

**COMMENTS  
ON THE  
DISABILITY DURATION GUIDELINES  
AND  
ISSUES CONCERNING  
LOSS OF WAGE EARNING CAPACITY**

**Submitted to:**

**NEW YORK STATE  
WORKERS' COMPENSATION BOARD**

**On behalf of:**

**NEW YORK STATE AFL/CIO**

**INJURED WORKERS' BAR ASSOCIATION**

**NEW YORK COMMITTEE FOR OCCUPATIONAL  
SAFETY AND HEALTH**

**WORKERS' COMPENSATION ALLIANCE**

**WESTERN NEW YORK COMMITTEE FOR  
OCCUPATIONAL SAFETY & HEALTH**

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**EXECUTIVE SUMMARY**

I. Introduction (*page 6*). The New York State Insurance Department has issued its proposed Disability Duration Guidelines for the determination of permanent partial disability awards in cases where the claimant is not working and which are subject to time limitations imposed by the 2007 amendments to the Workers' Compensation Law. The Workers' Compensation Board is directed to complete the Guidelines by developing a method to determine loss of wage earning capacity.

II. Medical Impairment vs. Loss of Wage Earning Capacity (*page 9*). It is inappropriate to use medical impairment as the basis for awards of compensation in a system that defines disability as the loss of wage earning capacity. Factors such as functional loss, age, education, skills, language proficiency, and literacy must also be considered.

III. The Board's Adjudication of "Disability" Since 1996 (*page 10*). The Workers' Compensation Board has historically awarded benefits based principally on an inquiry into medical impairment, rather than considering vocational factors that contribute to loss of wage earning capacity. The exception is claims involving industrial total disability.

IV. Matter of Buffalo Auto Recovery (page 11). Pending formal regulation, the Board decided Buffalo Auto in order to provide a current re-assessment of Board policy regarding benefit awards in permanent partial disability cases subject to the caps.

A. Pre-Reform Determination of Wage Earning Capacity (page 12).

Buffalo Auto reaffirmed the principle that permanent partial disability awards depend not merely upon medical disability, but that the “focal point” is the wage earning capacity of the claimant. Where a partially disabled claimant is working, his or her earning capacity is a function of earnings pursuant to WCL § 15(5-a).

B. Post-Reform Determination of Wage Earning Capacity (page 14).

The Board concluded that the difference between the claimant’s pre-accident earning capacity and post-accident earning capacity represents the loss of wage earning capacity. The loss of wage earning capacity determines both the benefit rate and the duration of benefits.

C. Issues Presented By Buffalo Auto (page 16). The Board

erroneously concluded that (1) the amendment to WCL § 15(3)(w) entitles it to disregard the WCL § 15(5-a) prohibition against finding a post-injury wage earning capacity in excess of 75% for a claimant who is not working; and (2) that the WCL § 15(5-a) provision mandating that wage earning capacity is a function of actual earnings should be disregarded where there is a post-classification in earnings.

D. Conclusion - Buffalo Auto (page 20).

V. The Disability Duration Guidelines (page 21). The Insurance Department has now released its proposed Disability Duration Guidelines.

A. The Guideline Process (*page 21*). First, the worker's medical impairment(s) related to the accident are to be identified, described, categorized, and assigned a severity ranking. Second, the functional limitations (ability to perform physical activities) associated with the medical impairment are to be assessed by the treating physician and the carrier's IME, with provision for an impartial evaluation in the event of a difference of opinion as to functional loss. Third, the extent to which the functional limitations affect the worker's ability to engage in gainful employment are to be determined.

B. Medical Impairment Guidelines (*page 25*). The Medical Impairment Guidelines require the treating physician and the IME to select the Chapter(s) that pertain to the injured body part(s), to select the Section within the Chapter that applies to the relevant condition, to identify the Medical Impairment Class, and to arrive at a severity ranking through the use of Tables.

C. Residual Functional Abilities/Losses Guidelines (*page 28*). The Residual Functional Abilities/Losses Guidelines require the treating physician and the IME to complete a Functional Assessment Form identifying the claimant's exertional and non-exertional impairments. However, the last section on the form considers only exertional impairments.

D. Loss of Wage Earning Capacity Guidelines (*page 31*). The Task Force did not agree on Loss of Wage Earning Capacity Guidelines.

VI. Loss of Wage Earning Capacity (*page 32*). It is essential that a methodology be developed to address the issue of loss of wage earning capacity. The

Insurance Department referred the matter to the Board for further consideration and resolution.

A. Factors Affecting Wage Earning Capacity (*page 32*). The factors affecting wage earning capacity include past relevant employment, functional loss, age, education, skills, language proficiency, literacy, and other factors.

B. The Social Security Disability System (*page 35*). The Social Security Administration has created a complex regulatory framework which is helpful in considering how to evaluate the impact of injury on a worker's earning capacity.

C. Translating the Social Security Process for Workers' Compensation (*page 38*). A method must be developed to translate the results of the sequential evaluation process, which considers both functional and vocational factors in a binary system, into a system that addresses the full range of disability. The Task Force considered four options: The Grid Approach, the Vocational Specialist Approach, the Hybrid Approach, and the Litigation Approach.

D. Loss of Wage Earning Capacity in Cases Involving Permanent Partial Disability Where the Claimant is Not Working (*page 48*). The Board should explore the Grid Approach as potentially the best vehicle for the determination of loss of wage earning capacity.

E. Cases Not Covered by the Guidelines (*page 49*). The Guidelines do not apply to claims for (1) temporary disability, (2) medical permanent total disability, (3) industrial total disability, and (4) permanent partial disability where

the claimant is working. The Guideline elements regarding wage earning capacity may, however, prove of some benefit in adjudicating such claims.

VII. Conclusion (*page 54*).

## **I. INTRODUCTION**

On September 15, 2010, the New York State Insurance Department transmitted a 108 page document to the Workers' Compensation Board ("the Board") entitled "Disability Duration Guidelines." The document was accompanied by a letter of explanation by the Superintendent of Insurance.

The letter outlined that in connection with the enactment of time limitations ("caps") on permanent partial disability awards for accidents occurring on or after March 13, 2007, former Governor Spitzer directed the Insurance Department "to develop new guidelines that related to loss of wage-earning capacity." A Task Force and Advisory Committee ("the Task Force") were created to develop such guidelines. The work of the Task Force culminated in the proposed Disability Duration Guidelines ("the Guidelines").

The Task Force envisioned a three-part structure for the determination of loss of wage earning capacity. First, the worker's medical impairment(s) related to the accident were to be identified, described, categorized, and assigned a severity ranking. Second, the functional limitations (ability to perform physical activities) associated with the medical impairment were to be assessed. Third, the extent to which the functional limitations affected the worker's ability to engage in gainful employment was to be determined. 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 could be based and the associated cap figure applied.

The release of the proposed Guidelines has generated significant interest among the various stakeholders in the workers' compensation system. Due to the clear statement accompanying the 2007 legislative amendments that further regulatory guidance would be provided regarding determination of loss of wage earning capacity in cases subject to the caps, few "cap cases" have been classified as permanent partial disability cases pending such guidance. Both claimant and defense attorneys are understandably reluctant to litigate the issue of loss of wage earning capacity in the absence of specific guidelines.<sup>1</sup> Meanwhile, injured workers are deprived of the legal protection that is (or should be) associated with a classification of permanent partial disability, and employers and carriers are prevented from achieving the cost savings that were presumed to be associated with the 2007 amendments.

Unfortunately, there are a number of limitations associated with the proposed Disability Duration Guidelines. The three most significant limitations are:

- (1) The proposed Guidelines presently have no legal force or effect. To have any legal effect, they would have to be translated into a regulation (or set of regulations) by the Workers' Compensation Board. That has not occurred, and it is highly unlikely that it will occur before there is a change of administration. It is therefore unclear whether the proposed Guidelines will ultimately achieve any legal significance.
- (2) The document does not address the question of how loss of wage earning capacity is to be determined. As stated in the Superintendent's letter, the Task Force "was not able to achieve consensus" on the ultimate issue of

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<sup>1</sup> The Board's much-criticized decision in Buffalo Auto Recovery Service, 2009 NY Wrk Comp 80703905 has not seemed to provide satisfactory guidance to practitioners on the issue of wage earning capacity.

translating medical impairment and functional loss into loss of wage earning capacity. Absent this critical component (consideration of which was deferred to the Board), the Guidelines cannot be applied to any claim.

