An Analysis of the Problem of Determining Non-Schedule Partial Disability Claims under the South Carolina Workmen's Compensation Law

James A. Reid
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UNDER THE SOUTH CAROLINA WORK-
MEN'S COMPENSATION LAW

JAMES J. REID*

Look in on any workmen's compensation hearing in South Carolina and chances are high that you would observe an inquiry for determining the "nature and extent of disability." A typical hearing involves an issue on post-injury residual consequences which add up to less than total disability; such as low back symptoms, post concussion (head) syndrome, stiff neck, hernia, myocardial infarction, arthritic joint disease, pain or other general disabling conditions. This type of claim in workmen's compensation is referred to as non-schedule partial disability. The purpose of such a hearing is to determine "disability" within the meaning of the statute as applied to certain factors established in the evidence. Added importance is attached to this subject due to its frequency as a basis for disputed claims. In the field of workmen's compensation this is for the courts and authorities, as well as the administrative adjudicators and experienced compensation lawyers, a most difficult area with intricate problems, both of proof and proper application of the statute for accomplishing legislative intentions.

Disability as defined by the statute:4

* * * means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

*Member, Employee's Compensation Appeals Board, U. S. Department of Labor, Washington, D. C. Formerly a member of the S. C. Industrial Commission and Past President of International Association of Industrial Accident Boards and Commissions.

1. Specific limited quasi-indemnity in accordance with a schedule of specific losses is provided for loss, or loss of use, of certain members of the body—fingers, toes, hand, foot, arm, leg, eye (vision), loss of hearing—and is determined directly and solely by the degree of physical loss or impairment of such a member. Code of Laws of South Carolina, 1952 § 72-153.

2. Code of Laws of South Carolina, 1952 §§ 72-10 and 72-152.

3. 12 NACCA LAW JOURNAL 55 (1953); SOMMERS AND SOMMERS, WORKMEN'S COMPENSATION 72, 73, 74 (1954).

4. Code of Laws of South Carolina, 1952 § 72-10. All Code sections cited in the body of the article have reference to the Code of Laws of South Carolina, 1952.
In determining compensation for partial disability, § 72-152 states that the employer shall pay the injured employee during partial disability:

a weekly compensation equal to 60 percent of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter **. (Emphasis added.)

This same provision appears in most workmen’s compensation acts. Able to earn and thereafter are key words, the interpretation of which has given rise to conflicting legal concepts necessitating resolution by the court of last resort in many jurisdictions. The phrase able to earn appearing similarly in most workmen’s compensation laws has been construed by the several courts and authorities as capacity to earn. Determining post-injury capacity to earn has proved to be a difficult problem. Generally one of two criteria has been applied: (1) post-injury wages received, or (2) physical impairment. However, several jurisdictions have established a rule which rejects either (cases cited in footnotes 25, 26 and 29); and the South Carolina law on this subject seems to be developing towards a rule recognizing that either criteria in a particular case may be insufficient.

As early as 1939 the South Carolina Supreme Court, in Manning v. Gossett Mills, et al., stated in construing §§ 72-10 and 72-152:

The criterion of the right of claimant to compensation under the act is this: Has his injury lessened his earning capacity and deprived him in whole or in part of the power to obtain employment? (Emphasis added.)

This principle was stated again by the court in Stone v. Ware Shoals Mfg. Co., et al., Burnette v. Startex Mills, et al., and Jewell v. R. B. Pond Co., et al.

After the 1941 amendment which made serious bodily

5. For discussion and cases see 2 Larson, Workmen’s Compensation Law 4 (1956); 5 NACCA Law Journal 105 (1950); 6 NACCA Law Journal 90, 102 (1950); 12 NACCA Law Journal 56-58 (1953); 13 NACCA Law Journal 120, 121 (1954).
7. 192 S. C. 459, 7 S. E. 2d 226 (1940).
8. 195 S. C. 118, 10 S. E. 2d 164 (1940).
disfigurement compensable irrespective of earning capacity, the Court stated in Ingle v. Dunean Mills:\footnote{11} 

Workmen's compensation, except specific benefits and that allowed for disfigurement under present law, is for loss or impairment of capacity to obtain employment and earn wages. (Emphasis added.)

No fault can be found with this principle as stated by the Court but it did not answer the ever-present question of what factor, or factors, are material and should be considered in reaching a determination of capacity to earn. But an answer was soon forthcoming.

