

## BULLETIN

November 4, 2011

R.C. 2285

### To the Members of the Board

Re: **2012 New York State Guidelines for Determining  
Permanent Impairment and Loss of Earning Capacity  
Workers' Compensation Board Subject Number 046-472**

The New York State Workers' Compensation Board has just released Subject Number 046-472, which announces the establishment of the 2012 New York State Guidelines for Determining Permanent Impairment and Loss of Earning Capacity. The 2012 Guidelines address the evaluation of both schedule loss of use awards and non-schedule permanent disabilities. The 2012 Guidelines will replace the existing 1996 Medical Impairment Guidelines and will take effect January 1, 2012.

A copy of Subject Number 046-472 is attached for your information and reference.

Questions regarding this subject number, or any other questions pertaining to the implementation of the Permanent Impairment and Loss of Earning Capacity Guidelines, should be directed to the Workers' Compensation Board.

Please distribute this information to the appropriate personnel within your organization.

Very truly yours,

Monte Almer

President

MH/ab  
Encl.

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Governor Andrew M. Cuomo

**Subject No. 046-472**

## **Workers' Compensation Board Announces 2012 NYS Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity**

Date: November 3, 2011

The Workers' Compensation Board (Board) has developed the [2012 New York State Guidelines for Determining](#)

[Permanent Impairment and Loss of Wage Earning Capacity](#)  ("2012 Guidelines") for use by medical professionals, carriers, attorneys, and the Board in the evaluation of permanent disabilities. The 2012 Guidelines will replace the existing 1996 Medical Impairment Guidelines and will take effect January 1, 2012. However, for claims that already have at least one medical opinion finding a permanent impairment with a rating based on the 1996 Guidelines on or before January 1, 2012, the Board will determine the claimant's degree of permanent disability using the 1996 Guidelines.

The 2012 Guidelines address the evaluation of both schedule loss of use awards and non-schedule permanent disabilities. The portion devoted to schedule loss of use awards (Chapters 2-8) is taken unchanged from the 1996 Guidelines. The non-schedule permanent disability sections (Chapters 9-17) are largely based on the work of the Insurance Department's Workers' Compensation Reform Task Force and Advisory Committee (Task Force). It includes guidance for medical professionals on how to evaluate medical impairment and physical function and guidance for the Board on how to determine loss of wage earning capacity. It is expected that attorneys, claims professionals, and others will utilize these new standards in an attempt to evaluate and settle claims.

The starting point for determining both schedule and non-schedule permanent disabilities is the finding by a medical professional that the injured worker has reached maximum medical improvement (MMI) and has a causally related permanent impairment. The 2012 Guidelines adopt the Task Force's consensus definition of MMI.

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

### **Task Force Recommendations**

The 2007 workers' compensation reform imposed duration caps for permanent partial disability payments under Workers' Compensation Law (WCL) §15(3)(w) on claims with a date of accident or disability on or after March 17, 2007. The caps are based on the injured worker's loss of wage earning capacity. The Task Force was directed to develop new recommended guidelines to assist in the determination of loss of wage earning capacity. Meanwhile, the Board has been applying and interpreting WCL §15(3)(w) in individual cases since it became law (e.g. [Matter of Buffalo Auto Recovery](#), 2009 NY Wrk Comp [80703905]).

In September 2010, Superintendent Wrynn submitted to me the Task Force's recommendations, which provides a three part analysis for determining loss of wage earning capacity:

- Evaluation and ranking of medical impairment
- Evaluation of functional ability/loss

- Determination of loss of wage earning capacity based on impairment, function and vocational factors (including education, skills, literacy, age, etc.)

The recommendations included consensus guidelines for evaluation of medical impairment and functional ability/loss. The Task Force and Advisory Committee could not reach consensus on a methodology for the determination of loss of wage earning capacity.

On October 13, 2010, I published Superintendent Wrynn's letter and recommendations and requested comments from stakeholders in [Subject No. 046-446](#). I received submissions from several stakeholders and incorporated their comments, when appropriate.

## **Determination of Loss of Wage Earning Capacity Under the Guidelines**

The 2012 Guidelines adopt the recommended three part analysis for determining loss of wage earning capacity. First, the 2012 Guidelines adopt the Task Force's proposed impairment guidelines for evaluation of conditions involving the spine and pelvis, respiratory system, cardiovascular system, skin, brain, and extraordinary pain (Chapters 11-17). The 2012 Guidelines also set forth principles for the evaluation of impairment of other body parts and systems (Chapter 17). The impairment guidelines employ objective standards for evaluating and rating medical impairment and are intended for medical professionals. The impairment guidelines include severity rankings by body part/system that use letter grades (A-Z) and a chart that places those letter grades on a scale from 0-6. It is important to note that impairment alone does not equate to loss of wage earning capacity.

The 2012 Guidelines contain a functional assessment component (Chapter 9.2) based on the Task Force's functional ability/loss guideline, which set forth standards for treating medical providers as well as carrier consultants to measure and report injured workers' abilities/losses across a range of work-related functions, including dynamic abilities (lifting, carrying, pushing), general tolerances (walking, sitting, standing), and specific tolerances (climbing, bending/stooping, kneeling, environmental).

The 2012 Guidelines also include new guidance on how to determine loss of wage earning capacity (Chapter 9.3). They set forth relevant medical factors (impairment and functional ability/loss) and vocational factors (education, skills, English language proficiency, age, etc.) that the Board should consider in evaluating the impact of a permanent impairment on a claimant's wage earning capacity. They provide general guidance regarding the impact of medical and vocational factors on an injured worker's earning capacity. The 2012 Guidelines do not overrule [Matter of Buffalo Auto Recovery](#), but rather provide additional assistance on how to calculate loss of wage earning capacity and implement WCL §15(3)(w).

