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WORKMEN'S COMPENSATION—PERMANENT PARTIAL DISABILITY—EVIDENCE OF ACTUAL WAGES ADMISSIBLE AS A FACTOR TO BE CONSIDERED IN DETERMINING CLAIMANT'S LOSS OF EARNING CAPACITY. *Hall v. Willard Sand & Gravel Co.*, 60 Md. App. 260, 482 A.2d 159 (1984).

Following a 1974 award of permanent partial disability benefits for a fifty-five percent loss of use of his body,[1] an employee was injured again in the course of his employment in 1975 when he fell from a piece of equipment. Subsequent to his initial hospitalization for injuries sustained in the fall, the employee was involved in two other accidents unrelated to his job, and surgery was delayed for more than a year.[2] Pursuant to the employee's claim for benefits occasioned by the fall from the machine, the Maryland Workmen's Compensation Commission (Commission) found him permanently totally disabled—fifty-five percent due to the preexisting disability, thirty percent due to the fall, and fifteen percent due to subsequent nonwork-related conditions.[3]

The Commission's decision was appealed to the Circuit Court for Montgomery County on the issue of the degree of permanent partial disability apportioned to the injury incurred in the 1975 fall. During the trial, the judge disallowed direct testimony about the claimant's average

1. Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 263-64, 482 A.2d 159, 161 (1984). Maryland provided workmen's compensation from 1912-14 for the actual decrease in average weekly wages after an accident, and from 1914-47 for the loss of capacity to earn. *See infra* notes 35-41 and accompanying text. The loss of "industrial use" or "industrial loss" terminology, which indicates the degree of permanent disability a claimant has suffered, has been used since 1947. Recent cases, in addition to *Hall*, have clarified that a determination or finding of industrial loss to an employee's body as a whole is a determination of loss of wage earning capacity. Cox v. American Store Equip. Corp., 283 F. Supp. 390, 395 (D. Md. 1968); Giant Food, Inc. v. Coffey, 52 Md. App. 572, 578, 451 A.2d 151, 155 (1982); *see* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 58.13(e) (1983) (industrial loss contrasted with physical loss) [hereinafter cited as WORKMEN'S COMPENSATION]; *see also infra* notes 42-55 and accompanying text.
2. Although Hall was scheduled for surgery on his back and for hernia problems experienced after the 1975 fall, the operation was postponed due to other physical ailments. He was in a car accident in December, 1976, and fell down a flight of stairs at home in August, 1976. *Hall*, 60 Md. App. at 262, 264, 482 A.2d at 160, 161.
3. In the appeal to the circuit court, Hall argued that the Maryland Workmen's Compensation Commission (Commission) erred in not finding permanent total disability due to either the combination of preexisting disability and the 1975 fall, Appellant's Brief at 3, Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 482 A.2d 159 (1984), or solely due to the 1975 injury, Reply Brief of Appellant at 6, Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 482 A.2d 159 (1984). Because 15% of the disability was apportioned to subsequent unrelated problems, Hall could not receive permanent total disability benefits. *See* Subsequent Injury Fund v. Thomas, 275 Md. 628, 342 A.2d 671 (1975) (subsequent unrelated injuries preclude permanent total disability benefits). Hall sought a finding of permanent total disability resulting solely from the 1975 injury in accord with Subsequent Injury Fund v. Compton, 28 Md. App. 526, 346 A.2d 475 (1975), *aff'd sub nom.* Anchor Motor Freight, Inc. v. Subsequent Injury Fund, 278 Md. 320, 363 A.2d 505 (1976), and Giant Food, Inc. v. Coffey, 52 Md. App. 572, 451 A.2d 151 (1982). In *Anchor Motor Freight*, and *Giant Food*, permanent total disability was found to result from a particular injury, notwithstanding preexisting or subsequent injury or illness.

weekly wages prior to the injury, but allowed evidence of postinjury earnings on cross-examination,[4] and affirmed the Commission's decision.[5] The Court of Special Appeals of Maryland reversed and remanded, holding that the claimant was entitled to submit evidence to the jury of his loss of earning ability, and further held it reversible error to exclude such testimony on the basis of possible undue sympathy from the jury.[6]

From the formative period of workmen's compensation law, two competing theories of compensation that have a direct bearing on the *Hall* decision have emerged.[7] These theories are the earning impairment theory and the physical impairment theory. The earning impairment theory bases compensation on actual wage loss or loss of earning capacity.[8] Alternatively, the physical impairment theory focuses on loss of bodily function in determining the amount of compensation.[9] Compensation for economic loss thus is contrasted with compensation for medical loss;[10] the former is based on a calculation or estimate of wage loss while the latter is based on a schedule of injuries which categorically relates specific bodily impairment, loss, or loss of use to a number of weeks for which compensation is to be paid.[11]

