. *See, e.g.*, Soc. Sec. Rul. 83-14, 1983 WL 31254 (1983), *available at* http://www.socialsecurity.gov/OP_Home/rulings/di/02/SSR83-14-di-02.html [hereinafter SSR 83-14].

Residual functional capacity, together with vocational factors, is the best measure of the extent of the employment capabilities of an injured worker.

C. Vocational Factors

The 2012 Guidelines identify four primary vocational factors that should be considered in determining loss of wage earning capacity: (1) education and training; (2) age; (3) skills; and (4) literacy and English proficiency.⁸⁴ The Board has prescribed *Form VDF-1* for the injured worker to report this information.⁸⁵ However, the 2012 Guidelines offer little guidance regarding the weight of these factors beyond general observations that less education, advancing age, fewer skills, and lower English literacy and fluency each have a negative impact on wage earning capacity.⁸⁶ It is ultimately left to the discretion of the WCL Judge to determine the relative weight to be accorded to the injured worker's functional loss and vocational factors, and to assess the impact of the various factors on the worker's wage earning capacity.⁸⁷

This Article proposes a structured approach to the use of functional and vocational factors in determining loss of wage earning capacity. The importance of each factor is discussed *infra* Part III.

III. A MECHANISM TO ASSIGN RELATIVE WEIGHT TO FUNCTIONAL LOSS AND VOCATIONAL FACTORS IN DETERMINING LOSS OF WAGE EARNING CAPACITY

Although the 2012 Guidelines establish the importance of functional loss and vocational factors in determining loss of wage earning capacity, they offer no mechanism to assign weight to those factors in a consistent, reproducible manner that can be applied by practitioners or WCL Judges. As a result, parties are unable to predict which factors a WCL Judge will consider, how much weight will be given to any particular factor, and the extent to which the various factors will be found to affect an injured worker's wage earning capacity. While this theoretically permits individualized determinations, the lack of outcome predictability injects substantial uncertainty into the process, resulting in litigation and inconsistency

84. 2012 GUIDELINES, *supra* note 9, at 49.

85. See N.Y. STATE WORKERS' COMP. BD., LOSS OF WAGE EARNING CAPACITY VOCATIONAL DATA FORM, available at <http://www.wcb.ny.gov/content/main/forms/vdf1.pdf> [hereinafter FORM VDF-1].

86. 2012 GUIDELINES, *supra* note 9, at 49.

87. *Id.* at 44.

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(one might also say unfairness) of result.⁸⁸

The *2012 Guidelines* can be supplemented by a Grid that, using the same concepts already incorporated in the process, assigns weight to each factor, functional and vocational. Thus providing a guide for litigants and WCL Judges to determine loss of wage earning capacity.

Under the 2007 amendments to the Workers' Compensation Law,⁸⁹ there are twelve segments of loss of wage earning capacity associated with permanent partial disability. These segments are shown on the table below along with the number of weeks of PPD benefits that may be paid for each segment:

<u>Loss of Wage Earning Capacity</u>	=	<u>Weeks of Benefits</u>
96 - 99%	=	525 weeks.
91 - 95%	=	500 weeks.
86 - 90%	=	475 weeks.
81 - 85%	=	450 weeks.
76 - 80%	=	425 weeks.
71 - 75%	=	400 weeks.
61 - 70%	=	375 weeks.
51 - 60%	=	350 weeks.
41 - 50%	=	300 weeks.
31 - 40%	=	275 weeks.
16 - 30%	=	250 weeks.
1 - 15%	=	225 weeks. ⁹⁰

Any approach that proposes to systematize the award of PPD benefits must therefore provide a range of outcomes that includes all twelve segments. The distribution of awards among the categories represents the system's judgment about the range of impacts that functional loss and vocational factors have on loss of wage earning