- (3) By their nature (and express terms), the Guidelines apply only to permanently partially disabled (non-schedule loss) claimants who are not working. Thus, they do not apply to claims (or the portion of claims) involving (a) temporary disability (whether partial or total); (b) permanent partial disability where the claimant is working (either at reduced earnings or full wages); or (c) permanent total disability (whether from a medical or industrial standpoint). With regard to the claims that are not covered by the proposed Disability Duration Guidelines, it is unclear whether the 1996 Medical Guidelines will continue to apply, whether they are to be rescinded and not replaced at all, or whether they are to be rescinded and replaced with a new methodology.<sup>2</sup>

Notwithstanding these limitations, the proposed Disability Duration Guidelines still represent an important step towards developing a system to determine loss of wage earning capacity. To place the Guidelines in proper context, however, the distinction between “medical impairment” and “loss of wage earning capacity” must be made clear. Thereafter, consideration must be given to the manner in which the Board has historically adjudicated claims and its interim effort to address the issue of loss of wage earning capacity through its decision in Buffalo Auto Recovery. This paper addresses the foregoing issues before turning to an assessment of the two segments of the Disability

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<sup>2</sup> It seems clear that the 1996 Medical Guidelines will continue to apply to the determination of schedule loss of use cases.

Duration Guidelines that have been published and concluding with a discussion of the issues associated with determining loss of wage earning capacity.

## **II. MEDICAL IMPAIRMENT vs. LOSS OF WAGE EARNING CAPACITY.**

The title of Workers' Compensation Law § 15 uses the word "disability" in the sense that a worker is "disabled" if the injury impacts his or her ability to earn a living.<sup>3</sup> 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." WCL § 15(5) (emphasis added). Thus, the term "disability" in workers' compensation practice refers to loss of wage earning capacity, not medical impairment. See, e.g., Marhoffer v. Alexander Marhoffer, 220 N.Y. 543, 116 N.E. 379 (1917).

The worker's average weekly wage is intended to reflect his or her pre-injury earning capacity.<sup>4</sup> If the injury results in a medical impairment that limits the worker's ability to function, the law would appear to require the Workers' Compensation Board to determine what effect the loss of function has had on the worker's earning capacity. Compensation should then be awarded based on the difference between the pre-accident earning capacity (the average weekly wage) and the post-accident earning capacity.

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<sup>3</sup> Workers' Compensation Law § 37, 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."

<sup>4</sup> This is emphasized by the provisions of Workers' Compensation Law § 14 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 25 in cases of permanent disability.

Thus, it is inappropriate to use medical impairment as the basis for awards of compensation in a system that defines disability as the loss of wage earning capacity. 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 occupations and their 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. 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.

### **III. THE BOARD’S ADJUDICATION OF “DISABILITY” SINCE 1996.**

Notwithstanding the above considerations, however, it has become commonplace to award workers’ compensation benefits based primarily on impairment rather than loss of earning capacity, with the singular exception being cases of “industrial total disability.” The principle of “industrial total disability” is that while a worker’s “medical disability” may not preclude all work, adding the worker’s vocational characteristics compels a conclusion that the worker is unemployable.

The trend towards determining benefit awards based primarily on medical impairment appears to have originated in the relative simplicity of deciding the issue of medical “disability” as opposed to loss of wage earning capacity. If awards are based solely on information about medical impairment, then this eliminates the additional step of inquiring about personal characteristics of the worker that, combined with medical impairment, may also affect wage earning capacity. This trend was accelerated by the publication of the 1994 Medical Guidelines (later superseded by the 1996 Medical Guidelines), which codified and published a methodology for defining “mild,” “moderate,” “marked” and “total” disability based exclusively on medical findings.<sup>5</sup> Since 1996, litigation regarding “degree of disability” and administrative law judge decisions on the issue have rested almost entirely upon the medical impairment methodology provided by the 1996 Medical Guidelines.

#### **IV. MATTER OF BUFFALO AUTO RECOVERY.**

The 2007 legislative amendments re-focused the Board’s attention on its obligation to award benefits based on loss of wage earning capacity instead of medical impairment. In response to the legislation, a Board Panel took the opportunity presented by Matter of Buffalo Auto Recovery, 2009 N.Y. Wrk. Comp. 80703905, to address the issue of the permanent partial disability caps and loss of wage earning capacity.

At the outset, it must be observed that the only issues before the Board in Buffalo Auto were whether the caps applied to the claimant’s permanent partial disability award

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<sup>5</sup> Although the Guidelines do state that the Administrative law judge is to “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,” in practice this isolated statement is disregarded in favor of the remaining fifty pages of instruction regarding disability evaluation based solely on information about medical impairment.

and whether the claimant had been properly determined to have a 50% loss of wage earning capacity. Much of the decision is simply *dicta*, as many of the legal issues considered in Buffalo Auto were not germane to the case before the Board. However, the Board has made it clear that (pending formal guidelines) it intends to apply the Buffalo Auto decision to all other cases involving permanent partial disability, giving the decision special significance.<sup>6</sup>

**A. Pre-Reform Determination of Wage Earning Capacity.**

The Board's analysis in Buffalo Auto began with recognition of the principle that permanent partial disability awards depend not merely upon medical disability, but that the "focal point" is the wage earning capacity of the claimant. Buffalo Auto, § 1.A. The Board also recognized that under WCL §15(5-a), the earning capacity of a permanently partially disabled claimant who is working is to be measured solely by reference to his or her actual earnings. Buffalo Auto, § 1.B. The Board also observed that where a partially disabled claimant is not working, the statute prohibits the Board from finding a wage earning capacity in excess of seventy-five percent of the claimant's average weekly wage.<sup>7</sup> Id. The Board elaborated on these legal principles with mathematical examples demonstrating the "pre-reform" calculation of benefit awards to working and non-working claimants. Buffalo Auto, § 1.C.

Although it had expressly dismissed the issue of "voluntary withdrawal from the labor market" with relation to the case at bar in the first paragraph of its legal analysis,

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<sup>6</sup> See, WCB Subject Number 046-446, Chair Seeks Comment on Task Force PPD Guideline Recommendations, available at [http://www.wcb.state.ny.us/content/main/SubjectNos/sn046\\_446.jsp](http://www.wcb.state.ny.us/content/main/SubjectNos/sn046_446.jsp)

<sup>7</sup> This provision effectively prohibits the Board from awarding benefits for less than a 25% disability unless the claimant is found to have no disability at all.

the Board nevertheless commented that a permanently partially disabled claimant's entitlement to continued benefits depends upon his or her "continued attachment to the labor market." Buffalo Auto, §1.B, see also §1.C. In view of the Board's specific finding that "voluntary withdrawal" was not an issue in the case, its subsequent statements on the subject are pure *dicta*. In addition, the validity of the blanket statement that all permanently partially disabled claimants are required to affirmatively demonstrate a continued attachment to the labor market as a condition precedent to the receipt of benefits is highly questionable.

In Leeber v. LILCO, 29 A.D.3d 1198, 816 N.Y.S.2d 205 (3<sup>rd</sup> Dept 2006), the Appellate Division, Third Department provided a three-part test for the Board to apply in cases involving the issue of "voluntary withdrawal from the labor market:"

When presented with a case of this nature, the Board must engage in a three-step analysis. First, the Board must determine whether claimant's permanent partial disability caused or contributed to his decision to retire. If it did not, the Board may then conclude that claimant voluntarily withdrew from the labor market and is not entitled to continued compensation. Next, however, if claimant's permanent partial disability caused or contributed to his decision to retire, an inference arises that his earning capacity is reduced by the disability and claimant is entitled to compensation until the inference is removed from the case. The third step involves removal of the inference. That occurs only when the employer or workers' compensation carrier submits "direct and positive proof that something other than the disability was the sole cause of claimant's reduced earning capacity after retirement." Proof that the claimant has not sought work postretirement, by itself, does not defeat the inference or shift the burden to claimant to show that the disability was a cause of the reduction. Thus, the Board erred in disallowing awards to claimant on the ground that he had not sought employment within his physical limitations postretirement.

Leeber, 29 A.D.3d at 1199, 816 N.Y.S.2d at 206 (3<sup>rd</sup> Dept 2006) (citations omitted) (emphasis added).

**B. Post-Reform Determination of Wage Earning Capacity.**

Having discussed the principles and calculation of benefits for claimants not subject to the caps on permanent partial disability benefits, the Board next turned to the determination of wage earning capacity for claimants subject to the caps. The Board noted that prior to the 2007 legislation the term “loss of wage earning capacity” was not expressly defined in the statute. Buffalo Auto, § III.B. The Board concluded that the difference between the claimant’s pre-accident earning capacity and post-accident earning capacity represented the loss of wage earning capacity. Id. Thus, the claimant’s post-accident earning capacity, plus his or her loss of wage earning capacity, would equal the pre-accident wage earning capacity. Id.

The Board stated that absent guidance from the Task Force, it would rely upon its 1996 Medical Guidelines in determining loss of wage earning capacity, with reference to “the nature and degree of the work-related permanent physical and/or mental impairment, work restrictions, claimant’s age, and any other relevant factors.” Buffalo Auto, § III.C.