In 1945 the Court cited §§ 72-10 and 72-152 again for construction for decision in Parrott v. Barfield Used Parts Co., et al.\footnote{12} This was a landmark decision. Non-schedule disability claims have been settled with administrative approval and adjudicated for more than a decade by the rule enunciated in this case. Although the employee (Parrott) testified he suffered some physical impairment, the Court considered that the Industrial Commission based a finding of 20 percent permanent [partial] disability solely upon medical opinion:

* * * the claimant had suffered “20 or 25 percent” disability * * *

The employee's post-injury earnings (for the limited period in question) were greater than his pre-injury average weekly wages. The Court held:

Medical opinion as to the extent of disability can have no probative value as against actual earnings.

The Court made it clear that it was error as a matter of law under these circumstances summarily to equate a medical percentage rating as disability. In arriving at this decision the Court did not look beyond the fact of post-injury earnings as determinative of capacity to earn, even though there were other facts in the record seeming to bear on the issue. Apparently, the Court was convinced that the Industrial Commission did not include these other facts as a basis for its findings. In considering these statutory provisions, the Court concerned itself properly in announcing that:

the Workmen's Compensation Act was not intended to provide any award for pain and suffering as such or

\footnote{11. 204 S. C. 505, 30 S. E. 2d 301 (1944).} \footnote{12. 206 S. C. 381, 34 S. E. 2d 802 (1945).}
for any of the other elements of damages recoverable in an ordinary action for personal injuries.

but went on to say:

** ** except to the extent that the employee had sustained an injury resulting in the diminution of his earnings ** **. (Emphasis added.)

It is noteworthy that in this concluding phrase stating the compensable criterion, no reference is made to capacity to earn. Earnings were accepted as controlling of capacity to earn; and this has been generally understood to mean wages received.

Since 1945 the Parrott case has been cited and applied many times in workmen’s compensation cases as authority for the equation that actual wages received equals capacity to earn. For purposes of administration of the South Carolina Workmen’s Compensation Law, Parrott has been applied as meaning that post-injury wages received measured against pre-injury average weekly wages, constituted the yardstick of non-schedule disability and all other factors had no probative value. Application of this rule in some cases has led to unjust results. Under Parrott an employee having an injury-caused physical impairment coupled with post-injury wages at least equal to his average weekly wages can receive no award, unless within 12 months from the last payment of compensation (which usually is for temporary loss of wages during the healing period) his impairment results in some wage loss; and after the 12 months his case is dead forever, even if the physical impairment at some time after the 12 months should then reflect loss of wage-earning capacity as measured by the concept of some partial or total diminution of wages.

In a 1947 decision, after citing §§ 72-10, 72-151 and 72-152, the Court restated the principle that the object of the Workmen’s Compensation Act, with the exceptions stated in Ingle, supra, is to compensate for loss of capacity to earn.

The Court’s next opportunity for interpretation of §§ 72-10 and 72-151, came in 1954 in the case of Keeter v. Clifton Mfg. Co. This employee, after the healing period, was found to

have a 25 percent physical impairment to the body as a whole. After returning to the same work, his post-injury earnings were equal to his pre-injury average weekly wages. An award was rendered by the Industrial Commission providing payment for partial disability compensation when and if Keeter's physical impairment manifested itself in a loss of wages at any time during the period of 300 weeks (the maximum period allowed by the statute). This award was reversed by the Circuit Court on the ground there was no present loss of earnings, and that the Industrial Commission was without authority to make an anticipatory finding. On appeal to the Supreme Court, appellant's attorney suggested to the Court that post-injury earnings equal to pre-injury average weekly wages are not conclusive of non-impairment of capacity, but at most create a presumption of such non-impairment which may be overcome by other evidence showing that post-injury wages received by an employee are not actually earned. The Court showed its interest in this concept. Although not necessary for decision in the case, it stated:

A number of circumstances are called to our attention as demonstrating the unreliability of post-injury earnings as a fair criterion of earning capacity in every case. *This is an interesting question.* *(Emphasis added.)*

The Court went on to point out that:

* * * The Industrial Commission has not found as a fact that claimant has suffered a diminution in his capacity to earn the wages which he was receiving at the time of his injury, and there is no showing that the compensation [wages] now paid him does not accurately reflect his earning capacity.

The Court concluded on the evidence of that case record and the findings of the Industrial Commission that there was no diminution in *earning capacity* and consequently Keeter was not entitled to partial disability compensation; and as to the nature of the award, the Court held:

The Industrial Commission has continuing jurisdiction over its awards, but its awards are final except for review, and the Commission could not by undertaking to retain jurisdiction for 300 weeks pending future developments, circumvent the limitation of 12 months within
which an award may be reviewed for change of conditions.\textsuperscript{16}

The language of the decision suggests that factors other than \textit{wages received} might affect \textit{capacity to earn} and that the door is open for the Industrial Commission and the Circuit Court so to consider; and that the Supreme Court itself will so consider upon a proper record and findings. By its dictum the Court repeated the rule laid down in \textit{Parrott}. However, it went further to say by implication that the post-injury \textit{wages received} shall constitute the measurement of \textit{capacity to earn} only where there is no showing to the contrary by other factors. The burden of so showing rests on the moving party which may be either the defendant or the claimant depending upon who seeks relief by overriding the operation of the \textit{Parrott} rule.