88. See discussion, *supra* Introduction.

89. N.Y. WORKERS' COMP. LAW § 15(3)(w) (McKinney Supp. 2012).

90. *Id.* Note that there is an inherent conflict between the lowest category of disability (1% - 15%) contained in section 15(3) of the Workers' Compensation Law and the fact that section 15(5-a) of the Workers' Compensation Law prohibits the Board from finding a worker who is partially disabled from having an earning capacity "in excess of seventy-five per centum of his former full time actual earnings," *Id.* § 15(5-a). The effect of section 15(5-a) of the Workers' Compensation Law is that the Board may not make an award for less than a 25% "disability" to a partially disabled worker, so that only eleven of the twelve segments of partial disability contained in section 15(3) of the Workers' Compensation Law can legally be used. See *id.* § 15(3), (5-a).

capacity. In arriving at that outcome, the Board must determine how much earning capacity is lost as a worker's earning capacity is diminished by injury, age, education, skills, language proficiency, and literacy.⁹¹

The proposed Grid assigns a range of figures representing the extent to which a workers' functional capacity was affected by the exertional loss associated with the injury. This is then further modified by the worker's vocational characteristics, non-exertional impairments and other factors. Several assumptions are inherent in the Grid, each of which is consistent with the *2012 Guidelines*:

- (1) Functional loss, including both exertional and non-exertional impairments, is the prime determinant of loss of wage earning capacity.⁹²
- (2) Greater functional loss is generally associated with greater loss of wage earning capacity.⁹³
- (3) A worker who is incapable of performing sedentary work from an exertional standpoint has a very substantial loss of wage earning capacity regardless of the exertional level of his or her past relevant work.⁹⁴
- (4) Injury has a greater impact on the wage earning capacity of an unskilled worker than it does for a skilled worker.⁹⁵
- (5) Injury has a greater impact on the wage earning capacity of an uneducated worker than it does for a highly educated worker.⁹⁶
- (6) Injury has a greater impact on the wage earning capacity of an older worker than it does for a younger worker.⁹⁷
- (7) Injury has a greater impact on the wage earning capacity of a worker who is not fluent and/or literate in English than it does for one who is fluent and/or literate in English.⁹⁸
- (8) Non-exertional factors must be taken into consideration and

91. These are the factors now contemplated by the 2012 GUIDELINES, *supra* note 9, at 49.

92. See, e.g., SSR 83-14, *supra* note 83.

93. See WCB SUBJECT NO. 046-472, *supra* note 9.

94. See SSR 96-9p, *supra* note 68.

95. See, e.g., Soc. Sec. Rul. 82-41, 1982 WL 31389 (1982), available at http://www.ssa.gov/OP_Home/rulings/di/02/SSR82-41-di-02.html [hereinafter SSR 82-41].

96. See WCB SUBJECT NO. 046-472, *supra* note 9.

97. See, e.g., 20 C.F.R. pt. 404, subpt. P, app. 2 (2012); WCB SUBJECT NO. 046-472, *supra* note 9.

98. See, e.g., 20 C.F.R. pt. 404, subpt. P, app. 2; WCB SUBJECT NO. 046-472, *supra* note 9.

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assigned weight to modify the Grid results on a case-by-case basis.⁹⁹

Based on these assumptions, the proposed Grid generally assigns unskilled and uneducated workers who are disabled from their past relevant work a substantial loss of wage earning capacity. This is so particularly where their past work was physically demanding or where their employability is further compromised by advancing age, lack of literacy, and/or lack of fluency in English. Conversely, highly educated and/or skilled workers, particularly when younger or whose past relevant work was sedentary in nature, are often found to have suffered only minor loss of wage earning capacity. The rationale for these assumptions and their outcome on the Grid arises from consideration of the various factors discussed below.

A. Exertional Loss

The degree to which an injured worker's exertional ability has diminished should be defined by reference to the physical demands of the at-injury job. In the workers' compensation system, wages earned in the at-injury employment are the basis for pre-accident wage earning capacity, thus making the demands of the at-injury job the relevant standard.¹⁰⁰ The Grid therefore compares the exertional level¹⁰¹ of the at-injury job to the post-accident exertional ability. The difference between the two is the loss of exertional ability, and it is this loss that primarily impacts wage earning capacity.