With regard to the calculation of benefit periods in cases subject to the caps, the Board observed that “the number of weeks a claimant with a permanent partial disability will receive indemnity benefits ... is based on the claimant’s ‘loss of wage earning capacity.’” Buffalo Auto, § II. The Board stated that it would “determine the claimant’s loss of wage earning capacity at the time a claimant is classified as permanently partially disabled.” Id.

For claimants who are not working at the time of classification, the Board's calculation of benefits under Buffalo Auto is precisely the same as it was prior to the 2007 legislation, with the sole difference being that the loss of wage earning capacity determines not only the weekly benefit rate, but also the number of weeks of benefits available pursuant to the caps. Buffalo Auto, § III.D.

For claimants who are working, the Board conceded that pursuant to WCL §15(5-a), the earning capacity of a claimant who is working is to be determined solely by his or her actual earnings, and further conceded that such earnings (and consequently the associated statutorily defined wage earning capacity) may fluctuate over time. Id. The Board stated, however, that it intended to disregard the statutory requirement in favor of administrative convenience, opining that it should not be required "to continually redetermine the duration of benefits" where a claimant is working at reduced earnings. Buffalo Auto, § II., III.D. The Board therefore concluded that the determination of wage earning capacity as of the date of classification would continue to apply regardless of any subsequent changes in the claimant's actual earnings that might be associated with a greater or lesser cap period. Id.

In essence, the Board's approach to this issue appears to represent an effort by the Board to treat non-schedule permanent partial disability claims, which the Board has always been required to reopen for the re-determination of benefits based on earnings, in the same fashion as schedule loss claims, which are resolved in a finite fashion. There is, however, no evidence that such was the intent of the Legislature with regard to the 2007 amendments, nor is there any statutory support for this approach.

**C. Issues Presented by Buffalo Auto Recovery.**

The Board's decision in Buffalo Auto raises two issues regarding the calculation and payment of awards in cases of permanent partial disability subject to the caps. Each issue arises out of the Board's attempt to "harmonize" WCL § 15(5-a) with its interpretation of WCL § 15(3)(w), and in each instance the Board's decision is incorrect as a matter of law.

**1. Re-determination of cap weeks post-classification.**

The first issue relates to the Board's insistence that the loss of wage earning capacity is to be immutably determined as of the date of classification and should not be subject to adjustment due to subsequent events. Under Buffalo Auto, a fluctuation in earnings after classification (whether a return to work by a claimant who was not working at the time of classification or a change in earnings by a claimant who was working at reduced earnings) will not affect the number of available cap weeks. The sole rationale enunciated for this position is that the Board should not be required "to continually redetermine the duration of benefits." Buffalo Auto, § II., III.D.

The rationale provided by the Board is, however, logically inconsistent with the Board's statement that although it will not re-determine the available cap weeks based on a post-classification return to work or change in earnings, it will recalculate the weekly benefit rate. Id. The decision provides little explanation as to why it would be more burdensome for the Board to recalculate the number of available cap weeks than it is to recalculate the weekly benefit rate, and indeed it would be difficult to discern a rational basis for such a distinction.

Even more troubling than the absence of a logical reason for the Board's refusal to recalculate the available cap weeks post-classification is that it would plainly violate WCL § 15(5-a). The Buffalo Auto decision specifically observes that WCL §15(5-a) mandates the determination of a partially disabled claimant's earning capacity by sole reference to his or her actual wages. Pursuant to the statute, therefore, a partially disabled claimant's wage earning capacity changes as his or her earnings change. In Buffalo Auto, however, the Board manufactures a different application of WCL § 15(5-a) applicable only to permanent partial disability cases subject to the caps, limiting consideration of actual earnings to those that exist "at the time of classification." This artificial limitation of the statute is created solely to justify the Board's unwarranted refusal to re-determine the number of available cap weeks. The Board is, of course, provided with statutory authority to modify awards pursuant to WCL §§ 22 and 123, and has the additional obligation to liberally construe the statute in order to benefit the injured worker, who is a member of the class it was intended to benefit. Graham v. Walsh Constr. Co., 30 A.D.2d 996 (3rd Dept. 1968), lv. to app. den. 23 N.Y.2d 642 (1968).

It is respectfully submitted that the Buffalo Auto contortions aimed at avoiding the re-calculation of benefit periods could be obviated by the simple expedient of holding that periods of work at reduced earnings are by definition periods of temporary disability. If, as the Board opines in Buffalo Auto, work at reduced earnings is by nature subject to fluctuation, then wages earned during such periods are not reflective of permanent disability, but rather are reflective of temporary, variable losses of wage earning capacity. If awards for periods of work at reduced earnings are made pursuant to WCL § 15(5) instead of WCL § 15(3)(w), then the issue of the permanent partial disability caps is

irrelevant. In addition, this approach would have the salutary effect of encouraging permanently partially disabled workers to return to work, as periods of work at reduced earnings would not be counted against their cap weeks.

2. Post-injury earning capacity in excess of seventy-five percent.

The second issue presented by the Buffalo Auto opinion is the Board's conclusion that "the non-rebuttable presumption" of WCL § 15(5-a) that a partially disabled claimant who is not working "has at least experienced a 25% loss of wage earning capacity has now been replaced by WCL § 15(3)(w)'s provision that a claimant's loss of wage earning capacity can be 15% or less." Buffalo Auto, § III.D. This opinion is founded on the assertion that the "statutes are in irreconcilable conflict with each other."

The primary obligation of the Board and the courts is "to avoid construing any statute in such a way as to render it ineffective. ... it is the duty of courts, if at all possible and consistent with the canons of statutory interpretation, to construe two separate statutes in harmony." NOW vs. Metropolitan Life Ins. Co., 131 A.D.2d 356, 358; 516 N.Y.S.2d 934, 936 (1<sup>st</sup> Dept. 1987). The courts "must presume that when the Legislature acts, it does so with full knowledge of its existing statutes." NOW, 131 A.D.2d at 359. It is only where the "two statutes utterly conflict with each other [that] the later constitutional enactment ordinarily prevails." Id.

Thus, the issue presented is whether there is any possible way to construe the "1% - 15%" loss of wage earning capacity provision of WCL § 15(3)(w) so that it does not conflict with the "no less than 25%" provision of WCL § 15(5-a) – in other words, whether both statutes can be given meaning. It is respectfully submitted that there are at

least two circumstances in which the “1% - 15%” provision of WCL § 15(3)(w) can be applied without disturbing the continued applicability of WCL § 15(5-a).

First, pursuant to WCL § 15(7), awards of compensation may be apportioned among a claimant’s cases. The result of an apportionment may be that the “causally related disability” assigned to one or more cases represents less than a 25% loss of wage earning capacity. By way of example, a claimant may be determined to have a 60% loss of wage earning capacity due to the combined effect of three separate injuries. Liability may then be apportioned 50% to one injury and 25% to each of the other two injuries. This would necessarily mean that the claimant has a 30% loss of wage earning capacity causally related to one file, and a 15% loss of wage earning capacity causally related to each of the other two files. As a result, cases involving apportionment can fall within the “1% - 15%” provision of WCL § 15(3)(w) without vitiating the requirements of WCL § 15(5-a).

Second, if it is determined that awards for reduced earnings are permanent partial disability awards subject to WCL § 15(3)(w), then the “1% - 15%” provision of the statute can clearly be made applicable to claimants who return to work earning in excess of 85% of their average weekly wage. This interpretation is wholly consistent with the provision of WCL § 15(5-a) determining wage earning capacity by reference to actual wages.

In short, the Board’s decision in Buffalo Auto states that the mere existence of a “1% - 15%” category in WCL § 15(3)(w) renders it irreconcilable with the “no less than 25%” provision of WCL § 15(5-a), and that therefore the latter statute must be nullified. As demonstrated above, however, the “1% - 15%” category can be applied in certain

circumstances to both working and non-working claimants without disturbing the general applicability of WCL § 15(5-a). In that the two statutes are not in “utter conflict”, and bearing in mind the courts’ obligation to construe the two statutes in harmony “if at all possible,” the portion of Buffalo Auto that purports to invalidate WCL § 15(5-a) is erroneous as a matter of law.

**D. Conclusion – Buffalo Auto.**

The Buffalo Auto opinion did not represent an advance in the Board’s approach to determining loss of wage earning capacity. Indeed, the only portion of the Buffalo Auto decision that addressed the elements contributing to loss of wage earning capacity was a reference to the 1996 Medical Guidelines. This reference was valuable only to the extent that it reaffirmed the principle that factors additional to medical impairment (described as “work restrictions, age, and any other relevant factors”) are relevant to the determination of wage earning capacity. This value is, however, undermined by the failure to identify a specific, comprehensive list of factors that may affect wage earning capacity or to provide a methodology by which those factors could be weighed and applied in practice.