Some light may be shed on this subject by referring to \textit{Utica-Mohawk Mills, et al., v. Curtis Orr}.\textsuperscript{17} Although the Court's decision contains no rule affecting determination of non-schedule disability, it concerned itself with the particular manner in which the compensation award was made for a non-schedule disability. This decision was on an action brought under the Declaratory Judgment Act.\textsuperscript{18} The Court's construction of the partial disability provision\textsuperscript{19} dealt only with the terms governing the method of mathematical computation of compensation payable which are not applied until partial disability has been determined. The Court had before it for construction an unappealed award of compensation rendered by the Industrial Commission, which found that Orr, although with total loss of wages, had only a 30 percent permanent partial disability to the body as a whole and it was apparent to the Court that this finding was based on a medical percentage rating. The Court was careful that its decision on a different issue did not reflect approval of the award. It stated:

As noted at the outset and now repeated for emphasis, there was no appeal from the award of the Commission and the correctness of it is not in question in this proceeding **.

\textsuperscript{17} 227 S. C. 226, 87 S. E. 2d 537 (1955).
\textsuperscript{18} \textit{Code of Laws of South Carolina, 1952} § 10-2001 et seq.
\textsuperscript{19} \textit{Code of Laws of South Carolina, 1952} § 72-152.
Based on the Court's caution and that part of the award at which its concern was directed, the inference is taken that the Court would not approve as a matter of law a summary equating of a medical rating of physical impairment as partial disability in the face of the accompanying fact that the claimant was earning no wages.

Viewing the Court's holding in Parrott, supra,

Medical opinions as to the extent of disability can have no probative value as against actual earnings in the light of the implications in the Court's attitude in Orr, supra, it follows that under the present state of the law, medical opinion as to the extent of disability of an existing injury-caused impairment cannot control when the evidence also establishes the fact of no earnings. But should an award for total disability then be issued? This would be the effect of applying the other end of the stick of logic employed by the Court in Parrott, or stated differently, it is how that two-edged sword cuts in the other direction.

A rule seemingly converse to Parrott has been applied in cases even where the employee received some wages. A recent decision20 of the South Carolina Court written by the very able Chief Justice, Mr. Justice Stukes, is most helpful in understanding the state of the law on this subject. The employee, a general laborer, suffered an injury-caused collapsed lung. Following recovery his injured lung was threatened with re-collapse upon exertion. Although after injury he worked for a brief period at light work earning some wages, his award for total disability was sustained by the Court, which said:

Disability is a relative term and must be related to the occupation of the claimant. Here he is disabled to perform common labor and cannot obtain employment at such; and he is not qualified by training or experience for any other.

The Court held that this evidence of the employee's employability was sufficient to support the finding of total disability, by stating:

* * * the extent of an injured workman's disability is a question of fact for determination by the commission and

will not be reversed if it is supported by competent evidence.

This decision quoted with favor decisions of other jurisdictions where total disability awards were sustained, even though the employee after injury was able to earn some wages at odd jobs or occasional work.21 In concluding, the South Carolina Supreme Court said:

We do not need in this case to go as far as the two last cited authorities because the respondent is unable to follow his occupation as a laborer and is unemployed; and the result here does not impinge upon the rule of our statute and decisions that, quoting, "the disability is to be measured by the employee's capacity or incapacity to earn the wages which he was receiving at the time of his injury. Loss of earning capacity is the criterion." Keeter v. Clifton Mfg. Co., 225 S. C. 389; 82 S. E. 2d 520.

A holding in a recent Federal decision is similar. In the case of Great American Indemnity Co. v. Segal22 it was stated:

Continuing employment without impairment of earnings after an injury does not preclude a finding of total disability. Disability is total when the injured employee is no longer able to secure and retain employment as prior to the injury, and the claimant should not be deprived of her compensation just because the employer, out of the goodness of his heart, has kept her on the payroll allowing her to do light work.

The NACCA Law Journal editor stated in commenting on this case:22a

In support of its sound conclusion, the court quotes from Mabry v. Travelers Ins. Co., 193 F. 2d 497 (5th Cir. 1952), noted in 10 NACCA Law Journal 111: "Pinched by poverty, beset by adversity, driven by necessity, one may work to keep the wolf away from the door though not physically able to work; and . . . the fact that the woman worked to earn her living did not prevent a jury from finding . . . that she was totally and permanently disabled even while working.