## **Benefit Rates for Non-Schedule PPD**

The 2012 Guidelines also clarify that the three part approach to loss of wage earning capacity (disability) applies in determining the benefit rate in pre- and post-reform non-schedule permanent partial disability claims.

## **Forms**

Based on the Task Force recommendations, the Board has modified Form C-4.3 and created a new form, Form VDF-1 (Vocational Data Form). Parties may begin using these new forms on January 1, 2012.

### **Form C-4.3 (Doctor's Report of MMI/Permanent Impairment)**

[Form C-4.3 \(Doctor's Report of MMI/Permanent Impairment\)](#) has been modified to accommodate the new medical impairment and functional loss guidelines. The form should be completed when the treating provider has determined that the claimant has reached MMI and has a permanent impairment, or in response to a request by the Board when an IME opinion finds MMI and permanency.

The provider should document medical impairment in section E. The provider should also state the history, physical findings, and diagnostic test results that support the impairment finding. If the injured worker has a non-schedule impairment of a body part or system that is not covered by an impairment guideline, the provider should follow Chapter 17 and include the relevant history, physical findings, and diagnostic test results, but no severity letter grade.

Form C-4.3 includes a new section F related to functional capabilities. This section should only be completed if the claim involves a non-schedule disability. The provider should not complete section F for claims involving a schedule loss of use.

Physicians who perform a thorough exam and fully complete Form C-4.3 for a non-schedule permanent disability, including sections E and F, may bill a level 5 consultation (CPT 99245) for the evaluation and completion of the form. (Physicians are not eligible for the enhanced payment for completion of the C-4.3 form for schedule loss of use evaluations).

## Form VDF-1 (Vocational Data Form)

The new [Vocational Data Form \(VDF-1\)](#) is designed to capture basic vocational information about the injured worker that is relevant to the injured worker's loss of wage earning capacity and potential to return to work. Injured workers who may have a non-schedule permanent impairment and who have not returned to work are encouraged to complete and submit Form VDF-1 as early as possible in the claim. Early submission of the vocational information should facilitate settlement discussions to resolve loss of wage earning capacity without the need for extended litigation.


## Classification Process (non-schedule permanent disabilities)

The Board is sensitive to the high level of litigation in workers' compensation cases and seeks to assist the parties to reach agreement whenever possible. The process for classifying injured workers in non-schedule loss of use cases is designed to address the relevant medical and non-medical factors that are considered in determining loss of wage earning capacity in an efficient and timely manner. The Board has developed classification process flow diagrams that show the steps involved in a non-schedule permanent partial disability (PPD) classification. The [Classification](#)

[Model for Represented Claimants](#)  and the [Classification Model for Un-Represented Claimants](#)  can be located on the Board's website.

The process begins when the Board receives evidence from either the carrier or the injured worker's health care provider reporting the claimant has reached MMI and has a permanent, non-schedule disability. Such an opinion should also include the claimant's impairment ranking and functional capabilities/losses. The other party will then have the opportunity to agree with the original medical opinion or offer conflicting medical evidence. If the disagreement is limited to MMI, the parties may take medical testimony and the Board will determine whether the claimant has reached MMI. If there is conflicting medical evidence on the degree of impairment and/or functional loss, the parties will have the opportunity to take additional medical testimony. If the parties are unable to reach agreement, the Board will ultimately schedule a hearing to resolve any unresolved medical disputes, to take testimony on vocational factors, and to allow for summations, after which the judge will issue a decision on loss of wage earning capacity.

The parties are encouraged to discuss and attempt to reach agreement on the claimant's impairment, functional abilities, and loss of wage earning capacity throughout the process. Stipulations on these issues may be submitted to

the Board on [Form C-300.5](#) . When the parties cannot reach agreement, the Board will play an active role in navigating claims through the classification process. The Board will identify claims that have medical evidence of a permanent impairment and direct the parties to obtain and submit their evidence within specific time frames. The parties, of course, should not wait for the Board to act and should seek to resolve issues on their own or ask the Board to initiate the classification process when they are ready.

## Education and Training

The Board recognizes that the introduction of new medical impairment and functional guidelines will require medical professionals and others involved in the classification process to learn a new set of standards. We are encouraged by the fact that the 2012 Guidelines are based on clinical information, such as history, physical findings and objective tests, that are at the heart of providers' diagnosis and treatment of workplace injuries. Similarly, providers should already be measuring and reporting on injured workers' functional abilities in connection with assessing their temporary impairment and facilitating return to work.

To encourage providers to learn to use the 2012 Guidelines, the Board, in connection with the Medical Society of the State of New York (MSSNY), is developing an e-learning module on the new impairment and functional assessment guidelines. The web-based course will be eligible for Continuing Medical Education (CME) credit. In addition, the Board is creating an e-learning course on the new forms and processes for classification of non-schedule permanent disabilities. Both courses will be available on the Board's website in mid-November without charge to all system participants, including medical providers, claims professionals, and attorneys. Finally, a continuously updated list of frequently asked questions and answers will also be available on the Board's website in November.

## Conclusion

The 2012 New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity should bring greater clarity to the implementation of the duration caps on permanent partial disability benefits that were agreed to as part of the 2007 reform. While the Board has been enforcing the caps on claims with dates of accident after March 13, 2007, since the statute's effective date, some claims have been slow to classify. The 2012 Guidelines, forms and classification process should improve the speed and consistency of classification and help realize the goals of the legislation. Finally, I want to thank the Task Force, including representatives from the AFL-CIO and the Business Council of NYS, for its hard work and excellent medical impairment and functional ability/loss guidelines.

Robert E. Beloten  
Chair