Instead, the Buffalo Auto decision was primarily directed towards the mechanism by which benefits should be awarded after loss of wage earning capacity has been determined. As discussed above, the Board’s assessment that “loss of wage earning capacity” is represented by the difference between the claimant’s pre-injury wage earning capacity and post-injury wage earning capacity (whether represented by actual earnings or the Board’s determination of residual wage earning capacity) is unobjectionable, as its statement that the compensation rate is two-thirds of the loss of wage earning capacity

figure. However, the Board erroneously concluded that (1) the amendment to WCL § 15(3)(w) entitles it to disregard the WCL § 15(5-a) prohibition against finding a post-injury wage earning capacity in excess of 75% for a claimant who is not working; and (2) that the WCL § 15(5-a) provision mandating that wage earning capacity is a function of actual earnings should be disregarded where there is a post-classification in earnings.

## **V. THE DISABILITY DURATION GUIDELINES.**

Against this background, the Insurance Department has now released its proposed “Disability Duration Guidelines.” The Introduction to the Guidelines outlines a three-part structure for the determination of loss of wage earning capacity. First, the worker’s medical impairment(s) related to the accident are to be identified, described, categorized, and assigned a severity ranking. Second, the functional limitations (ability to perform physical activities) associated with the medical impairment are to be assessed by the treating physician and the carrier’s IME, with provision for an impartial evaluation in the event of a difference of opinion as to functional loss. Third, the extent to which the functional limitations affected the worker’s ability to engage in gainful employment are to be determined. See, Disability Duration Guidelines, pp. 4-5.

### **A. The Guideline Process.**

The Guidelines include a Flow Chart which outlines the proposed process. Guidelines, pp. 6-7. The Flow Chart begins with a determination of Maximal Medical Improvement, continues through findings regarding the applicable medical severity ranking and residual functional abilities/losses, and concludes with the consideration of

vocational factors, the determination of loss of wage earning capacity, and classification. It is to be noted that classification and the determination of wage earning capacity occur at the end of the process, and do not relate back to the initial finding of maximal medical improvement.

1. Maximal Medical Improvement.

The process begins with the submission of a report by either party indicating that (1) the claimant has reached maximal medical improvement (“MMI”); (2) he or she is not working; and (3) he or she is permanently partially disabled (Step 1). Upon receipt of such a report, the Board is to request a vocational data form from the claimant and to afford the opposing party to produce its own report on the issue (Step 2).<sup>8</sup>

The first decision to be made is whether the claimant is at MMI (Decision #1).

MMI is defined as

an assessed condition of the claimant based on 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. A finding of maximal medical improvement is a standard precondition for determining the permanent disability level of a claimant. The need for palliative 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.

Guidelines, p. 96.

If the parties agree (or the administrative law judge determines following medical testimony) that the claimant is at MMI for all of the conditions related to the accident,

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<sup>8</sup> The vocational data form is discussed in Section V.D., below.

then the process continues with the submission of severity rankings. If the administrative law judge determines that the claimant is not at MMI, then the process ends and temporary disability benefits continue until a new MMI report is submitted.

## 2. Severity Rankings and Functional Loss.

If MMI is found, then the treating physician and the IME must then submit reports outlining the severity ranking of each work-related medical condition (Step 3(a)). The severity rankings are to be submitted in accordance with the Impairment Guidelines, which are discussed in Section V.B, below.

The treating physician and the IME are also required to submit functional loss evaluations, termed “relevant residual work-related abilities/losses” (Step 3(b)). Functional Impairment is defined as “restriction in or lack of ability to perform a physical or cognitive activity due to a medically diagnosed impairment.” Guidelines, p. 96.

If the physicians agree on severity ranking and functional loss, or if the parties stipulate to those findings, then the process continues to a determination of the loss of wage earning capacity (Step 3(f)). It should be noted that functional loss, not the severity ranking, is the input into loss of wage earning capacity. It is therefore unlikely that the issue of the applicable severity ranking will be subject to significant litigation, as the severity ranking is not directly relevant to wage earning capacity, which is the determinative question regarding benefit awards.

If the parties disagree as to the claimant’s functional loss, then either party or the administrative law judge may request a functional capacity evaluation (“FCE”) by an impartial functional evaluator, identified as a Designated Health Care Professional

("DHCP") (Step 3(c)). The report of the DHCP is to be returned to the treating physician and the IME for reconsideration of their opinions (Step 3(d)). If there is still no agreement, then cross-examination of the treating physician, the IME, and the DHCP is to be permitted (Step 3(e)), after which the administrative law judge may determine the claimant's severity ranking and functional loss (Decision #2). Following this decision, the process continues to a determination of the loss of wage earning capacity.

The Residual Functional Abilities/Losses Guidelines are discussed in Section V.C., below.

### 3. Loss of Wage Earning Capacity.

The Guidelines process culminates in a determination regarding the claimant's loss of wage earning capacity. The Guidelines state that although "a consensus could not be reached by the Advisory Committee about the approach for determining loss of wage earning capacity," certain factors must be considered. Guidelines, p. 5. Those factors include education, skill level, and age, which are to be collected on the vocational data form. Guidelines, p. 4. The Guidelines further state that four different approaches to the determination of loss of wage earning capacity were considered: (1) the Grid Approach; (2) the Vocational Specialist Approach; (3) the Hybrid Approach; and (4) the Litigation Approach. Guidelines, pp. 4-5.

The issue of loss of wage earning capacity is considered in Sections V. D. and VI, below.

## **B. Medical Impairment Guidelines.**

The Impairment Guidelines “require an accurate history, contemporaneous physical examination and review of the medical record, including test results. ... Physicians are to look to the objective findings of the physical examination and data as contained within the medical records.” Guidelines at p. 8. The Impairment Guidelines are not to be used until the patient has arrived at MMI. Guidelines, p. 10.

The structure of the Impairment Guidelines is that “each body part is designated by a Chapter number and each Guideline within a Chapter is designated as a Schedule.” Id. Schedules are then supplemented by Tables regarding specific types of clinical finding. Id.

The Impairment Guidelines include three important cautions. First, the medical severity ranking for body part (Chapter) “should not be compared to the rankings in other Chapters. For example, a ‘D’ ranking in the Spine and Pelvis Chapter is not intended to imply that a ‘D’ ranking in the Respiratory Chapter is of equal severity.” Id. Second, “there is no formula for combining severity rankings,” meaning that each severity ranking must be considered independently, as must the functional abilities/losses associated with each underlying medical impairment. Guidelines, p. 9. Third, and most importantly, “the Medical Impairment Class and severity ranking should not be used as a direct translation to loss of wage earning capacity.” Guidelines, p. 8, see also Guidelines, p. 9. Again, the medical severity ranking exists solely to provide a foundation for the assessment of functional loss, and it is functional loss that (when combined with vocational factors) is directly relevant to loss of wage earning capacity.

To use the Impairment Guidelines, the physician must first identify the injured body part(s) and select the appropriate Chapter(s). For example, if the spine or pelvis is involved, the physician would turn to Chapter 2.

Having identified the applicable Chapter, the physician must then identify the applicable Schedule(s). For example, if the injury involved a soft tissue condition of the spine that did not involve surgery, Schedule 2.1 would apply. If the injury involved surgery, Schedule 2.2 would apply. Vertebral fractures would require consideration of Schedules 2.3, 2.3(a), 2.3(b) or 2.3(c), depending on the nature of the fracture. Spinal cord injury would require consideration of Schedule 2.4.

Once the proper Schedule(s) are identified, the physician must then identify the Medical Impairment Class, which is the group of findings (including the patient's subjective complaints, clinical findings, and diagnostic test results) that best matches the patient's condition. For example, a medically documented spinal injury without surgery, but with recurrence/persistence of symptoms, no objective clinical findings, and correlative imaging findings would be a Class 3 injury. Pursuant to Schedule 2.1, this injury would receive a severity ranking of "B" whether it occurred in the cervical, thoracic, or lumbar spine.

In some instances, the Medical Impairment Class will require the physician to refer to one or more Tables to determine the appropriate severity ranking. 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. For a Class 4 lumbar spinal injury, the Impairment Guidelines require the physician to

refer to Tables 2.1, 2.3, and 2.4 in order to determine the appropriate severity ranking.<sup>9</sup> Depending on the outcome of the physician's reference to the Tables, the severity ranking may fall anywhere from "D" to "J."<sup>10</sup>

In using the Tables, the physician is required to answer a series of questions, each of which results in a "point score." The points are then totaled and a Point Table identifies the severity ranking represented by the point total. Consider a Class 4 lumbar spinal injury that requires reference to Tables 2.1, 2.3 and 2.4. On Table 2.1, the physician will review imaging test results, EMG results, muscle testing, sensory testing, reflex testing, and range of motion testing, assigning points as indicated for each outcome. Some outcomes on Table 2.1 require the physician to refer to Tables 2.1(a) and 2.1(b) to consider additional findings and derive point totals. The physician will then turn to Table 2.3, identify the affected nerve root, and assign points as indicated for sensory deficit and/or weakness. The physician will thereafter total the points from Tables 2.1, 2.1(a), 2.1(b) and 2.3 and turn to the applicable Point Table, which in this case is Table 2.4. For a Class 4 lumbar spinal injury, Table 2.4 directs the physician to Table 2.4(b), where the point total is converted into a severity ranking between "D and "J."