22. 229 F. 2d 845 (5th Cir. 1956).
22a. 18 NACCA LAW JOURNAL 124 (1956).
Accord, American General Ins. Co. v. Bailey, 287 S. W. 2d 290 (Tex. Civ. App. 1956) final affirmance of award in psychic injury case reported in 14 NACCA Law Journal 47 and 16 id. 67; Roling v. Hatten & Davis Lumber Co., 85 So. 2d 486 (Miss. 1956), total permanent proper on new finding increasing disability retroactive in effect to original date of injury, despite lack of appeal from previous order fixing disability at 50%.

In view of the present state of the problem concerning determination of non-schedule disability, the South Carolina Supreme Court's language in the recent cases of Keeter, Orr, and Colvin, and the trend as seen by the decisions in other jurisdictions, lawyers representing either claimants or defendants must concern themselves with proof of facts bearing on 

**wage-earning capacity** in addition to 

**post-injury wages** and 

**physical impairment**. Wages are compelling evidence of 

**capacity to earn** but wages are subject to influences of economic fluctuations, particularly inflation, sympathy of employers, overtime work, unwillingness to work regularly, and other factors, and therefore are unreliable as conclusive evidence. Percentage of 

**physical impairment** is strong evidence, but, although the 

**impairment** is the same in different individuals, it may produce differing losses of 

**capacity to earn**, depending on age, occupation, training, adaptability for retraining and other factors and, therefore, is unreliable as conclusive evidence.

It should not necessarily follow as a fact nor as law in construing section 72-151 (total disability) or section 72-152 (partial disability) that:

1. **wages received equals capacity to earn**, nor
2. **physical impairment equals capacity to earn**.

Legislative intent clearly seen in § 72-152, requires the comparing of two factors for determining compensation payable for non-schedule partial disability:

1. **pre-injury average weekly wages**, which is constant, and
2. **post-injury capacity to earn**, which although constant, may be influenced by factors which are not constant.

Factor (1) affords very little difficulty of proof. To determine whether an employee is incapacitated for work as re-
sult of injury, it is necessary to ascertain what capacity for work he had before he sustained the injury and then to see to what extent, if any, that capacity has diminished as the result of the injury. So, the first of these two factors for proof is pre-injury average weekly wages which the legislature intended to stand as the sole measurement of the employee’s pre-injury capacity to earn. This is usually very simple to establish in a manner as outlined by the statute, and once established this factor remains constant. Establishing factor (2) is a difficult problem of proof. For comparison, factors (1) and (2) must be placed on the same economic level. This can best be done by bringing together all material facts within a reasonable time following the healing period, and pinning them down as near as possible to the same circumstances. In establishing factor (2) care should be taken in comparing post-injury wages received with pre-injury average weekly wages. Between these two, if there has been a lapse of time during which wage fluctuations occurred, the comparison without adjustment is inaccurate as an index to capacity to earn.

In making that comparison, therefore, it is necessary to test present post-injury wages with the wages which the claimant would presently be earning in his old job were it not for the injury, which in effect is placing the two economic factors on the same level and discounting the variable wage fluctuation caused by unrelated influences.

Although capacity to earn and not wages received is the proper test, an employee’s actual wages may constitute compelling evidence of his capacity to earn and in a proper case may be used as a yardstick in determining an injured employee’s diminished earning capacity. However,

The length of any yardstick used, if inequities and injustices are to be prevented, must remain constant. It must follow then that wages received two, five, or ten years after an employee has sustained an injury and during which period changes in business conditions have

caused wages to double due to a business boom or to be cut in half due to a depression cannot be used as a conclusive factor in determining a claimant's diminished wage-earning capacity after he has been injured.\textsuperscript{27}

The statute does not state that compensation is to be based upon the difference between an employee's average weekly wages and whatever variable dollar income he might have in the future. It provides for the payment of compensation in non-schedule partial disability cases upon the basis of the impairment in the employee's \textit{capacity to earn wages} and not upon actual \textit{wage loss} as such nor upon physical impairment as such. Once established, \textit{post-injury earning capacity} is subject to change only upon a showing of change in the claimant's physical condition or other statutory ground with the burden of proof resting on the party seeking relief.\textsuperscript{28}

Several courts have held that where there is evidence other than the facts pertaining to \textit{post-injury wages} and \textit{physical impairment} bearing on post-injury \textit{wage-earning capacity} it is reversible error to base a determination on the premise that non-schedule partial disability compensation is (1) payable according to the degree of \textit{physical impairment}, or (2) payable according to \textit{wage loss}, or (3) not payable when there is no \textit{wage loss}.\textsuperscript{29} It is a great convenience merely to equate \textit{wages received} or a physician's percentage of \textit{physical impairment} as \textit{wage-earning capacity}, but either basis constitutes a false assumption of being a just equation in the face of the fact that necessary correlation of all material facts is neglected thereby. The information contained in either alone is insufficient; and to be adequate must be supplemented by any other available material evidence.