Using this method, a worker who was engaged in "very heavy" work can potentially lose up to five "levels" of exertional ability (from "very heavy" down to "less than sedentary"). Meanwhile, a worker who was engaged in "sedentary" work can lose, at most, one "level" (from "sedentary" to "less than sedentary"). However, different losses can have substantially different impacts on wage earning capacity. A worker who loses one "level" of exertional ability from "very heavy" to "heavy" may have a minimal loss of wage earning capacity (because the worker can still do many different types of work), while a worker who loses one "level" from "sedentary" to "less than sedentary" may be wholly unemployable (because fewer jobs exist at that level).¹⁰²

99. For an explanation of non-exertional impairments, see discussion *supra* Part II.B.

100. See *supra* Introduction.

101. There are six exertional levels: very heavy; heavy; medium; light; sedentary; and less than sedentary. U.S. DEP'T OF LABOR EMP'T & TRAINING ADMIN., SELECTED CHARACTERISTICS OF OCCUPATIONS DEFINED IN THE REVISED DICTIONARY OF OCCUPATIONAL TITLES, apps. A, A-2 (1993).

102. See SSR 96-9p, *supra* note 68.

As a result, the Grid does not assign a standard weight to the loss of a “level” of exertional ability, but rather assigns variable weight depending on the nature of the pre-injury exertional category as compared to the post-injury exertional category. The variation reflects the fact that some exertional losses have a greater impact on the nature and number of jobs that can be performed than others.

The figure assigned to loss of wage earning capacity due solely to exertional loss is called the “impact” figure. The impact figure is then modified by consideration of the worker’s skill level, education, age, language proficiency, literacy, non-exertional impairments, and other factors discussed below.¹⁰³

It is important to remember that functional loss includes both exertional and non-exertional impairments.¹⁰⁴ The Grid uses exertional loss as the basis for the impact figure because it is often the most significant factor affecting wage earning capacity, but also because its measurability tends to enhance consistency of outcome. This tends to narrow the issues in dispute and may encourage settlement. When applicable, however, full consideration must be given to non-exertional factors and appropriate weight assigned to modify the impact figure.¹⁰⁵

In some cases, a worker can lose substantial wage earning capacity while retaining his or her full pre-accident exertional ability. One example would be a case involving purely psychological injury.¹⁰⁶ In these instances, the WCL Judge must assign weight to the non-exertional impairments and use that figure as a substitute for the impact figure that is ordinarily attributable to exertional loss.¹⁰⁷ The Grid modifications for skill, education, age, fluency, and literacy in cases where there is no exertional loss, are still intended to be used in cases of solely non-exertional loss, with the assessment of non-exertional loss serving as the impact figure.

103. See *infra* Parts III.B-H.

104. See *supra* Part II.B.

105. This approach is consistent with Social Security Rulings stating that these additional factors must be given consideration. See, e.g., SSR 83-10, *supra* note 72; SSR 83-14, *supra* note 83.

106. “Purely psychological” refers to cases in which the accident is some sort of psychological trauma and there is no physical harm to the worker, only psychological harm. As there is no physical harm to the claimant, there is no change in his exertional (physical) abilities.

107. As the claimant’s physical capabilities have not changed, there must be a consideration of how psychological changes have affected the ability to work.

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A worker's past relevant employment will have created a group of skills, each of which may or may not be transferable to post-injury employment. A given employment may generally be categorized as "unskilled," "semi-skilled," or "skilled."¹⁰⁸

The skill required to perform a job is defined partly by the specific vocational preparation ("SVP") required for that employment.¹⁰⁹ Depending in part on the SVP, a job may be characterized as "unskilled," "semi-skilled," or "skilled."¹¹⁰ SVP is based partly on the length of time required to learn the job, which is reflected in the chart below:

<u>SVP</u>	<u>Training Time</u>
1	Short Demonstration Only
2	Up to 1 Month Training
3	1 – 3 Months Training
4	4 – 6 Months Training
5	7 Months – 1 Year
6	1 – 2 Years ¹¹¹