Regardless of the severity ranking that is obtained as an outcome of the Medical Impairment Guidelines, "[m]edical impairment cannot be directly translated to loss of wage earning capacity. Guidelines, p. 10. The relevance of the severity ranking is simply that it is intended to be "generally predictive of residual functional ability/loss." Id. That

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<sup>9</sup> Note that different Tables are referenced for Class 4 cervical and thoracic injuries.

<sup>10</sup> Note that the range of potential severity rankings for Class 4 cervical and thoracic injuries is different.

finding is intended to be obtained through the Residual Functional Abilities/Losses Guidelines discussed below.

**C. Residual Functional Abilities/Losses Guidelines.**

In addition to determining the medical impairment class and severity ranking under the Medical Impairment Guidelines, the treating physician and the IME are instructed to “determine the current functional abilities and losses, using a standard Functional Assessment Form (FAF).” Guidelines, p. 98.<sup>11</sup> The goal of the functional evaluation is to determine the claimant’s “residual abilities and losses in relation to the work related diagnosed medical impairment and to the likely workplace requirements.” Id.

Section 2 of the FAF inquires whether the claimant is able to return to his or her at-injury job without restriction. If the answer is yes, then there can be no loss of wage earning capacity and the inquiry ends. Guidelines, p. 100.

If the claimant is not able to return to the at-injury job without restrictions, then the next inquiry is whether the claimant might be capable of returning to the at-injury job with restrictions, or alternatively whether he or she may be capable of performing other work. Id. In order to provide a foundation to answer that inquiry, Section 3 of the FAF directs the treating physician and the IME to provide information regarding the claimant’s abilities in a variety of areas. It is important to observe that the evaluation is not limited to the work-related medical impairment, but rather is to consider the claimant’s overall function including the effect of the work-related injury.

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<sup>11</sup> The process in the event of a disagreement between the treating physician and the IME regarding functional ability/loss is discussed in Section V. A., infra.

The FAF specifically addresses the six strength-based exertional categories of lifting/carrying, sitting, standing, walking, climbing, and pushing/pulling, as well as postural limitations in kneeling and bending/stooping. It also attempts to address several non-exertional impairments, including grasping, fine manipulation, reaching (either overhead or at shoulder level), and temperature/humidity. It specifically identifies two work activities that require a combination of exertional and non-exertional abilities, driving a vehicle and operating machinery.

Work involves a variety of exertional, postural, and non-exertional abilities, which are not addressed comprehensively by the first fifteen categories in Section 3 of the FAF. The FAF therefore includes a category labeled “other/environmental limitations,” which may be used to identify functional losses that are not considered elsewhere on the FAF. These would include, among others, the impact of pain and/or medication and conditions which affect the mind, vision, hearing and speech (as well as the delineated “environmental limitations”). The nature and extent of non-exertional impairments can, of course, vary significantly depending on the nature of the medical impairment.

In each of the sixteen categories, the FAF asks the physician to identify whether the claimant can perform the activity “never,” “rarely/occasionally,” “intermittently/frequently,” or “regularly/constantly.” These terms are not defined on the FAF or elsewhere in the guidelines. Some of the categories on the FAF (such as sitting and standing) involve time requirements, but there may be a significant disparity between the amount of time a worker can perform the activity continuously and the total amount of time that same worker perform the activity in an eight-hour workday. Other categories

(such as walking) involve distance, and again there may be a significant disparity between the distance a worker can walk in a single stretch and the total distance that may be walked in a workday. There is no indication that the need to take unscheduled breaks is considered on the FAF. While the form requires weight tolerance for lifting and carrying, it does not do so for pushing and pulling and it also draws no distinction between the tolerance for repetitive weight handling and occasional weight handling, which is a critical distinction in many occupations. We anticipate that the lack of guidance provided by the FAF regarding these and other issues will require significant supplementation of the form by the treating physician and the IME.

The FAF also calls for the physician to determine whether the limitation is entirely, partially, or not at all related to the work-related injury, again without indicating the impact this determination is intended to have on the ultimate conclusion in the cases.

Section 4 of the FAF asks the physician to select the best represents “the claimant’s exertional ability” from the categories of “very heavy,” “heavy,” “medium,” “light,” “sedentary,” and “less than sedentary.” It is important to note that of the sixteen categories of functional ability identified on the FAF, only six fall into the category of “exertional” abilities. As a result, the conclusion in Section 4 of the FAF is not representative of the full range of functional abilities and losses identified in Section 3, but rather is representative only of the subset of functional abilities and losses that are exertional in nature. The Section 4 conclusion is therefore not a summary of all of the information contained in the FAF.

The outcome of the Residual Functional Abilities/Losses Guidelines is intended to serve as an input into the determination of loss of wage earning capacity. We suggest

that administrative law judges must exercise extreme caution in considering the FAF, and must take special care to avoid translating the “exertional loss” conclusion contained in Section 4 of the FAF to loss of wage earning capacity. As discussed above, the FAF lacks adequate definition of many terms, fails to consider the multiple aspects of several exertional abilities, and its conclusion is limited to six exertional abilities listed on the form without consideration of at least ten non-exertional abilities also listed on the form. These undefined and omitted items can directly and significantly impact wage earning capacity, and must be considered by the administrative law judge in the ultimate determination of loss of wage earning capacity, as we discuss further in Section VI, below.

**D. Loss of Wage Earning Capacity Guidelines.**

The Residual Functional Abilities/Losses Guidelines are intended to provide a basis for the determination of the claimant’s loss of wage earning capacity pursuant to a set of Loss of Wage Earning Capacity Guidelines. While the Task Force agreed that factors such as functional loss, education, skill level, and age, are relevant to the issue of wage earning capacity, it was unable to agree on a set of guidelines to synthesize these elements into a method by which the issue could be determined by an administrative law judge. Four different approaches to the determination of loss of wage earning capacity were considered: (1) the Grid Approach; (2) the Vocational Specialist Approach; (3) the Hybrid Approach; and (4) the Litigation Approach.

The issues pertinent to loss of wage earning capacity and each of the four approaches considered by the Task Force are considered in Section VI., below.

## **VI. LOSS OF WAGE EARNING CAPACITY.**

As discussed above, the Disability Duration Guidelines do not address the question of how loss of wage earning capacity is to be determined due to the Task Force's failure to agree on a method by which information about functional loss and vocational factors can be used to determine loss of wage earning capacity. It is essential that a methodology be developed to address this issue, and the Task Force referred the matter to the Board for further consideration and resolution. In this section, we outline the elements that the Board must take into account in completing the work begun by the Task Force.

It is important to note that the Guidelines apply only to permanently partially disabled (non-schedule loss) claimants who are not working. Thus, they do not apply to claims (or the portion of claims) involving (a) temporary disability (whether partial or total); (b) permanent partial disability where the claimant is working (either at reduced earnings or full wages); or (c) permanent total disability (whether from a medical or industrial standpoint). It will be necessary to develop independent methodologies to address benefit awards in such claims, in which elements of the Guidelines may be of some benefit. Claims not covered by the Guidelines are discussed in Section VI. E., below.

### **A. Factors Affecting Wage Earning Capacity.**

The factors that must be taken into consideration in determining the loss of wage earning capacity for a permanently partially disabled claimant who is not working include:

(1) Past Relevant Employment. A disabled worker's loss of earning capacity must be measured from the standpoint of his or her pre-accident earning capacity. The employment in which the worker was injured required some combination of functional ability, education, language proficiency, literacy, and skills. This group of abilities, perhaps supplemented by skills acquired in other past employment, provided the worker with the assortment of abilities that provided his or her pre-injury wage earning capacity. The difference between the pre-accident earning capacity and the workers' post-accident earning capacity is the loss of wage earning capacity that determines benefits under WCL § 15(3)(w).

(2) Functional Loss. Medical impairment is relevant to the extent that it results in functional loss, meaning a reduction in the ability to perform work-related activities. Evaluation of functional loss must include consideration of both "exertional impairments," which are those affecting an individual's physical abilities requiring strength, such as the ability to walk, stand, sit, lift, carry, push, pull; and "non-exertional impairments," which include the effects of pain and/or medication, environmental restrictions and those which affect the mind, vision, hearing, speech, use of the body to climb, balance, stoop, kneel, crouch, crawl, reach, or handle, or use the fingers for fine activities.<sup>12</sup>

(3) Age. Age impacts wage earning capacity, especially for particularly young or old workers.