A very appropriate comment as to the unreliability of \textit{wages received} as the sole basis for determining \textit{wage-earning capacity} is that it

\begin{itemize}
  \item \textsuperscript{27} Whyte v. Industrial Commission, 71 Ariz. 333, 227 P. 2d 230 (1951).
  \item \textsuperscript{28} J. A. Foust Coal Co. v. Messer, 195 Va. 762, 80 S. E. 2d 533 (1954).
\end{itemize}
capacity is found in 12 NACCA LAW JOURNAL, pages 56-57:

To use the actual difference between the old and new wage may be unfair to an insurer as well as to an employee. For example, an employee previously earning $60 accepts a $35 job after the injury, although actually capable of earning $50 on another job. In a state like Massachusetts, where he gets the entire difference in partial compensation from the insurer, the insurer would be compelled to pay $25 partial rather than $10 if "actual" wages were to control. Yet it has long been held that "able" to earn may be more than "actually" earning. Smith v. Tonawanda Paper Co., 238 A. D. 690, 266 N. Y. S. 160 (1933). Lavallee's Case, 277 Mass. 538, 179 N. E. 214 (1931)—may give higher earning capacity than actual wages received, citing Durney's Case, 222 Mass. 461 (1916), where actual earnings were $13.20, but "he was able to earn $15 a week, notwithstanding his injuries." (Italics supplied.)

Conversely, the injury may so cripple an employee that while "not able to earn" his old wage, i. e., his earning ability or capacity may be seriously impaired, yet for some unusual reason an employer may actually pay him as much or more than before. In such a situation earning capacity, not actual wages, governs. The earning capacity may be less than the actual wages and hence disability compensation may be due. In each of the following situations higher actual post-injury wages were held not to bar disability compensation: (1) where part of the post-injury wages were a gift or out of sympathy for the claimant (Shaw's Case, 247 Mass. 157, 141 N. E. 858 (1923), and cases in notes 39-41, 2 Larson's Workmen's Compensation Law, p. 16); or (2) were due to an increase in general wage levels since the time of accident (Whyte v. Industrial Commission, 71 Ariz. 338, 227 P. 2d 230 (1951), 7 NACCA LAW JOURNAL 106, and cases cited in 2 Larson's Workmen's Compensation Law, p. 13, note 29); or (3) were due to the claimant's greater maturity or training (Ludwickson v. Central States Elec. Co., 142 Neb. 308, 6 N. W. 2d 65 (1942)); or (4) were due to working longer hours (cf. Devlin v. Iron Works Creek Construction Corp., 164 Pa. Super. 481, 66 A. 2d
221 (1949)); or (5) were due to other temporary or unpredictable reasons making post-injury wages unreliable.

A most profound statement contained in a decision of the Employees' Compensation Appeals Board, United States Department of Labor, in Fred Foster,30 shows clearly one of the reasons why physical impairment does not represent wage-earning capacity and why medical ratings alone should not be relied upon for determining physical impairment.

Physician's percentages at the best are mere rough individual estimates, as to which any reasonable unanimity of opinion cannot be expected * * * There is nothing scientific in the “percentages” estimate (often it reflects a “hard” or “soft” attitude on the part of the estimator), nor is there any recognizable table from which to derive the percentages. This leaves the whole matter of such percentages to great chance or hazard, and for this reason alone of doubtful value as the sole criterion upon which to base loss of wage-earning capacity. The most important object in the administration of any workmen's compensation law is to make certain that the law is properly and fairly applied as intended by the legislature. A practice which does not accord with law cannot be accepted merely because it affords administrative convenience. It may involve more difficulty to obtain evidence bearing upon the extent to which an injury impairs wage-earning capacity than merely to choose some such “percentage,” but the fact of any such greater difficulty does not justify a departure from the requirement of the law, nor warrant the acceptance of an inherently invalid principle.

Assuming that all individuals with a given percentage of physical impairment have the same loss of wage-earning capacity due to common physical structures is to ignore other facts such as age, training, occupation, etc., which cause differing economic consequences to different persons. A laborer with a 25 percent physical impairment resulting from a back injury as a matter of fact might well lose a greater percentage of his capacity to earn than 25 percent, but to a person with a sedentary job the same impairment might result in no loss of earning capacity. Any other view overlooks realities.