Using these figures as a reference point, it can generally be concluded that a job with an SVP of 3 or below is probably unskilled, a job with an SVP of 4 or 5 is likely semi-skilled, and a job with an SVP of 6 or higher is skilled.¹¹²

Additional information may be found in a job description provided by either the employer or the injured worker.¹¹³ Unskilled work is work which needs little or no judgment to do simple duties that can be learned on the job in a short period of time.¹¹⁴ Examples are jobs that require handling, feeding, and lifting materials.¹¹⁵ Semi-skilled work needs

108. See, e.g., 2012 GUIDELINES, *supra* note 9, at 49; see generally DICTIONARY OF OCCUPATIONAL TITLES, *supra* note 80, at app. C.

109. See DICTIONARY OF OCCUPATIONAL TITLES, *supra* note 80, at app. C.

110. SSR 82-41, *supra* note 95.

111. DICTIONARY OF OCCUPATIONAL TITLES, *supra* note 80, at app. C.

112. *Id.*

113. The use of *Form VDF-1* is one option. See *supra* text accompanying note 85. However, the *Dictionary of Occupational Titles* may also be used. See, e.g., SSR 96-9p, *supra* note 68 (noting the use of vocational resources).

114. See SSR 82-41, *supra* note 95.

115. See *id.*

some skills, but does not require doing more complex job duties.¹¹⁶ It may require alertness and close attention to machine processes, or inspecting parts.¹¹⁷ Co-ordination and dexterity are often required.¹¹⁸ Skilled work requires qualifications in which a person uses judgment to determine the machine and manual operations to be performed in order to obtain the proper form, quality, or quantity of material to be produced.¹¹⁹ Skilled work may require laying out work, estimating quantity or quality, reading blueprints, making computations, and making mechanical adjustments.¹²⁰

Despite a high SVP for the pre-injury job, if the skills acquired are not transferable then the work may be deemed semi-skilled, or even unskilled.¹²¹ Skills may be transferable where the activity is the same but a lesser degree of skill is required, where similar tools or machines are used, and where similar raw materials, products, processes, or services are involved.¹²² However, there are no transferable skills from unskilled work, and skills cannot be transferred from semi-skilled or skilled work to unskilled work.¹²³

In general, there is more work available to skilled workers throughout the range of exertional requirements than to unskilled workers.¹²⁴ Therefore, loss of exertional ability impacts the wage earning capacity of unskilled workers more significantly than skilled workers, and the impact figure is modified to varying degrees depending on whether the worker is deemed to be skilled, semi-skilled, or unskilled.

C. Education

It is generally accepted that lack of education has an impact on wage earning capacity.¹²⁵ Most employment requires a high school diploma, and many require an associate's degree or equivalent vocational training at a minimum. In the analogous Social Security

116. *Id.*

117. *Id.*

118. *Id.*

119. SSR 82-41, *supra* note 95.

120. *See id.*

121. Unlike pre-injury exertional capacity, which should be measured solely by reference to the at-injury job, consideration may be given to skills acquired in other past relevant employment. *Id.*

122. *See id.*

123. *See id.*

124. *See generally* SSR 82-41, *supra* note 95.

125. *See* 2012 GUIDELINES, *supra* note 9, at 49.

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Disability system, less educated workers are presumed to have fewer employment opportunities than more educated workers, and thus the same injury has a greater impact on wage earning capacity for an uneducated worker than it does for a college graduate.¹²⁶ Therefore, the impact figure in the Grid is modified to varying degrees depending on the education of the injured worker.

Non-U.S. education presents a special challenge due to the difficulty of translating foreign educational systems into the U.S. equivalent. High school degrees in the U.S., Ecuador, Germany, China, and Afghanistan may each represent a different educational level. As a result, non-U.S. education is not easily subject to the assignment of a pre-determined modification figure on the Grid, and the WCL Judge must exercise his or her discretion in making appropriate modifications in such cases.