(4) Education. Lack of education adversely impacts wage earning capacity. The relevant educational categories for workers educated in the United States can generally be described as "less than high school," "high school or G.E.D.," "vocational school," and

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<sup>12</sup> See SSR 83-10.

“college or greater.” Determining the equivalent level for non-U.S. education is especially challenging and requires careful consideration.

(5) Skills. As mentioned above, 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.” Skills that are not transferable to new employment should not be included in determining the worker’s pre-injury skill level.

(6) Language Proficiency. Absent or limited ability to communicate fluently in English has a negative impact on wage earning capacity. It is important to observe that there are varying levels of fluency that accordingly affect wage earning capacity to varying degrees.

(7) Literacy. Absent or impaired English language literacy has a negative impact on wage earning capacity. It is important to observe that there are varying levels of literacy that accordingly affect wage earning capacity to varying degrees.

(8) Other Factors. There are a variety of additional factors that affect wage earning capacity, including the nature and availability of jobs in the local economy, the availability of public transportation, and aspects unique to the individual injured worker. Some of these factors may have a quantifiable impact on wage earning capacity, while others may be wholly unquantifiable.<sup>13</sup>

In order to determine how these factors affect wage earning capacity, a system must be devised that assigns weight to each, produces a set of reasonably foreseeable results that can be anticipated by the parties, and provides for the sound exercise of discretion by the administrative law judge. At least one analogous system already exists

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<sup>13</sup> These factors are discussed further in Section VI. C., below.

and may be used as a reference in this effort – that used by the Social Security Administration.

**B. The Social Security Disability System.**

The Social Security Administration (“SSA”) has created a complex regulatory framework which is helpful in considering how to evaluate the impact of injury on a worker’s earning capacity. However, unlike workers’ compensation systems that provide benefits for partial loss of earning capacity, SSA awards benefits only when it finds that the worker has lost virtually all earning capacity. As a result, the SSA regulatory framework cannot be imported wholesale into the workers’ compensation arena.

The SSA disability determination system is based on the “sequential evaluation process.”<sup>14</sup> Because the sequential evaluation process is tied to the standard for receipt of Social Security disability benefits (“SSDB”), which as noted above is different from the standard for receipt of workers’ compensation benefits, not all of its elements are relevant to our inquiry. However, a number of steps in the process (and SSA’s regulations related to those steps) are important to consider in developing a standard to determine loss of earning capacity.

An early step in the sequential evaluation process is determining whether the injured worker has a medical impairment. This decision is made with reference to medical evidence regarding the worker’s diagnosis, clinical presentation and the nature of

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<sup>14</sup> 20 CFR § 404.1520

the associated physical, mental or other restrictions.<sup>15</sup> The Disability Duration Guidelines provide an analogous step through the Medical Impairment Guidelines.

If there is a medical impairment, it is then compared to SSA's medical "listings."<sup>16</sup> A "listing" will typically include a diagnosis, a number of findings that may be associated with that diagnosis, and the degree of those findings. If the worker's condition matches the listing, or if the worker has other findings that "equal" those of the listing, the worker is deemed "disabled" and entitled to SSDB. In essence, the listings presume that certain medical conditions with appropriate findings preclude substantial gainful employment of the individual. The Disability Duration Guidelines do not provide a direct analogy to this step.<sup>17</sup>

If the worker does not "meet or equal a listing," the sequential evaluation process continues, focusing on how the disability impacts the worker's earning capacity. At the next step, the agency assesses the worker's "residual functional capacity." This assessment is made by considering "exertional" and "non-exertional" impairments. "Exertional" impairments are those which affect an individual's ability to sit, stand, walk, lift, carry, push and pull.<sup>18</sup> Any other impairments are deemed "non-exertional," and may include such things as inability to see or hear, loss of concentration due to pain, the need to periodically elevate an injured leg, the loss of fine motor skills, and more.<sup>19</sup> Again, the Disability Duration Guidelines provide an analogous step through the Residual Functional Abilities/Losses Guidelines.

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<sup>15</sup> We note that while this is where the Social Security process begins, it is essentially where the existing workers' compensation process ends.

<sup>16</sup> 20 CFR § 404 Subpart P, Appendix 1

<sup>17</sup> But see Section VI. E. 2., below, regarding the potential use of the Medical Impairment Guidelines to establish permanent medical total disability.

<sup>18</sup> SSR 83-10, SSR 96-9p

<sup>19</sup> See, e.g., SSR 83-12, SSR 83-14, SSR 83-15, SSR 96-9p

Once the injured worker's residual functional capacity has been determined, a finding is made whether the worker can perform his or her "past relevant work," which is generally the types of job the worker has done in the past 15 years.<sup>20</sup> If the worker is able to perform his or her past relevant work, then the worker is not disabled for purposes of SSDB.

If the worker cannot perform his or her past relevant work, the inquiry turns to whether he or she can do other work.<sup>21</sup> Unlike the present workers' compensation system, in which "other work" is often considered in a vacuum without reference to its actual availability or the worker's vocational characteristics, SSA limits its consideration to "other work" that exists in substantial numbers in the local or regional economy and which may be suitable for the injured worker. Factors that are considered include the worker's residual functional capacity, age, education, language proficiency, literacy and work experience.<sup>22</sup>

Under SSA's "medical-vocational guidelines," often referred to as "the grids," some workers are deemed disabled at this stage of the process.<sup>23</sup> If the worker is not awarded SSDB on the grids or at any earlier stage of the process, a hearing is held before an administrative law judge on the question of whether SSA correctly assessed the worker's residual functional capacity (age, education, and work experience being generally uncontroversial, although issues occasionally arise). The worker is granted benefits if his or her residual functional capacity, combined with age, education and work

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<sup>20</sup> SSR 82-61

<sup>21</sup> At this point in the sequential evaluation process the burden shifts from the worker to the Social Security Administration, which is required to prove that there is other work the claimant is capable of performing and that such work exists in significant numbers in the local or regional economy.

<sup>22</sup> 20 CFR Subpart P, Appendix 2

<sup>23</sup> *Id.* Workers who are found to be disabled "on the grids" are usually those over the age of 50; younger workers rarely "grid out."

experience, preclude the performance any job that exists in significant numbers in the national economy.<sup>24</sup>

### **C. Translating the Social Security Process for Workers' Compensation.**

Social Security Disability benefits are available only for what is essentially “total disability” either from a medical or industrial standpoint, whereas workers’ compensation benefits may be paid for a range of partial disabilities.<sup>25</sup> It is clear that a worker who satisfies some portions of the sequential evaluation process, but not enough to be awarded SSDB, may have a significant loss of earning capacity that would create an entitlement to workers’ compensation benefits. Therefore, if the Social Security process is to be used as a guideline for the evaluation of earning capacity in the workers’ compensation system, a method must be developed to translate the results of the sequential evaluation process to address the full range of disability, rather than to fit a binary conclusion of “disabled” or “not disabled.”<sup>26</sup>

Under the 2007 amendments to the Workers’ Compensation Law, 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 permanent partial disability benefits that may be paid in each segment.

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<sup>24</sup> Id. Again, the ability to perform a hypothetical job is not sufficient to deny benefits. SSA must establish that the job actually exists in significant numbers and that it is usually performed in a way that is consistent with the worker’s limitations.

<sup>25</sup> We here use the term “disability” as shorthand for “loss of earning capacity;” it is understood that “total disability” equates to complete loss of earning capacity and “partial disability” equates to partial loss of earning capacity.

<sup>26</sup> “Disabled” in the Social Security sense being the equivalent of “totally disabled” in workers’ compensation.

<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. <sup>27</sup>

Workers' Compensation Law § 15(3)(w).

The determination of loss of wage earning capacity is more closely related to the concept of “industrial disability” than it is to the concept of medical impairment. If the medical impairment does not totally disable the worker, then its severity from a medical standpoint is less relevant to its impact on earning capacity than the extent to which it affects the worker’s functional capacity.<sup>28</sup>

A system must therefore be devised to determine how much earning capacity is lost as a worker’s residual functional capacity is diminished by injury, having due regard for the worker’s age, education, skills, language proficiency, and literacy. The Task Force considered four options: (1) the Grid Approach; (2) the Vocational Specialist

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<sup>27</sup> We note that there is an inherent conflict between the lowest category of disability (1%-15%) contained in WCL § 15(3) and the fact that WCL § 15(5-a) prohibits the Board from finding a worker who is partially disabled from having an earning capacity “in excess of seventy-five percentum of his former full time actual earnings.” The effect of WCL § 15(5-a) is that the Board may not make an award for less than a 25 percent “disability” to a partially disabled worker, so that only 11 of the 12 segments of partial disability contained in WCL § 15(3) can legally be used. For purposes of this paper, however, we will use the 12 segments of partial disability established by WCL § 15(3).

