

Disabled, but employed and earning more than before: Where's the loss?

Calculating worklife loss relies on five criteria to predict loss of future earning capacity in cases of partial disability

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[*Editor's. Note: This is the fourth in a series of articles that explore issues surrounding the determination of damages from loss of future earning capacity in cases of partial disability*]

It may be obvious, but it needs to be noted that in order for there to be a loss of future earning capacity, the individual needs to have had a capacity to earn prior to the injury. Thus, with rare exception, if the plaintiff is past retirement age and not working, or was collecting Social Security Disability Insurance prior to the incident in question, there is not likely to be a loss of earning capacity.

However, there is a difference between not having an earning capacity and not having a past earnings history. For example, a woman, age 35, who is seriously injured in an automobile collision may have an earning capacity, even if she has been a homemaker and mother to her children and thus has never earned money in the labor market. Many women return to or enter the workforce as their children get older; therefore, it is probable that the woman in this hypothetical has suffered a loss of future earning capacity.

Additionally, for there to be a loss of future earning capacity the injured individual needs to have suffered a permanent impairment resulting in a disability. The evidentiary basis for this conclusion is typically provided by physicians and/or medical experts. Ideally, the evidence is presented in the form of *work limitations*, such as no lifting over 25 lbs., sedentary or light work only, cannot sit for more than two hours, etc. Such a plaintiff would meet the criteria for having a work disability as defined by the U.S. Department of Commerce, Bureau of the Census. Data specific to a work disabling condition are collected in a survey known as the Current Population Survey (CPS), which measures both earnings and employment for persons with a work disability. (U. S. Census Bureau. *Public Use Files from the March Current Population Survey (CPS).* 1998 forward. http://www.bls.census.gov/ferretftp.htm#cpsmarch (accessed December 2008).)

In addition, the Census Bureau conducts a macro survey known as the American Community Survey (ACS). This survey's sample size is approximately 3.6 million persons, and it collects earnings and employment data on persons with a physical, cognitive, and/or sensory disability. (U. S. Census Bureau. "ACS Public Use Microdata Sample (PUMS)." *American FactFinder.* 2008. http://factfinder.census.gov/home/en/acs_pums_2006.html (accessed December 2008).)

Each of these macro studies reveals that year-round, full-time employed persons with a disability have reduced earnings and worklife expectancy when compared to their non-disabled counterparts.

The vocational economic assessment

As described in previous articles, the methodology for calculating the loss of future earning capacity is a five-step process:

- Determine the pre-injury earning capacity
- Determine the pre-injury worklife expectancy
- Determine the post-injury earning capacity
- Determine the post-injury worklife expectancy
- Determine the present value of the loss

Once these five determinations are made, calculations are performed to arrive at a figure (or a range of figures) that reasonably describes the individual's pre-injury and post-injury earning capacity. The difference between the two is the loss of earning capacity. The expert's judgment must be brought to bear on each of the five decision points, particularly in determining the appropriate statistical grouping for the individual plaintiff.

Where's the loss?

Many individuals who have been injured return to work in the position they previously held if they have the residual functional capacity to do so. This makes intuitive sense. People tend to be rewarded in the labor market for increased competence and efficiency; changing careers often means sacrificing hard-won experience and starting again from square one. Thus, in cases of partial disability injured individuals often return to work with the same employer and may earn the same amount or more per year, even after a serious injury.

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Nonetheless, such individuals may have in fact sustained a loss of future earning capacity for two reasons. As described in a previous article, government data indicates very clearly that persons with a disability who work full-time year-round *earn less* and *have a reduced worklife expectancy* when compared to their non-disabled cohort group. Specifically, the ACS reveals that a male with a professional degree (i.e., M.D., J.D., D.D.S., or other professional degree except for a Ph.D) with no disability earns $181,489 per year on average, while a similar male with a physical disability earns $126,081 per year on average. A 35-year-old male with a professional degree with no disability has a worklife expectancy of 31.9 years, while a similar male with a physical disability has a worklife expectancy of 25.6 years.