Larson in his exhaustive work, Workmen's Compensation Law,31 referring to wage-loss versus medical rating in determining disability, says:

Compensable disability is inability, as the result of a work-connected injury, to perform or obtain work suitable to the claimant's qualifications and training. The degree of disability depends on impairment of earning capacity, which in turn is presumptively determined by comparing pre-injury earnings with post-injury earning ability. The presumption may, however, be rebutted by showing that post-injury earnings do not accurately reflect claimant's true earning power.

The proper balancing of the medical and the wage loss factors is * * * the essence of the "disability" problem in workmen's compensation.

He goes on to state that it is in

the two fields of non-schedule partial disability and total permanent disability which occasions controversy because of the constant interplay of medical and wage-loss factors.

Mr. Larson, in discussing earning capacity, states:

It obviously does not mean actual earning, since the legislature deliberately chose a different phrase for the post-injury earnings factor. * * * The concept of wages he "is able" to earn cannot mean definite actual wages alone, especially in the absence of a fixed period of time within which post-injury wages are to be taken as controlling.

In discussing the "thereafter" period for ascertaining post-injury earnings as the determinative factor, this author says:

An award must be made now and paid now to do the claimant any good.

Therefore he suggests:

The only possible solution is to make the best possible estimate of future impairments, on the strength not only of actual post-injury earnings but of any other available clues.

31. 2 Larson, Workmen's Compensation Law 1-13 (1956); for full discussion of non-schedule partial disability see pages 1-58.
He cautions that post-injury earnings may be unreliable, due to a number of things: increase in general wage levels since the time of accident; claimant's own greater maturity or training; longer hours worked by claimant after the accident; payment of wages disproportionate to capacity out of sympathy to claimant and the temporary and unpredictable character of post-injury earnings.

Mr. Larson points out that,

The ultimate objective of the disability test is, by discounting these variables, to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant as injured, taking wage levels, hours of work, and claimant's age and state of training as of exactly the same period used for calculating actual wages earned before the injury. Only by the elimination of all variables except the injury itself can a reasonably accurate estimate be made of the impairment of earning capacity to be attributed to that injury.

He concludes, saying,

By its nature permanent partial loss of earning capacity must be always a prediction about the indefinite future.

Horovitz states the rule, with supporting authorities, as follows:

Actual wages earned do not necessarily establish an employee's earning capacity. It is within the province of the trier of facts to find the amount which he actually earned represented what he "was able" to earn, but evidence of a greater earning capacity may not be excluded, nor of a lesser, i. e., that part of his so-called wages was a gratuity or gift.32

Any whole body physical impairment, more than slight, should raise a presumption of fact of some loss of wage-earning capacity. It is difficult to accept the reasoning that the legislature intended that material physical impairment would not constitute some loss of wage-earning capacity even in the face of post-injury wages equal to pre-injury wages. If Parrott and Keeter truly represent the fully crystallized state of the law on this subject, legislative changes are necessary in order to harmonize this part of the workmen's compensation law with its overall intents and purposes established as pub-

32. Horovitz, Workmen's Compensation 276 (1944).
lic policy by the legislature. Such changes in the law could be either:

1. To abolish the twelve months’ limitation for review of an award so a claimant may be followed for life or to extend the period so far into the future that compensation can assuredly be awarded when and if physical impairment manifests itself in lost wages; or

2. To add a conclusive presumption clause to the non-schedule disability section that loss of wage-earning capacity shall be equal at least to the same degree of whole body physical impairment, but shall not constitute a bar to proof of a greater loss of wage-earning capacity; or

3. To extend the coverage in the schedule for indemnity awards.

Schedule disability compensation is limited quasi-indemnity grafted on to workmen’s compensation. A schedule of disabilities as basis for money awards regardless of wages or capacity to earn came into being for a purpose. It became apparent in the early administration of workmen’s compensation laws that there were some injury-caused physical losses not resulting in any wage-loss nor affecting earning capacity, consequently no compensation was payable. The view developed that to allow this was poor public policy. Historically, in theory, these schedules of disabilities in workmen’s compensation were presumptively tied to wage-earning capacity. It was further presumed that each individual with the same physical impairment or anatomical loss to a scheduled member would have the same resulting loss of earning capacity for the same period of time. The resulting money payment is, of course, what the legislature intended but it is nonsense to accept in fact that this theory is correct in the practical affairs of workmen in our industrial society. These schedules