<sup>28</sup> Of course, in many situations greater severity of medical impairment is associated with greater functional loss. Therefore, although medical impairment is not directly related to loss of wage earning capacity, it will often retain an indirect impact on the ultimate determination.

Approach; (3) the Hybrid Approach; and (4) the Litigation Approach. Guidelines, pp. 4-5.

1. The Grid Approach.

A Grid Approach should include each of the factors that contribute to wage earning capacity, assign a range of figures representing the degree of loss of wage earning capacity associated with the extent to which each category was affected by the injury, and then modify those figures by reference to the worker’s other characteristics. In most cases, the category primarily affected by injury is exertional function, which must then be modified by reference to the worker’s age, education, skills, language proficiency, literacy, non-exertional impairments, and other factors.<sup>29</sup> As a result, a Grid might look something like this:

Functional Exertional Ability		Impact	Past Relevant Skills			Education				Age					Lang. Comp.	Literacy	Non-Exertional Impairments	Other Factors
Before	After		Unskilled	Semi	Skilled	< HS	HS	>HS	College	< 25	25 - 34	35 - 44	45 - 54	> 54				
Very Heavy	Heavy	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Very Heavy	Medium	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Very Heavy	Light	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Very Heavy	Sedentary	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Very Heavy	< Sedentary	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Heavy	Medium	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Heavy	Light	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Heavy	Sedentary	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Heavy	< Sedentary	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Medium	Light	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Medium	Sedentary	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Medium	< Sedentary	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Light	Sedentary	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Light	< Sedentary	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	
Sedentary	< Sedentary	X	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	+/	

<sup>29</sup> It must be borne in mind that the non-exertional consequences of some injuries are far greater than their impact on exertional loss. Head trauma, psychological disability, and conditions that cause environmental limitations can result in purely non-exertional impairments that may significantly impact wage earning capacity. In addition, many injuries have both exertional and non-exertional impacts (for example, hand injuries that can affect both the ability to lift and carry (exertional) and the ability to use the fingers for fine manipulations (non-exertional)).

It is, of course, essential that proper consideration be given to impact on loss of wage earning capacity caused by the contribution of each of the elements that appear on the Grid. In some instances, elements should be assigned specific values, while in others a range of values should be provided. Each element is considered separately below.

a. Exertional Loss.

An injured worker's pre-injury exertional ability should be defined by referring to the physical demands of the at-injury job.<sup>30</sup> Work is defined as "very heavy," "heavy," "medium," "light," or "sedentary" depending on the frequency and quantity of walking, standing, sitting, lifting, carrying, pushing and pulling required in the job.<sup>31</sup> The worker's loss of earning capacity would then be measured in the first instance by exertional loss from one category to another, greater diminution in exertional ability corresponding to greater loss of earning capacity. Specific figures would be assigned to represent the loss of wage earning capacity associated with a reduction from category to category, with special consideration being given to cases in which the worker was unable to perform the full range of sedentary work activities, which severely impairs wage earning capacity regardless of the exertional level associated with the at-injury employment.<sup>32</sup>

The figure representing the loss of wage earning capacity attributable solely to exertional loss can be called the "impact figure." The impact figure must then be modified by consideration of the worker's skill level, age, education, language proficiency, literacy, non-exertional impairments, and other factors.

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<sup>30</sup> The exertional requirements of other past relevant employments are not significant.

<sup>31</sup> See, 20 CFR § 404.1567; SSR 83-10; SSR 83-12; SSR 83-14; SSR 96-9p

<sup>32</sup> See, SSR 96-9p

b. Skill.

The “skill” required to perform a job is defined by the specific vocational preparation (“SVP”) required for that employment.<sup>33</sup> Depending on the SVP, a job may be characterized as “unskilled,” “semi-skilled,” or “skilled.”<sup>34</sup> 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.<sup>35</sup> In general, there is more work available to skilled workers throughout the range of exertional requirements than to unskilled workers. Therefore, loss of exertional ability impacts the wage earning capacity of unskilled workers more significantly than skilled workers, and the impact figure must be modified to varying degrees depending on whether the worker is deemed to be skilled, semi-skilled, or unskilled.

c. Age.

It is generally accepted that age has an impact on wage earning capacity. Within the Social Security framework, older workers are presumed to have fewer employment opportunities than younger workers, and thus the same injury has a greater impact on wage earning capacity for an older worker than it does for a younger worker.<sup>36</sup> Therefore, the impact figure must be modified to varying degrees depending on the age of the injured worker.

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<sup>33</sup> See, Dictionary of Occupational Titles, U.S. Department of Labor.

<sup>34</sup> SSR 82-41.

<sup>35</sup> Id. 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.

<sup>36</sup> See, 20 CFR Subpart P, Appendix 2

d. Education.

It is generally accepted that lack of education has an impact on wage earning capacity. Most employments require a high school diploma, and many require an associate's degree or equivalent vocational training at a minimum. Within the Social Security framework, 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.<sup>37</sup> Therefore, the impact figure must be 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. A high school degree in the United States, 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 in a Grid Approach, and the administrative law judge must be afforded discretion to make appropriate modification in such cases.

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. The impact of language proficiency is not, however, binary – a mere inquiry into whether a worker “can” or “can’t” speak English is inadequate to properly assess the impact of language proficiency on wage earning capacity. Some jobs, often those that are

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<sup>37</sup> Id.

heavy, unskilled work, can be performed without any ability to speak English. A worker who is unable to speak English and who can no longer perform heavy, unskilled work may have a complete loss of wage earning capacity.

Other jobs, often those that involve unskilled or semi-skilled work with medium exertional requirements, can be performed with rudimentary English language proficiency. Most skilled jobs with light or sedentary exertional requirements require good language proficiency.

Thus, a Grid Approach must allow for modification of the impact figure to a variable degree depending on extent of the worker's language proficiency in the context of the loss of wage earning capacity accounted for by other considerations.

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. 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 Approach must allow for modification of the impact figure to a variable degree depending on extent of the worker's literacy in the context of the loss of wage earning capacity accounted for by other considerations.

g. Non-exertional impairments.

Non-exertional impairments involve injury-related limitations that do not involve the basic "strength" categories that comprise exertional function (which in turn governs

the categorization of pre-injury employment). This includes pain, the impact of prescription medication, environmental restrictions and those which affect the mind, vision, hearing, speech, use of the body to climb, balance, stoop, kneel, crouch, crawl, reach, or handle, or use the fingers for fine activities.<sup>38</sup>

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. 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. One example of such a case would be a worker with a neck injury and carpal tunnel syndrome who also suffers from consequential depression.

The Grid Approach must therefore provide for modification of the impact figure to a variable degree depending on nature and extent of the work-related non-exertional impairments.

#### h. Other Factors.

Other factors that affect wage earning capacity including the nature and availability of jobs in the local economy, the availability of public transportation, and factors unique to the individual injured worker. Consideration must also be given to the

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<sup>38</sup> See SSR 83-10.

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.

The Grid Approach must therefore provide for modification of the impact figure to a variable degree depending on nature and extent of the work-related non-exertional impairments.

i. Grid Approach – Conclusion.

The benefit to the Grid Approach is that it provides consistency and predictability in loss of wage earning capacity determinations. This permits the parties to evaluate the case based on a set of known, pre-determined factors. The drawback associated with the Grid Approach is the arbitrary nature of the wage loss determinations assigned to the factors considered. This can, however, be offset by permitting judicial flexibility in the application of the Grid. It is impractical (and probably impossible) to construct a grid that would take into account every possible permutation of loss of earning capacity and which assigns each permutation a wage loss figure based on scientific data. Thus, any Grid Approach must permit flexibility for administrative law judges to consider which factors apply in any given case, to include those factors in rendering a decision, and to depart upward or downward from any individual grid figure or from the cumulative total where cause exists and is supported by the evidence.

## 2. The Vocational Specialist Approach.

The Vocational Specialist Approach would require assessment of each non-working permanently partially disabled claimant by an impartial vocational specialist (“VS”). The VS would consider the same factors outlined in the Grid Approach, together with other information, resources and literature generally accepted in the profession.

The chief benefits of the Vocational Specialist Approach are the availability of individualized determinations and the presumable scientific basis for such determinations. The drawbacks of the Vocational Specialist Approach are the paucity of qualified professional vocational specialists, the expense of utilizing a VS in each case, and the subjective aspect of the VS assessment, which could lead to a lack of consistency, certainty, and reproducibility of results.

## 3. The Hybrid Approach.

The Hybrid Approach would use the Grid Approach in the first instance, providing the parties or the WCL Judge recourse to an impartial VS in the event of an objection to the result produced by the Grid Approach. In order to preserve the principle benefit of the Grid Approach, VS departure from the grid result would be generally restricted to an upward and downward range, perhaps with a provision for further departure in rare circumstances for good cause shown.