D. Age

It is generally accepted that age has an impact on wage earning capacity and that older workers have fewer employment opportunities than younger workers.¹²⁷ Thus, the same injury has a greater impact on wage earning capacity for an older worker than it does for a younger worker.¹²⁸ In the Social Security Disability system, which considers the same factors as the *2012 Guidelines*, age is generally considered in accordance with the chart below:

<u>Age</u>	<u>Impact</u>
Under 45	Generally Irrelevant
45-49	Minimally Affects Wage Earning Capacity
50-54	Affects Wage Earning Capacity
55-59	Significantly Affects Wage Earning Capacity
60+	Severely Affects Wage Earning Capacity ¹²⁹

Consistent with this approach, the impact figure is modified to varying degrees depending on the age of the injured worker.

126. *See generally* 20 C.F.R. pt. 404, subpt. P, app. 2 (2012).

127. *See id.*

128. *See id.*

129. *See generally* 20 C.F.R. §§ 404.1563, 404.1568(d)(4) (2012) (regulations emphasizing that age is a consideration in terms of whether a disabled person could adjust to another type of work).

E. Language Proficiency

The inability to communicate fluently in English has an adverse impact on wage earning capacity because it restricts the range of employment available to the injured worker.¹³⁰ The impact of language proficiency is not, however, binary—a mere inquiry into whether a worker “can” or “cannot” speak English is inadequate to properly assess the impact of language proficiency on wage earning capacity. Some jobs, often those that are heavy, unskilled work, can be performed without any ability to speak English.¹³¹ A worker who meets this description and who is limited to light work due to the injury may have a complete loss of wage earning capacity because most light jobs require some degree of skill and/or English language fluency.¹³²

Other jobs, often those that involve unskilled or semi-skilled work with medium exertional requirements, can be performed with rudimentary English language proficiency.¹³³ Most skilled jobs with light or sedentary exertional requirements require good language proficiency.¹³⁴ Thus the Grid allows for modification of the impact figure to a variable degree depending on the extent of the worker’s language proficiency and the nature of the work available given the worker’s exertional loss.

F. Literacy

The considerations associated with determining the impact of literacy on loss of wage earning capacity are essentially similar to those regarding language proficiency.¹³⁵ However, literacy must be considered separately due to the fact that verbal and written skills may apply differently in different employments. As in the case of language proficiency, the Grid allows for modification of the impact figure to a variable degree depending on the extent of the worker’s literacy and the nature of the work available given the worker’s residual functional capacity.

G. Non-Exertional Impairments

Non-exertional impairments involve injury-related limitations that do not involve the basic “strength” categories that comprise exertional

130. See 2012 GUIDELINES, *supra* note 9, at 49.

131. See SSR 96-9p, *supra* note 68; see also 20 C.F.R. pt. 404, subpt. P, app. 2.

132. See, e.g., 20 C.F.R. pt. 404, subpt. P, app. 2.

133. See 2012 GUIDELINES, *supra* note 9, at 49.

134. See generally 20 C.F.R. pt. 404, subpt. P, app. 2.

135. See, e.g., *id.*

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function, which in turn governs the categorization of pre-injury employment and the impact figure on the Grid, as discussed *supra* Part III.A. They include pain, the impact of prescription medication, environmental restrictions, injuries that “affect the mind, vision, hearing, speech, and use of the body to climb, balance, stoop, kneel, crouch, crawl, reach,” or handle, or use of the fingers for fine activities.¹³⁶

Some injuries can result in significant non-exertional limitations without any associated exertional loss. Three examples would include cases involving psychiatric disability, loss of cognitive function, or environmental restrictions.¹³⁷ Other injuries can result in significant non-exertional limitations while causing only slight exertional loss. One example would be carpal tunnel syndrome, which may have limited impact on the ability to lift and carry, but significantly impair the ability to use the fingers for fine manipulation or to type on a keyboard. In other cases, there may be a combination of injuries, some of which involve purely exertional loss, some of which involve purely non-exertional loss, and some with mixed effect.¹³⁸ One example of such a case would be a worker with a neck injury (exertional loss) and carpal tunnel syndrome (mixed) who also suffers from consequential depression (non-exertional loss).

