

***Workers' Compensation
Guidelines for
Determining Impairment***
First Edition, November 22, 2017
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I. Introduction

The analysis examines the *Workers' Compensation Guidelines for Determining Impairment* issued by the New York Workers' Compensation Board on November 22, 2017.

The proposed *Guidelines* have serious deficiencies in part because the draft provides a confusing discussion of the purposes of workers' compensation cash benefits. The draft also confounds the purposes of cash benefits and the operational approaches used to determine the amounts of those benefits. The draft also fails to provide evidence justifying the changes in the *Guidelines* from the previous edition published in 2012.

The Workers' Compensation Board should withdraw the November 2017 draft of *Guidelines for Determining Impairment* and start the process of preparing *Guidelines for Determining Disability*.

Sections II to V provide a general framework for understanding cash benefits in workers' compensation. Sections VI to VIII analyzes the draft *Guidelines for Determining Impairment* and provides suggestions for an evidence-based procedure to produce *Guidelines for Determining Disability*.

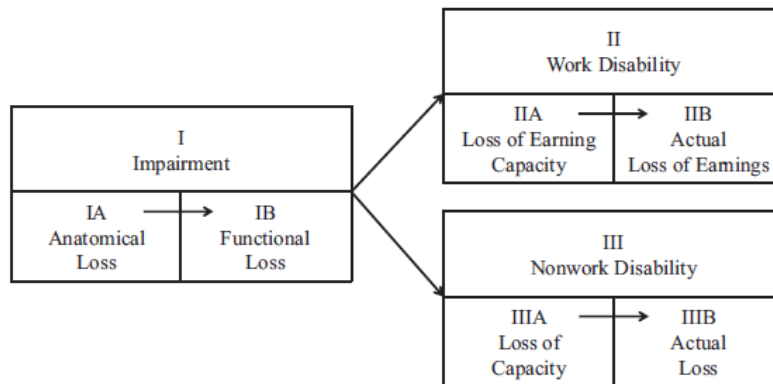
II. The Consequences of Workplace Injuries and Disease

The consequences of workplace injuries or diseases are shown in Figure 20-4.²

- *Impairment* includes the medical consequences, such as an anatomical loss (amputation of a leg) or functional loss (deficits in shoulder motion).
- *Work Disability* includes both presumed loss of earning capacity and actual loss of earnings.

- *Nonwork Disability* includes the presumed loss of the quality of life resulting from the impairment and the actual loss of the quality of life.

Figure 20-4
Consequences of an Injury or Disease



The arrows in Figure 20-4 may suggest precise chains of causation, such as an impairment involving 50 percent loss of use of arm results in a 25 percent of loss of earning capacity, which in turn causes a 25 percent loss of actual earnings. In the “real world,” there are many factors that affect the relationship between a particular impairment and the resulting loss of earning capacity and loss of actual earnings. These include controllable factors, such as medical care, vocational rehabilitation, and employer return-to-work policies, as well as uncontrollable factors, such as the workers’ age and prior education and the general state of the labor market. The lack of a close relationship among impairment, loss of earning capacity, and actual loss of earnings is discussed in more detail in Section IV.

III. The Purposes of Workers’ Compensation Cash Benefits

The purpose or purposes of workers’ compensation cash benefits and in particular permanent partial disability (PPD) benefits are discussed in Burton (2008a, 15, 23-25).³ Arthur Larson argued that the purpose of PPD benefits is to compensate for work disability as that concept is defined in Section II, that is the worker’s actual loss of wages or loss of earning capacity. The National Commission on State Workmen’s Compensation Laws (1972, 69) indicated that the primary purpose of benefits “should be the worker’s loss of wages” but that “limited payments for permanent impairment are appropriate.” The Commission’s discussion indicates that “permanent impairment” includes nonwork disability as that concept is used in Figure 20-4. The National Commission suggested (1972,

69) that if a state wanted to compensate both work disability and nonwork disability, there should be two types of benefits: one for work disability and one for nonwork disability. Two states and several Canadian provinces currently use the dual benefits approach for permanent partial disability benefits.⁴

To simplify the discussion, I assume that the sole purpose of PPD benefits is to compensate for work disability (loss of earning capacity or actual wage loss).