34. There has never been a survey in any jurisdiction for determining if in reality these schedule disabilities have any relationship to the arbitrary fixed periods of presumptive loss of wage-earning capacity. The outstanding workmen’s compensation authority, Dr. Herman E. Somers, Chairman of the Political Science Department, Haverford College, Haverford, Pennsylvania, has confirmed this in person to the writer and said further his studies revealed these schedules as indemnity payments established as a matter of public policy. This has also been confirmed to the writer by many state administrators. If this were not so there would be efforts to make such a survey for purposes of altering or abolishing the schedules.
on their face are nothing but a list of limited quasi-indemnities in lieu of compensation which were enacted by the legislature as public policy to make certain that employees having any enumerated loss would surely be indemnified to a limited extent for that loss \textit{per se}. Certain risks to the employee's receiving an award in the absence of such a schedule must have been apparent to the legislators. For example, not being able to prove that an anatomical loss resulted in wage loss or loss of wage-earning capacity; or, after waiting a long indefinite period for the anatomical loss to show up in a wage loss, going uncompensated due to some statutory cut-off period.

Under this so-called view of presumptive loss of wage-earning capacity, such loss is determined by the degree of anatomical loss or physical impairment (as found by the adjudicator measured against industrial utility of the affected member).\textsuperscript{35} So, in the schedules by theorizing we have, in effect, the equation that \textit{physical impairment} equals loss of \textit{wage-earning capacity} for the number of weeks as specified. With this as an easy and working tool in the very great number of schedule disability claims, it became convenient to employ the same tool in handling non-schedule disability claims. The occurrence of this is understandable but as to non-schedule disability, the legislature deliberately chose the criterion of loss of \textit{wage-earning capacity} not \textit{physical impairment} as the basis of entitlement to compensation and no presumption as to what constitutes loss of wage-earning capacity was written into the non-schedule disability statute. This must be determined as all other facts by the adjudicator.

Accepting, therefore, that neither \textit{post-injury wages} nor \textit{physical impairment} as such represents \textit{wage-earning capacity}, and that other additional facts are needed for doing justice as intended by the legislature, certain questions arise. What are these other facts or clues? How are they proved? When proved, what formula applies for correlation of "other facts" with the facts of \textit{physical impairment} and \textit{post-injury wages} and the assessing of probative value to the parts and to the whole? By way of preface to a discussion of answers to these three questions, and repeating for emphasis, it should be recognized on going into a compensation hearing on this

\textsuperscript{35} This is another problem area in workmen's compensation administration and in itself is a subject for a separate paper. For reference see the rule on industrial loss of vision.
subject that the word "disability", misused and abused at a hearing, is likely to confuse the evidence and cause it to be misleading. Often the word is used wrongly in view of the specific meaning given it by statute and interpretation of the South Carolina Supreme Court.

The disability in non-schedule disability claims is determined by the law and facts, that is, applying the evidence to the statute. Finding "disability" is the conclusion sought. This is the necessary decision solely for the adjudicator. Therefore, great care should be exercised not to use the word "disability" loosely when referring to the "injuries" or "impairments" in making the record. It should not be used as compensation jargon nor in the sense of its common meaning by the adjudicator, the lawyers, or witnesses. Using precise terms in proper context affords a better basis for an objective and soundly reasoned evaluation of the evidence on the question. Even medical witnesses, as experts giving opinion evidence as to the extent of post-injury residual consequences, should not use the word "disability." The most appropriate term is physical impairment. Disability outside workmen's compensation has a common meaning inclusive of physical impairment; but disability has lost its common meaning by virtue of the statute and where used in making the record must be considered as meaning more than physical impairment.

What these other facts are, and how they are proved, are related questions. Establishing the degree of causally related physical impairment and post-injury wages, if any, is the primary burden of proof. In addition, come the other facts as clues to wage-earning capacity which may be elicited from the usual witnesses in accordance with varying factual situations. This cannot be spelled out. It is here that the ingenuity of the lawyer is challenged in the preparation and presentation of the appropriate evidence.

As recognized, the claimant and the medical experts are the most important witnesses. Other witnesses may include claimant's neighbors, associates, supervisors, past and present employers and co-workers, and other lay persons who might possess pertinent evidence concerning the "before" and "after" state of the claimant's health and physical condition. Efforts should be made to elicit testimony befitting the factual situation from the claimant and other lay witnesses con-
cerning the claimant's "before" and "after" injury functional efficiency as a physiological unit in an industrial society; more particularly the post-injury physical condition with which he must live "* * * as compared with a person of the same age and sex whose physical and mental condition is normal"; claimant's age, occupational training, occupational experience, occupational aptitude; wages earned before injury; wages he would now be earning in his old job were it not for the injury; claimant's efforts and degree of success in obtaining post-injury employment and post-injury wages received; whether post-injury wages were comparable to wages paid claimant before injury for same labor or presently paid other employees for similar labor or whether affected by other considerations or influences; whether the post-injury wages came from some temporary or make-shift odd job or occasional work as opposed to employment in one of the enduring substantial occupations in the community; whether the post-injury labor marketed by the claimant enabled him to be competitive on the labor market for an enduring type job; employment opportunities available to such a person as the claimant with the same remaining physical functional efficiency; and descriptions of whatever specific situations a particular claimant must face in his work-a-day world.