The highly variable nature of non-exertional impairments precludes the assignment of a pre-determined figure or range of figures on the Grid. Moreover, when the injury does not affect exertional function (such as a case involving purely psychological injury), the weight assigned to non-exertional impairments must serve as the impact figure to be modified by vocational factors.¹³⁹ As a result, the extent to which non-exertional impairments affect wage earning capacity in each case is left to the discretion of the WCL Judge, and the Grid indicates that the Judge should “add as appropriate.”

136. See SSR 83-10, *supra* note 72. Examples of “fine” activities include using the fingers for pinching or picking up small objects. See SSR 96-9p, *supra* note 68.

137. See SSR 83-14, *supra* note 83. Environmental restrictions can “include exposure to extremes of heat or cold, humidity, noise, vibration, hazards, fumes, dust, and toxic conditions.” *Id.* As with purely psychological injuries, see *supra* text accompanying note 98, the worker’s physical abilities may not be affected at all, but the non-exertional factor affects the worker’s ability to work. See SSR 83-14, *supra* note 83.

138. See 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(e)(2); SSR 96-9p, *supra* note 68.

139. See *supra* Part III.A.

H. Other Factors

Other factors that may affect wage earning capacity include the nature and availability of jobs in the local economy, the availability of public transportation, and factors unique to the individual injured worker.¹⁴⁰ Consideration must also be given to the effect of the ability to work on a part-time basis. In most employments, the availability of part-time work is significantly less than the availability of full-time work. Thus, a worker who retains the exertional ability to perform his or her past relevant work on a part-time basis has a greater loss of earning capacity than may be reflected in a simple hourly reduction calculation. Some of these factors may have a quantifiable impact on wage earning capacity, while others may be wholly unquantifiable.

As in the case of non-exertional impairments, the diversity of other factors precludes the assignment of any pre-determined figure on the Grid, which indicates that the WCL Judge should employ judicial discretion and “add as appropriate.”

I. The Grid

With these principles in mind, the following Grid is proposed as a guide to assign weight to the various factors that impact wage earning capacity.

140. See, e.g., 1996 GUIDELINES, *supra* note 10, at 2.

LOSS OF WAGE EARNING CAPACITY CALCULATION GRID

Exertional Capacity		Past Relevant Skills			Education			Age					Language			Literacy					
Before	After	Impact	Unskilled	Semi Skilled	< HS	HS	>HS	College	< 25-44	25-44	45-49	50-54	55-59	60+	None or Poor	Fair	Good	None or Poor	Fair	Good	
VH	VH	0	7	4	0	7	3	0	-5	3	0	3	6	9	15	1	0	0	1	0	0
VH	H	15	7	4	0	7	3	0	-5	3	0	3	6	9	15	1	0	0	1	0	0
VH	M	35	11	7	3	7	3	0	-5	3	0	3	6	9	15	3	1	0	3	1	0
VH	L	50	11	7	3	7	3	0	-7	3	0	3	6	9	15	3	1	0	3	1	0
VH	S	60	14	11	3	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0
VH	<S	75	14	11	3	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0
H	H	0	7	4	0	7	3	0	-5	3	0	3	6	9	15	1	0	0	1	0	0
H	M	20	7	4	0	7	3	0	-5	3	0	3	6	9	15	3	1	0	3	1	0
H	L	40	11	7	3	7	3	0	-7	3	0	3	6	9	15	3	1	0	3	1	0
H	S	60	14	11	3	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0
H	<S	75	14	11	3	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0
M	M	0	7	4	0	7	3	0	-5	3	0	3	6	9	15	1	0	0	1	0	0
M	L	25	11	7	3	7	3	0	-7	3	0	3	6	9	15	3	1	0	3	1	0
M	S	50	14	11	3	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0
M	<S	75	14	11	3	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0
L	L	0	7	4	0	7	3	0	-5	3	0	3	6	9	15	1	0	0	1	0	0
L	S	20	11	7	3	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0
L	<S	75	14	7	3	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0
S	S	0	7	4	0	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0
S	<S	75	14	7	3	7	3	0	-10	3	0	3	6	9	15	5	3	0	5	3	0