IV. The Operational Approaches to Workers' Compensation Cash Benefits

Three operational approaches are used for cash benefits in the United States, as shown in Figure 20-5.⁵

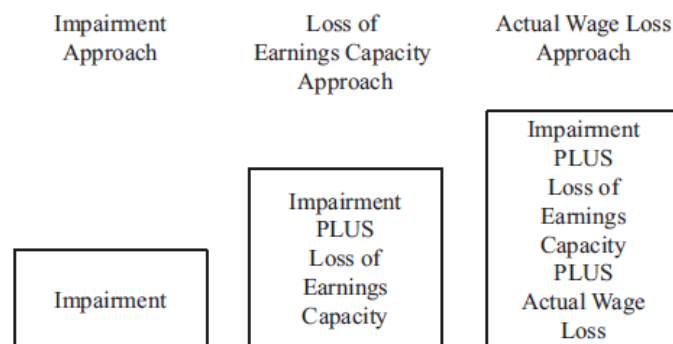
- The *impairment approach* rates the degree of impairment (anatomical loss or functional loss) resulting from the injury or disease and bases the amount of cash benefits on the impairment rating. The impairment approach also includes ratings that consider the impact of the injury or disease on the activities of daily living. A worker can receive cash benefits using the impairment approach even if the worker does not experience a loss of earning capacity or a loss of actual wages.

- The *loss of earning capacity approach* requires the worker to have an impairment and then rates the loss of earning capacity resulting from the injury or disease, taking into account the type and severity of the impairment as well as factors such as the worker's age, education, and previous work experience. The amount of cash benefits is based on the rating of the loss of earning capacity. A worker can receive cash benefits using the loss of earning capacity approach even if the worker does not experience a loss of actual wages.

- The *actual wage loss approach* requires the worker to have an impairment, a loss of earning capacity, and an actual loss of earnings due to the injury or diseases. The actual loss of earnings is determined by comparing the worker's earnings in the preinjury period with the worker's earnings after the work-related injury or disease. The amount of cash benefits in the actual wage loss approach is based on the actual loss of wages or the loss of earning capacity, whichever is less.

Figure 20-5

Three Operational Approaches to Cash Benefits in Workers' Compensation



The arrows in Figure 20-4 and the discussion in the preceding paragraphs suggest a chain of causation from impairment to loss of earning capacity to actual loss of earnings. This helps explain the reliance on the impairment operational approach or the loss of earning capacity operational approach to serve the purpose of workers' compensation cash benefits – namely to compensate for actual wage loss. *The implicit assumption is that permanent impairment ratings and loss or the loss of earning capacity are appropriate proxies or predictors of the extent of actual wage loss for an injured worker.* However, the chain of causation is neither immutable nor automatic after the injury because the links in the chain can be affected by factors such as the worker's personal characteristics (including age, education, and work experience), by acts by participants in the delivery system of medical care and rehabilitation services (including physicians), and by public policy (including statutes that provide incentives to employers to rehire disabled workers).

Despite these drawbacks of relying on proxies for actual wage loss, the impairment operational approach is used in part because it is the easiest approach to administer since only one factor is considered – the seriousness of the worker's medical condition. And while the loss of earning capacity approach is more complicated than the impairment approach, it avoids the problems of having to monitor actual wage losses and decide how much of the losses is due to the workplace injury and how much is due to other factors, such as the nonoccupational injuries or the worker's decision to curtail work effort because lower earnings may be partially offset by higher PPD benefits. And employers, insurers, state workers' compensation administrators, lawyers, and many workers prefer the impairment or loss of earning capacity operational approaches in which the amount of PPD benefits can be determined in a hearing soon after the date of MMI rather than having to keep cases open for extended periods to see how the worker fares in the labor market.

V. Evaluation of Workers' Compensation Cash Benefits

The generally accepted criteria for cash benefits in the workers' compensation program is that they should be adequate and equitable.⁶

- The National Commission on State Workmen's Compensation Laws (1972) recommendations for most types of cash benefits (all but PPD Benefits) required the benefits to replace at least two-thirds of wages lost because of work injuries to be considered adequate. Subsequently, the National Academy of Social Insurance required PPD benefits to replace at least two-thirds of lost wages to be considered adequate (Hunt 2004)

- The equity criterion for PPD benefits has two dimensions. Horizontal equity requires that workers who experience equivalent losses of wages should receive equal benefits. Vertical equity requires that workers with different losses of wage should receive benefits proportional to their losses.

The adequacy and equity criteria have been used in empirical studies of workers' compensation permanent partial disability (PPD) benefits, which are known as wage-loss studies. Wage-loss studies rely on data from large samples of injured workers who received PPD benefits and compares their permanent disability ratings, the workers' compensation benefits received by the workers, and the actual losses of wages for the workers as result of their workplace injuries.

Berkowitz and Burton (1987) examined workers in California, Florida, and Wisconsin in a wage-loss study. The PPD benefits were considered adequate in Wisconsin and Florida and inadequate in California. The study found serious equity problems with the PPD benefits in all three jurisdictions.

More recent wage-loss studies have also found equity problems but also found serious adequacy problems. For example, Boden, Reville, and Biddle (2005, 37) conducted wage-loss studies in five jurisdictions (California, New Mexico, Oregon, Washington, and Wisconsin). PPD benefits replaced between 16 and 26 percent of earnings losses in the ten years after the workers were injured, which the authors concluded did not meet the benchmark for adequacy.