In the matter of wage-earning capacity evaluation, the medical expert's testimony primarily should concern opinion of the claimant's physical impairment, i.e., his physical functional efficiency as a physiological unit in an industrial society. It is not for the medical witness, unless especially qualified, to say what job the claimant could or could not perform since this is the province of the trier of the facts. The medical witness' testimony should be restricted to his qualifications and the purpose for which he is called as a witness. His opinion must be more than that the employee is "able to do light work" or "not able to do laborious work." The medical witness can best help the trier of the facts by describing factually the claimant's physical impairment in terms of limitation on physical functions; what physical activities claimant is able or is not able to engage in, particularly weight lifting, body and joint movements, bending, stooping, walking, stair

37. Ibid.
climbing, time endurance of working, standing, sitting, body agility working around and under machinery, climbing and using step-ladders, working overhead, fatigability, risk to health or recurrence of disabling condition upon certain types of exertion, activities, or exposure; pain, if any, accompanying physical function; and other helpful evidence as dictated by a particular fact situation.

In addition to his opinion on these matters the medical witness should outline, preparatory to his opinion, his findings upon medical examination of the claimant and all other facts which he accepts as a predicate for his opinion. Where the medical witness is answering hypothetical questions it is especially essential that the trier of the facts understand clearly what facts the medical witness accepted as a predicate for his opinion. When the trier of the facts has made his findings he must look to the facts upon which medical opinion was predicated and, in accordance with their comparison in material aspects with his findings, decide the probative value of the medical opinion.

In the matter of wage-earning capacity evaluation, certain other witnesses become important. Since it is essential to know as much as possible about a particular community's labor market as well as the claimant's employability, certain lay persons such as employers, personnel and industrial relations directors, and others having a wide knowledge of the labor market, could be expected to supply some evidence. But more important than these are the job placement experts, such as the specialists with the Office of Vocational Rehabilitation (State Department of Education), the Employment Service Division of the Employment Security Commission, and others with private employment agencies. These impartial specialists are acquainted with the employment conditions of their districts and could give reliable evidence on what jobs, if any, are available to the claimant and the nature of such jobs; and opinion as to what wages could be earned in a particular community by a person with the claimant's physical impairment and background.

When all evidence is in it becomes the duty of the trier of the facts to study the evidence, determine its probative value, weigh the evidence, correlate the evidence, resolve the conflicts, and make findings. There is no precise formula which can be spelled out for this purpose. When the facts proved
supply more than one inference it is solely for the trier of the facts to draw the inference in determining disability as in determining all other facts. True he must consider all the facts bearing on disability in weighing the evidence. In the process he should look to what present facts show as to the employee's capacity to obtain and perform work in some enduring type of employment on the labor market, and what present facts show as to the employee's capacity to satisfactorily and continuously perform such work on into the indefinite future. It is assumed in such cases that the trier of the facts considered all of the facts in evidence unless there is a showing to the contrary which must rest upon proof. This manifestly would be shown should the trier of the facts base a determination of non-schedule disability solely upon either post-injury wages as such, or physical impairment as such, without considering other material facts when they are of record. Such a showing would also constitute a reversible error as a matter of law. Otherwise, any finding by the trier of the facts which is based upon competent evidence is conclusive.

The trier of facts must make a finding whether there is or is not causally related whole body physical impairment when that fact is in issue. When there is such physical impairment, he must proceed to find whether there is any resulting loss of wage-earning capacity. The rule may be stated that this is presumptively determined by comparing post-injury wages with pre-injury average weekly wages, and that the presumption is overcome only when other facts show that post-injury wages do not fairly and reasonably represent post-injury capacity to earn. Then the trier of the facts by correlating all material facts, and according to whatever formula persuades or gives him a conviction as a reasonable man in the conduct of a serious affair, may make a finding that the claimant presently has a wage-earning capacity of "X" dollars. That, when compared to his pre-injury average weekly wages, reveals whether there is any loss in his wage-earning capacity. If there is such loss it is the measure of non-schedule disability.

The best the Industrial Commission can do in these cases, to paraphrase Mr. Larson, is to make a finding now on the present wage-earning capacity of the claimant, which is a prediction about the indefinite future and should be made on the basis of all available clues.