Post-Grid Adjustments

Non-Exertional Impairments: Add as appropriate
 Other non-medical factors: Add as appropriate

KEY

VH = Very Heavy
 H = Heavy
 M = Medium
 L = Light
 S = Sedentary
 <S = Less than Sedentary

J. Using the Grid

In order to use the Grid, decisions must be made regarding loss of exertional capacity, skills, age, education, language and literacy, non-exertional impairments, and other factors. Loss of exertional capacity provides the impact figure in the first column, and that figure is then modified by each additional factor moving from left to right across the Grid. The sum of the impact figure and all modifications is then further adjusted by the impact of non-exertional impairments and other factors. The resulting figure is the worker's percentage loss of wage earning capacity.¹⁴¹

The first finding that must be made is the loss of exertional capacity. The exertional capacity required to perform the pre-injury employment must be determined using information from the worker, the employer, and external references, such as the *Dictionary of Occupational Titles*.¹⁴² Where there is a conflict among the various sources, a credibility determination must be made by the WCL Judge as to how the worker's job was actually performed, which may differ from the formal "job description."

Once the exertional requirements of the pre-injury employment have been identified, it can be classified in exertional terms as very heavy, heavy, medium, light, or sedentary. Next, a determination must be made about the worker's post-injury exertional capacity, using *Form C-4.3* and other medical evidence. These two findings will determine the worker's loss of exertional capacity and identify the impact figure to be used on the Grid.

The second finding to be made is the skill level of the pre-injury employment. Again, information may be obtained from the worker, the employer, and external sources. Careful consideration is needed as to whether any particular trait constitutes a skill and whether it is transferable.¹⁴³ The use of vocational resources, such as the *Dictionary of Occupational Titles*, may be necessary in this inquiry. As discussed previously, skilled employment that does not involve transferable skills may be treated as semi-skilled or unskilled when applying the Grid.¹⁴⁴

141. In rare instances, the grid may produce a figure greater than 100% or less than zero. This is due to the fact that the grid attempts to capture all possible permutations of functional loss and vocational factors. It is clear that a WCL Judge should not find a loss of wage earning capacity in excess of 100% or below zero, and that such atypical grid results are to be reduced to 100% or increased to zero as indicated.

142. See generally *DICTIONARY OF OCCUPATIONAL TITLES*, *supra* note 80.

143. See *supra* Part III.B.

144. See *id.*

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Third, a finding must be made about the injured worker's education. While this may often be uncontroversial, there will be cases in which the WCL Judge must translate a foreign educational level into a U.S. equivalent.¹⁴⁵ Information may be obtained from *Form VDF-1* or through the worker's testimony.¹⁴⁶

It is unlikely that the fourth finding, the worker's age, will generate significant controversy. It should be noted, however, that the relevant standard is the worker's age at the point in time when loss of wage earning capacity is measured.¹⁴⁷

Fifth, the worker's language and/or literacy skills must be assessed, and appropriate modification made within the range provided by the Grid. Again, information may be obtained from *Form VDF-1* or through the worker's testimony.¹⁴⁸

Sixth, adjustment must be made for non-exertional impairments. This information may be obtained from *Form C-4.3*, the claimant's testimony, and other medical documentation.¹⁴⁹ Where the functional loss is primarily exertional, little or no adjustment may be warranted for non-exertional impairments. In cases involving significant non-exertional factors (such as chronic pain or psychological injury), substantial modification of the impact figure may be required.¹⁵⁰ Because non-exertional impairments present such a wide range of potential impact on wage earning capacity, no figure is assigned by the Grid, and the adjustment must be made with the sound exercise of judicial discretion.