VI. The Operational Approaches and Purposes of Workers' Compensation Cash Benefits in New York

There are several reasons why it is evident that the purpose of §15. *Schedule in Case of Disability* is to provide compensation for work disability (not for impairment).

- (1) The original 1910 Workers' Compensation Law did not contain a list of impairments to determine the duration or amount of cash benefits. The purpose of the cash benefits was to compensate for work disability. As discussed by Larson, the list of scheduled benefits was added to the New York Law to simplify the application of the law, not to change the purpose of the cash benefits. In essence, the durations in §15(3)(a)-(l) provided estimates of the durations of wage loss expected for losses of the various members.
- (2) § 15(3)(v) provides another indication that the purpose of the scheduled PPD benefits is to compensate for work disability. If the worker with 50 percent or more loss of an arm, leg, hand, or foot is still experiencing an "impairment of wage earning capacity" at the end of the scheduled period of PPD benefits, the worker is entitled to additional cash benefits. This extension of the duration of PPD benefits only makes sense if the purpose of the benefits is to compensate work disability.
- (3) §15(3)(w) deals with "other cases" than the body members covered by the schedule. For these workers, the PPD benefit is 66 2/3 percent of the difference between the worker's actual wages during the permanent disability period and the worker's wage-earning capacity. This is an example of the actual wage-loss approach since the worker with no earnings loss is not entitled to any benefits under this provision. (There may be a settlement that provides benefits on the assumption that a loss of earning capacity may manifest itself later in actual loss of wages.)

The conclusion of this review of the operational features of the New York PPD benefits provided by §15 *Schedule in Case of Disability* is that the purpose of all the variants of PPD benefits is to compensate for work disability (an economic consequence of an injury or disease) and not to compensate for impairment (a medical consequence of an injury or disease).

VII. An Examination of the *Workers' Compensation Guidelines for Determining Impairment* Proposed by the New York Workers' Compensation Board

The proposed *Workers' Compensation Guidelines for Determining Impairment* issued on November 22, 2017 by the New York Workers' Compensation Board is seriously deficient for several reasons.

First, the purpose of the cash benefits and the general thrust of the *Guidelines* are inconsistent. Chapter 1 begins with this sentence (which is consistent with previous sections in my analysis):

Disability is a legal determination that reflects the impact of a workplace injury on a claimant's ability to work.

The next sentence in Chapter 1 then pronounces:

The Workers' Compensation Law Judge establishes the level of disability based on the available medical evidence and other relevant information.

What is the "other relevant information" on which the Judge is to base his determination of "the impact of a workplace injury on a claimant's ability to work"? I find no guidance for the Judge in the draft *Guidelines*. And where should the information on a claimant's ability to work come from? On page 7, the medical provider is provided seven instructions, including "For a non-schedule permanent disability, evaluate the impact of the impairment(s) on claimant's functional and exertional abilities." But "functional and exertional abilities" are surely not the only relevant factors that determines the "impact of a workplace injury on a claimant's ability to work."

Second, the proposed *Guidelines* seem to confuse the purpose of the cash benefits with the operational approaches use to determine the amount of permanent partial disability (PPD) benefits. The Impairment Operational Approach relies on impairment ratings, but the role of those impairment ratings is to provide a proxy (or predictor) of the extent of work disability that will result from the impairments. However, the proposed *Guidelines* do not seem to adopt the Impairment Operation Approach since, the Judge is supposed to rely not only on "the available medical evidence" but also on "other relevant information."

Third, the November 2017 *Guidelines* replace the *Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity* that were issued in December 2012 by the Workers' Compensation Board without any discussion of the reasons for any changes since 2017 or any evidence justifying any changes in the ratings for particular medical conditions. Arguably, impairment ratings for some medical conditions could be reduced because advances in medical care that shorten the duration

of recovery and thus affect the relationship between an injury and the extent of the resulting impairment. Presumably this advance in medical care should also affect the extent of the resulting work disability. However, the November 2017 draft of the *Guidelines* apparently provides no citations to studies documenting this beneficial effect of modern medicine on the extent of impairment or on the extent of work disability.

Moreover, the proposed *Guidelines* do not discuss other factors that can adversely affect the relationship between an injury and the extent of the resulting impairment that have received considerable attention in the research literature in recent year, including the wide-spread use of opioids.

Fourth, the proposed *Guidelines* do not discuss the evidence about the factors that can affect the relationship between a worker's impairment and the extent of the resulting work disability. This lack of evidence in the November 22 draft of the *Guidelines* is disturbing because there is a well-established methodology (the wage-loss studies discussed in Section V) that has been used to determine the validity of impairment ratings as a predictor of work disability.