So let us imagine that the plaintiff is a 35-year-old male corporate associate attorney who has suffered a back injury, resulting in a back fusion. After recovering from the surgery, he returns to work at his law firm earning the same amount of money as he earned prior to injury, $175,000 per year. He works in pain even though he takes a variety of pain medications. In addition, he can no longer work his pre-injury schedule of 50 to 60 hours per week.

Data from the ACS tell us that while, in the near term, our corporate attorney may be able to continue earning at his historic levels, over time his injuries will likely impact his ability to work as productively. As a result, he is likely to receive fewer raises and will earn less money than he would have earned had the injury not occurred.

In projecting his loss of earning capacity, one way a vocational expert can account for the probable diminution is to assume his pre-injury earning capacity is 30.5 percent greater than his current salary, because the difference between the earning capacity of a male with a professional degree with no disability and one with a disability is 30.5 percent. Under such a scenario, our attorney's pre-injury lifetime earning capacity would be approximately $228,000 per year, stated in terms of today's dollars. His post-earning earning capacity is best represented by his actual current salary, $175,000 per year, stated in terms of today's dollars.

Moreover, because of his injuries he will likely have additional surgeries as he ages, as stated by his orthopedic surgeon. In addition, his future orthopedic problems will likely force him to retire at a younger age than he would otherwise have retired. The opinions of the orthopedic surgeon are supported by data from the ACS. As the aging process unfolds, the decline in employment decreases precipitously for males during their 50s. On average, they exit the labor market earlier than their non-disabled counterparts; hence, the 35-year-old male has a 6.3-year reduction in worklife expectancy in comparison with his non-disabled counterparts. In this example, the lifetime loss of earning capacity would be approximately $2.8 million**,** using a net neutral discount in calculating present value. The figure does not take into consideration fringe benefits that would likely accrue both pre- and post-injury.

Another example

Another common scenario involves a plaintiff who, after injury, is referred to a vocational rehabilitation counselor and as a result is retrained and now qualifies for a position that pays more than the position held prior to injury. An example would be a 29-year-old female shelf-stocker at Wal-Mart earning $9 per hour/$18,000 per year who, post-injury, goes back to school to become an accountant.

Oftentimes, a vocational expert hired by the defense will opine that not only is there no earning loss but the plaintiff earning more now than before injury has experienced economic gain as a result of the injury. Such an opinion, however, ignores the paradigm shift that has occurred. Once again, earning capacity is the standard used to determine damages, not wages. If the plaintiff currently has the capacity to work as an accountant based on her physical and cognitive ability, surely she had the same capacity or more prior to the impairment. Thus, the relevant question for the expert to ask is whether a person with a baccalaureate degree and a physical disability is likely to earn at a level equal to or less than a person with a baccalaureate degree and no disability. Similarly, what will the difference be in terms of probable level of worklife expectancy without and with a disability?

As the data tell us, persons with a disability earn less and work less than their non-disabled counterparts when they work year-round and full-time. In this case, it might make sense for the vocational expert to provide damages figures based on the earnings of persons with a baccalaureate degree. At first it may seem counter-intuitive not to research the average earnings of accountants and use that figure; however, career theory and societal trends tell us that the occupation one has at age 30 is not necessarily the occupation one will have at age 40 or 50. Therefore, the aggregate earnings may provide a more reasonable representation of what is probable in the future. Ultimately, it is up to the trier of fact to decide. As a person with a baccalaureate degree, her pre-injury earning capacity would be represented by the figure $79,163 per year, and her post-injury earning capacity would be represented by the figure $65,038 per year. To properly assess this loss, 26 percent should be added to each figure to account for fringe benefits.

The worklife expectancy for females with a baccalaureate degree and no disability is 28.3 years, and for the cohort with a disability it is 23.5 years. In this hypothetical situation the loss would come to approximately $897,000, using a net neutral discount in calculating present value.

Conclusion

It should come as no surprise that persons with a disability are disproportionately represented as living below the

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poverty level. As a result, it is our taxpayer dollars that are being spent to take care of many persons who are wrongfully disabled. By seeking to recover damages from those liable for the disabilities inflicted on plaintiffs, it eases the burden on the public sector, and places the burden on the responsible parties.

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