Finally, adjustment may be made for any factors not otherwise accounted for by the existing categories. As in the case of non-exertional impairments, this adjustment is to be made in the WCL Judge's discretion and no pre-defined modification is assigned. These post-Grid adjustments emphasize the intent that the Grid serve only as a guide. Upward or downward departures may be justified by non-Grid factors or other evidence, and the rationale for such departures should be provided in the ultimate decision.¹⁵¹

145. See *supra* Part III.C.

146. See FORM VDF-1, *supra* note 85; see also SSR 96-9p, *supra* note 68.

147. See FORM VDF-1, *supra* note 85.

148. See *id.*

149. See discussion *supra* Part II.B, III.A., III.G.

150. See discussion *supra* Part III.G.

151. Providing explanations for any adjustments made is similar to the requirement that a judge include findings of fact in Social Security Disability judgments involving the transferability of skills. See SSR 82-41, *supra* note 95.

K. Examples

The chart below provides examples of wage earning capacity calculations using the proposed Grid. The examples include a range of jobs, skills, ages, educational levels, language skills, and literacy skills. For each hypothetical worker, different outcomes are shown depending on the degree to which the injury causes exertional loss. Post-Grid adjustments for non-exertional impairments or other factors are not shown, but as has been emphasized, it is to be anticipated that such adjustments will be required to some degree in most cases.

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CAPACITY CALCULATION GRID TO CERTAIN EXAMPLES**

Past Relevant Work	At- Injury Exertional Level	Post-Injury Exertional Level	Impact	Past Relevant Skills	Education	Age	Language	Literacy	Loss of Wage Earning Capacity
Nurse's Aide	Heavy			Semi-skilled	HS	36	Good	Good	
		Medium	20	4	3	0	0	0	27
		Light	40	7	3	0	0	0	50
		Sedentary	60	11	3	0	0	0	74
		<Sedentary	75	11	3	0	0	0	89
Sheetrocker	Heavy			Unskilled	<HS	33	Good	Fair	
		Medium	20	7	7	0	0	1	35
		Light	40	11	7	0	0	1	59
		Sedentary	60	14	7	0	0	3	84
		<Sedentary	75	14	7	0	0	3	99
Day laborer	Heavy			Unskilled	<HS	24	Poor	Poor	
		Medium	20	7	7	3	3	3	43
		Light	40	11	7	3	3	3	67
		Sedentary	60	14	7	3	5	5	94
		<Sedentary	75	14	7	3	5	5	100 (109)
Bus operator	Medium			Skilled	Voc. Sch.	45	Good	Good	
		Light	25	3	0	3	0	0	31
		Sedentary	50	3	0	3	0	0	56
		<Sedentary	75	3	0	3	0	0	81
Waitress	Medium			Semi-skilled	HS	47	Good	Good	
		Light	25	7	3	3	0	0	38
		Sedentary	50	11	3	3	0	0	67
		<Sedentary	75	11	3	3	0	0	92
Secretary	Light			Skilled	Voc. Sch.	36	Good	Good	
		Sedentary	20	3	0	0	0	0	23
		<Sedentary	75	3	0	0	0	0	78
Food Service	Light			Semi-skilled	<HS	25	Fair	Fair	
		Sedentary	20	7	7	0	3	3	40
		<Sedentary	75	7	7	0	3	3	95
Teacher	Light			Skilled	College	42	Good	Good	
		Sedentary	20	3	-10	0	0	0	13
		<Sedentary	75	3	-10	0	0	0	68

CONCLUSION

The Grid proposed in this Article supplements the *2012 Guidelines* by providing a coherent framework within which a WCL Judge can weigh the various factors that contribute to loss of wage earning capacity. The use of a grid is beneficial to the system and the parties because it enhances predictability of result. This permits the parties to evaluate the case against a known standard, instead of attempting to predict which factors will be considered in any given case and what weight will be assigned to those factors. This should reduce litigation, encourage settlement, and promote fairness and consistency in the system.