For example, in recent decades, the occupational composition has shifted towards more skilled occupations, which may rely less on physical strength and more on skills requiring advanced education. Workers who have the requisite skills may experience smaller earnings losses for their impairments than in earlier decades. However, workers who do not have the education or training needed to qualify for the emerging skilled occupations may experience greater earnings losses for their impairments than in earlier decades.

Another example of the changing relationship between a worker's impairment and the resulting work disability is the state of the labor market. A recent RAND study (Dworsky et al. 2016) indicates that many workers experienced greater wage losses in recent years for a given level of impairment than did workers with similar impairments prior to the Great Recession of 2008-09.⁷

In summary, there is no indication that the proposed *Guidelines* considered any evidence on factors (1) that may affect the consequences of workplace injuries on the extent of the resulting impairment or (2) that may affect the impact of impairments on the resulting work disability. In short, there is no evidence that the proposed *Guidelines* are evidence-based.

VIII. Suggestions on How to Proceed

First, the Workers' Compensation Board should withdraw the proposed *Guidelines for Determining Impairment* that was released for comments on November 22, 2017.

Second, the Workers' Compensation Board should reword the title of the proposed *Guidelines* to reflect the proper scope of the document.

- In 2012, the Workers' Compensation Board issued the *NYS Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity, December 2012*

- In 2017, the Workers' Compensation Board released the *Workers' Compensation Guidelines for Determining Impairment*. The change in the title to omit the reference to Loss of Wage Earning Capacity is indicative of the failure to recognize the primary purpose of the guidelines

- The new guidelines should be entitled *Workers' Compensation Guidelines for Determining Loss of Wage Earning Capacity* to reflect the actual purpose of the guidelines.

Third, the Workers' Compensation Board should commission a wage-loss study of injured workers who received permanent partial disability (PPD) benefits in New York to determine if the current PPD benefits are adequate and equitable.

Fourth, based on the evidence from the wage-loss study and with the assistance of an Advisory Committee that includes, *inter alia*, experts on the determination of the extent of work disability that results from workplace injuries and diseases -- the Workers' Compensation Board should prepare *Guidelines for Determining Loss of Wage Earning Capacity* that will increase the adequacy and equity of the cash benefits in the New York workers' compensation program.

Fifth, an alternative approach to improving the adequacy and equity of the PPD benefits in New York involves a two-step process.⁸

- The first step would revise as necessary the impairment ratings to reflect current evidence on the relationship between particular injuries and the extent of impairment resulting from the injury. (This corresponds to the Third topic discussed in Section VII of my analysis.)

- The second step would then determine the relationship between these impairment ratings and the actual wage losses experienced by workers with those ratings. This information could then be used to produce adjustment factors that convert impairment ratings into disability ratings. If, for example, the impairment ratings from the *Guidelines for Determining Impairment* for upper extremities systematically under-predict the actual loss of earnings by 20 percent compared to the predictions for other types of impairments, then New York can adopt an evidence-based impairment-to-disability-conversion factor (EBIDC factor) that would increase the PI ratings for upper extremities by 20 percent in order to determine the appropriate amount of PPD benefits.

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Endnotes

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² Section II and Figure 20-4 are based on Burton (2017, 967).

³ Section III is based in part on Burton (2017, 967)

⁴ Burton (2008b, 16-17) describes the dual benefits or concurrent benefits approach. Massachusetts and Rhode Island apparently are the only states that currently provide two tracks of benefits that are paid concurrently, one of which is designed for work disability and one of which is designed to compensate for nonwork disability. Florida had two types of PPD benefits between 1979 and 1990, one of which relied on the impairment operational approach and one on the actual wage loss operational approach (which are described in Section IV of the current analysis). In addition, several Canadian provinces currently use the dual benefits approach. Sinclair and Burton (1994) examined Ontario, which since 1989 has relied on a dual-award system of PPD benefits, which includes one benefit designed to compensate injured workers for their loss of earning capacity and another benefit designed to compensate the workers for the loss of enjoyment of nonworking life (Noneconomic Loss).

⁵ Figure 20-5 and Section IV are based on Burton (2017, 968-69).

⁶ The discussion of the adequacy and equity criteria for evaluation of cash benefits is based on Burton (2008b, 17-25).

⁷ "If we compared a worker injured before the recession (2005-2007) with a worker injured after the recession (2010-2012) who had the same demographics, earnings, job tenure, employer, and injury characteristics, earnings losses would be 4.8 percentage points (19%) greater for the worker injured after the recession." (Dworsky 2016, xviii-xix).

⁸ The proposal for a two-step process to improve the adequacy and equity of the PPD benefits in New York is similar to a proposal involving the American Medical Association *Guides to the Evaluation of Permanent Impairment* provided in Burton (2008, 30).