The benefit of the Hybrid Approach is that the consistency and reproducibility of the Grid Approach is maintained, and that the use of the VS can provide verification of the grid result, with appropriate modification where indicated. The drawbacks of the Hybrid Approach are the addition of another layer to the process of determining loss of

wage earning capacity, the lack of available vocational specialists, the expense of VS evaluations, and the uncertainty of result created by departure from the grid.

#### 4. The Litigation Approach.

The Litigation Approach would simply provide all the identified factors to the administrative law judge for assessment and determination. Each party would be permitted to introduce evidence or argument on the question of the weight of each factor and the overall impact of functional loss and vocational factors on wage earning capacity in any given case.

The benefit of the Litigation Approach is that fully individualized determinations would be provided in each case and the provision of full discretion to the parties to introduce evidence and argument on their behalf. The drawbacks of the Litigation Approach are the creation of litigation on the issue of wage earning capacity in addition to litigation on the issues of medical impairment and functional loss, the unequal resources of claimants and carriers in securing experts and evidence, and the lack of consistency and reproducibility of results.

#### **D. Loss of Wage Earning Capacity in Cases Involving Permanent Partial Disability Where the Claimant is Not Working.**

In completing the work delegated to it by the Task Force, the Board must determine which vocational factors are relevant, the weight to be assigned to each, and the system in which the factors are to be applied. Each system considered by the Task Force has benefits and drawbacks, and it impossible to conclude whether one approach is

superior to another in terms of fairness of result in the absence of fully formed products that can be compared. It appears, however, that the Grid Approach has the potential to consider all necessary factors in an objective fashion, is likely to result in the least friction, and will almost certainly produce the most predictable and consistent results. We therefore suggest that the Board explore the Grid Approach as potentially the best vehicle for the determination of loss of wage earning capacity.

#### **E. Claims Not Covered by the Guidelines.**

The Guidelines do not apply to claims for (1) temporary disability, (2) medical permanent total disability, (3) industrial total disability, and (4) permanent partial disability where the claimant is working. The Guideline elements regarding wage earning capacity may, however, prove of some benefit in adjudicating such claims.

##### **1. Claims for Temporary Disability.**

A threshold question is whether there should be a different standard for determining loss of earning capacity during periods of temporary and permanent disability. We have previously discussed the tendency of the workers' compensation system to focus on a worker's hypothetical ability to do work from a medical standpoint without regard to vocational factors. This problem is exacerbated in cases of temporary disability, where the worker's theoretical ability to do some work (or to be retrained to do some work) is used to reduce benefit payments without regard to whether suitable work or retraining is available, practical, or even legal.<sup>39</sup> While it may be reasonable to require

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<sup>39</sup> In some instances collective bargaining agreements or employer policies preclude a temporarily disabled worker from seeking other employment.

a permanently disabled worker to seek vocational retraining or light duty work once it has become clear that the worker will not return to pre-injury status, the same cannot be said in cases of temporary disability. It is patently unreasonable to require a temporarily disabled worker to seek other work or vocational retraining for a limited period of time while that worker retains a reasonable expectation of returning to the pre-injury employment in the near future.

We therefore suggest that the standard for assessing loss of earning capacity during periods of temporary disability should depend on whether the worker is capable of returning to the pre-injury employment or to any light duty or modified work assignment reasonably offered by the employer. If the worker cannot return to the pre-injury employment and no light or modified duty is made available by the employer, the worker should be deemed to have a complete loss of earning capacity during the period of temporary disability.

At a minimum, the impact of vocational factors should be taken into account in cases involving temporary disability, rather than limiting such consideration to cases of permanent disability. Pursuant to WCL § 15(5-a), the legal standard for benefit awards is loss of wage earning capacity, regardless of whether the disability is temporary or permanent. It is irrational and inappropriate to limit consideration of the effect of vocational characteristics on wage earning capacity to cases of industrial total disability. Rather, the Board should consider a worker's vocational characteristics in all non-schedule loss cases, resulting in the systematic award of benefits based on loss of earning capacity instead of purely medical impairment.

## 2. Medical Permanent Total Disability.

One aspect of the Social Security process may be capable of translation into the workers' compensation system to assist in the determination of whether there is a medical permanent total disability. At step three of Social Security's sequential evaluation process the inquiry is whether the worker's injury "meets or equals a listing." This is a purely medical question, and if the worker is found to meet or equal a listing, benefits are awarded. In essence, this step amounts to a non-rebuttable presumption that certain medical conditions, when accompanied by appropriate clinical and diagnostic findings, are totally disabling.

The Workers' Compensation Law already contains something of a counterpart to step three of the sequential evaluation process. Known as the "statutory total disability" provision, Workers' Compensation Law §15(1) provides that a worker who loses any combination of two hands, feet, arms, legs or eyes is deemed permanently totally disabled "in the absence of conclusive proof to the contrary." WCL § 15(1). It would seem logical to supplement this statutory provision with a regulatory standard identifying the severity rankings in each Chapter that constitute medical total disability.<sup>40</sup>

Of course, care must be taken to permit workers who do not meet the applicable severity ranking to establish permanent total medical disability. The severity rankings do not address all known medical conditions, and the process must allow flexibility to permit a judicial determination of permanent total medical disability for good cause shown.

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<sup>40</sup> As the Medical Impairment Guidelines state that the "disability" represented by severity ranking in one Chapter is not equivalent to the "disability" represented by the same severity ranking in another Chapter, the regulation would have to establish the severity ranking that amounts to a permanent total medical disability in each Chapter.

### 3. Industrial Permanent Total Disability.

The concept of “industrial total disability” also presently exists in the workers’ compensation system, and in fact was codified as part of the 2007 amendments to the Workers’ Compensation Law.<sup>41</sup> The principle of industrial total disability is that the worker’s medical impairment and resulting functional loss, when superimposed upon vocational factors including age, education, skills, language proficiency and literacy, leave the working without any earning capacity. Because these factors must be taken into account in deciding claims for permanent partial disability, care must be taken to preserve the statutory right to a claim for industrial total disability over and above the result of the permanent partial disability determination.

Both the Hybrid Approach and the Vocational Specialist Approach involve the use of vocational specialists. As a result, each Approach already includes an element (use of the VS) that can also be used to determine whether the claimant is industrially totally disabled. Should the Board adopt either the Grid Approach or the Litigation Approach, however, then safeguards will be required to ensure the determination and award of industrial total disability benefits in appropriate cases. It is likely that the use of impartial vocational specialists, to whom recourse would be available in certain defined circumstances, would satisfy this requirement.

### 4. Working Claimants.

A claimant who has a medical impairment resulting in functional loss and has arrived at maximal medical improvement may be employed either at full salary or at reduced earnings. The Disability Duration Guidelines expressly do not apply to such

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<sup>41</sup> Workers’ Compensation Law §35(2).

claimants. As discussed in connection with the Buffalo Auto case, supra, WCL § 15(5-a) requires that the earning capacity of a partially disabled claimant who is working be determined by reference to his or her actual earnings, which are of course subject to fluctuation. If wage earning capacity is depending on earnings, and earnings are subject to fluctuation, then the permanent loss of wage earning capacity cannot be determined by reference to earnings. In addition, reduced earnings tend to diminish as earnings increase over time, resulting in a de facto cap on such awards, thus mitigating against the need for imposition of formal caps. We therefore suggest that awards for claimants who are working, whether at full wages or reduced earnings, be deemed awards for temporary disability.<sup>42</sup>

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<sup>42</sup> See, Section IV. C., supra.

## **VII. CONCLUSION.**

The proposed Disability Duration Guidelines represent an important step towards developing a system to determine loss of wage earning capacity. The Guidelines clarify the distinction between “medical impairment” and “loss of wage earning capacity.” The Board has historically adjudicated claims based on medical impairment, with the exception of claims involving industrial total disability. Its interim effort to address the issue of loss of wage earning capacity in Buffalo Auto Recovery, while focusing attention on the proper legal standard governing benefit awards and identifying some factors that may be relevant to the issue, reaches several controversial legal conclusions and fails to provide a systematic approach.

Each system considered by the Task Force has benefits and drawbacks. Having considered the elements of each, however, we therefore suggest that the Board explore the Grid Approach as potentially the best vehicle for the determination of loss of wage earning capacity.

Dated: October 27, 2010

Respectfully submitted,  
*Robert E. Grey*  
Robert E. Grey

### **SUBMITTED ON BEHALF OF:**

**NEW YORK STATE AFL/CIO  
INJURED WORKERS’ BAR ASSOCIATION  
NEW YORK COMMITTEE FOR OCCUPATIONAL SAFETY AND HEALTH  
WORKERS’ COMPENSATION ALLIANCE  
WESTERN N.Y. COMMITTEE FOR OCCUPATIONAL SAFETY & HEALTH**