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4. *Hall*, 60 Md. App. at 264, 482 A.2d at 161. On direct and redirect examination, the objection to testimony about prior actual wages was sustained to avoid "undue sympathy" from the jury. *Id.* This same information about prior earnings, however, was admitted into the record at the Commission hearing where the average weekly wages at time of injury were determined. Appellant's Brief at 9, Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 482 A.2d 159 (1984).
5. *Hall*, 60 Md. App. at 262-63, 482 A.2d at 161.
6. *Id.* at 268, 482 A.2d at 163. The court of special appeals held that, because ability to work must be considered in determining the degree of disability a claimant has sustained, the employee's wages prior and subsequent to the accident must be among the facts available to the jury. *Id.*
7. *See* WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(a); Recent Cases, *Calculation of Earnings Capacity*, 4 WM. MITCHELL L. REV. 268 (1978); Burton, *Permanent Partial Disabilities and Worker's Compensation*, 53 J. URB. L. 853 (1976).
8. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14-.14(a); Recent Cases, *supra* note 7, at 271-74; Burton, *supra* note 7, at 871-73; *see infra* notes 42-45 and accompanying text.
9. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14-.14(a). Larson contrasts the "earning impairment" and "physical impairment" theories according to "whether the essence of what is being compensated for is medical or economic." *Id.* § 57.14(a), at 10-28.
10. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(a), at 10-28. The theory based on medical loss was formerly known as the "whole-man theory," but is currently known as the "physical impairment theory." *Id.*
11. *Id.* § 57.14-.14(a). Typically, a schedule relates specific bodily impairment, loss, or loss of use to the number of weeks for which compensation will be paid. *See id.* § 58.00.-.13(f). Although the payments do not depend on actual wage loss, it is presumed conclusively that there will be a loss of earning capacity. *Id.* § 58.11, at 10-174; *see* Larson, *The Wage-Loss Principle in Workmen's Compensation*, 6 WM. MITCHELL L. REV. 501, 507-10 (1980). Larson explains that, although three "schools of thought" regarding statutory disability can be identified—actual wage loss, earning capacity, and "whole man" or physical impairment—no pure wage-loss statutes exist today in the United States. The wage-loss statutes provide for both economic and medical compensation. WORKMEN'S COMPENSATION, *supra* note 1,

Originally, the function of workmen's compensation was to provide support for disabled industrial workers during periods when they were actually disabled,[12] a "purely wage-loss replacement function."[13] Before developing in the United States, compensation statutes were enacted in twenty-one other countries or provinces and none included schedules for permanent partial disability apart from actual loss of wages.[14] Of the first ten state statutes enacted in the United States, only one had a disability schedule[15] and eight were purely wage-loss statutes.[16]

Within a few years, schedules were incorporated into existing state compensation laws[17] and newly-adopted state compensation statutes,[18] including Maryland's.[19] These schedules provided compensation in fixed amounts for particular bodily loss,[20] but originally were not intended to

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§ 57.14(a); Larson, *The Wage-Loss Principle in Workmen's Compensation*, 6 WM. MITCHELL L. REV. 501 (1980).

12. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14, at 10-27; *see* Larson, *supra* note 11, at 502; Oros v. Mayor of Baltimore, 56 Md. App. 685, 690, 468 A.2d 693, 695 (1983).
13. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(b), at 10-31; Larson, *supra* note 11, at 503.
14. For a list of these countries, provinces, and the dates of enactment, see WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(b), at 10-32. Larson states that in these systems the amount of compensation paid was directly related to prior wages, and that all twenty-one were "pure wage-loss statutes." Larson, *supra* note 11, at 504-05; WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(b), at 10-32.
15. New Jersey had the first compensation statute containing a schedule. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(b), at 10-34. For a brief description of a schedule, see *supra* note 11 and *infra* note 20. Washington had one of the first ten workmen's compensation statutes passed in the United States but it was difficult to classify. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(b) n.61.
16. In WORKMEN'S COMPENSATION, *supra* note 1, Larson identifies and cites those statutes from Wisconsin, Ohio, Kansas, California, Nevada, New Hampshire, Massachusetts, and Illinois. *Id.* § 57.14(b), at 10-34; *see also* Larson, *supra* note 11, at 506-07. *See generally* Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35 (1917) (detailed account of development of workmen's compensation statutes).
17. For a citation and description of these statutes in Ohio, Wisconsin, Nevada, Massachusetts, Illinois, and California, see WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(d), at 10-39, 10-40 nn.83-88; Larson, *supra* note 11, at 511 nn.45-50. California's modified acceptance of a schedule "displayed its kinship to the presumed wage-loss principle and its rejection of the physical-impairment principle." WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(d), at 10-40 n.88; Larson, *supra* note 11, at 511 n.50.
18. For a citation and description of the original statutes in Michigan and Rhode Island, see WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(d), at 10-39 nn.80-81; Larson, *supra* note 11, at 510 nn.42-43.
19. Act of April 15, 1912, ch. 837, 1912 Md. Laws 1624, 1626; *see* WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(d), at 10-39, n.82; Larson, *supra* note 11, at 511 n.44. For background and a description of this statute, see *infra* notes 34-36 and accompanying text.
20. The two components of the schedule principle include how the amount of compensation is determined and the fixed amount of compensation regardless of wage loss. The former is understood in relation to industrial accident schedules in insurance policies. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(c); Larson, *supra* note 11, at 507-08.

be divorced from the wage-loss principle. The injuries included in the schedules were serious enough to support a "conclusive presumption that actual wage loss would sooner or later result."[21]

Subsequent expansion of the schedule principle[22] carried with it this presumption of lost earning capacity, even among states applying the physical impairment theory.[23] In 1974 the Minnesota legislature was the first to adopt expressly the physical-impairment basis for permanent partial disability benefits, to the exclusion of lost earning capacity.[24] Several other state courts have taken similar initiatives when interpreting their compensation statutes.[25] Notwithstanding this new minority[26] of states that pay compensation for physical impairment alone, most states make compensation awards not merely for physical injury, but also for disability that results from such injury.[27] These states identified as proponents of physical impairment principles arguably still retain the presumption of decreased earning capacity,[28] and states emphasizing wage-loss theory adjust the value of earnings or make limited use of schedules without

21. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(c), at 10-36; Larson, *supra* note 11, at 508; *see* WORKMEN'S COMPENSATION, *supra* note 1, 58.11. In a 1912 address to the Law Association of Philadelphia, denying that the proposed limited schedule in an early Pennsylvania statute represented compensation for physical impairment, Francis H. Bohlen explained: "the sole object . . . is to protect . . . the injured workmen and those dependent upon them from the economic sufferings entailed by the total or partial destruction of their earning power." *Id.* § 57.14(c), at 10-38; Larson, *supra* note 11, at 510.

22. *See* WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(d); Larson, *supra* note 11, at 510-15.

23. Larson illustrates by example how case law in New Jersey, Missouri, West Virginia, and Wisconsin, states identified with the physical impairment theory, includes a rationale for workmen's compensation based on impairment of earning capacity. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(e).

24. Act of April 12, 1974, ch. 486, 1, 1974 Minn. Laws 1230, 1231 (current version at MINN. STAT. § 176.021(3) (1978 & Supp. 1986)). The 1974 amendment stated: "[p]ermanent partial disability is payable for functional loss of use or impairment of function." Act of April 12, 1974, ch. 486, 1, 1974 Minn. Laws 1230, 1231; *see* WORKMEN'S COMPENSATION, *supra* note 1, §§ 57.14, at 10-27 nn.35-36, 57.14(f), at 10-47, 10-48 n.11; Larson, *supra* note 11, at 513 nn.55-56.

25. *See, e.g.*, Cuarisma v. Urban Painters, Ltd., 59 Hawaii 409, 583 P.2d 321 (1978) (concept of disability as purely functional and physiological); Cody v. Jayhawk Pipeline Corp., 222 Kan. 491, 565 P.2d 264 (1977) (purpose of statute to compensate injured workers for physical injures); Clarius v. Fogleman Truck Lines, Inc., 367 So.2d 1264 (La. App. 1979) (only loss of use or function required); Redfern v. Sparks-Withington Co., 403 Mich. 63, 268 N.W.2d 28 (1978) (effect on wage-earning capacity not determinitive); Buechler v. North Dakota Workmen's Compensation Bureau, 222 N.W.2d 858 (N.D. 1974) (permanent total and permanent partial award made for the same injury); Taylor v. State Accident Ins. Fund, 40 Or. App. 437, 595 P.2d 515 (1979) (purpose of permanent partial disability payments to compensate for injury). For a brief account of the facts and reasoning in these cases, see WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(f)nn.14-18.

26. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(f), at 10-50.

27. WORKMEN'S COMPENSATION, *supra* note 1, § 57.11, at 10-2. For an extensive list of supporting cases, see *id.* n.2.

28. *See supra* note 23 and accompanying text.

losing that classical identity.[29] In response to the trend toward converting workmen's compensation into a system paying for physical rather than wage-earning impairment,[30] and in the interest of economic and judicial efficiency,[31] the Florida legislature passed far-reaching[32] amendments to revive emphasis of that state's wage-loss position.[33]

After a modest beginning,[34] Maryland's first workmen's compensation statute[35] included a limited schedule[36] for permanent partial disabil-

29. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(a), at 10-30. Larson identifies these concessions as (1) adjustments of earnings before and after the injury to make comparison more realistic and (2) limited use of schedules. *Id.* Examples of variables used to determine earnings adjustments are: change in general wage levels; age, training, or hours; wages paid out of sympathy or in consideration of long service; and lack of performance of employment following injury. *Id.* § 57.32-.35.
30. WORKMEN'S COMPENSATION, *supra* note 1, § 57.15, at 10-62; Larson, *supra* note 11, at 510-22.
31. Larson identifies two motives behind the "present movement to restore the wage loss principle": (1) reducing monetary "waste" compensating losses that are not disabling; and (2) reducing administrative, legal, and judicial waste of time and resources. WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(j); Larson, *supra* note 11, at 522.
32. Whittaker, *The 1979 Florida Workers' Compensation Law (The Wage-Loss Concept)*, 49 INS. COUNS. J. 76 (1982).
33. Act of May 11, 1979, ch. 79-40, 1979 Fla. Sess. Law Serv. 311 (West) (amending FLA. STAT. ANN. §§ 20, 440, 624, 627 (West 1966 & Supp. 1978). Oregon has considered a reform of compensation laws that would make rehabilitation and reemployment of the injured worker the primary goal, and in 1980, Delaware considered wage-loss reform. *See* WORKMEN'S COMPENSATION, *supra* note 1, § 57.15; Larson, *supra* note 11, at 523-31.
34. Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206, 232 (1952). Maryland enacted the first compensation act in the United States in 1902. Act of April 1, 1902, ch. 139, 1902 Md. Laws 218 (a cooperative insurance fund for miners). This statute was held unconstitutional in an unappealed decision in the Court of Common Pleas of Baltimore City. Franklin v. United Rys. & Elec. Co. of Baltimore, 2 Baltimore City Rep. 309 (1904); Rhodes, *The Inception of Workmen's Compensation in the United States*, 11 ME. L. REV. 35, 43-44 (1917); Student Project, *Developments in Worker's Compensation Law*, 53 J. URB. L. 755, 757 (1976).
35. Act of April 15, 1912, ch. 837, 1912 Md. Laws 1624. This Act was to "facilitate the insurance of employees against the consequence of accidents resulting in personal injury or death, and to permit agreements between employers and employees with reference to such accidents." *Id.* The insurance was to be administered under the supervision of the State Insurance Commissioner. *Id.*; *see* WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(d) n.82; Larson, *supra* note 11, at 511 n.44; *supra* note 19 and accompanying text. Before public general laws were passed, the Maryland legislature recognized special conditions in the coal and clay mines of Allegany and Garrett Counties. After an initial statute that compensated for negligent fatalities, Act of April 8, 1902, ch. 412, 1902 Md. Laws 593 (repealed April 7, 1910), the legislature enacted a public local law "to create a fund for the relief and sustenance" of injured employees. This statute included a schedule for loss of hands, feet, and eyesight, and the support it offered for "those who are or may become paupers and charges upon the public" reflected the strong presumption of wage loss. Act of April 7, 1910, ch. 153, 1910 Md. Laws 484, 484-89. For a description of this act and the context in which it originated, see Solvuca v. Ryan & Reilly Co., 131 Md. 265, 280, 101 A. 710, 715 (1917).
36. The schedule covered amputation of one or both hands or feet and the irrevocable

ity, which provided compensation for amputation of one or both hands or feet and loss of one or both eyes. Payments were based on average weekly wages during the year prior to injury, less the average amount earned after the accident. This statute acknowledged functional loss but paid compensation only during periods of disability[37]—a solid wage-loss position. A lengthy statute was enacted in 1914,[38] enlarging the schedule and inserting a category of permanent partial disability not on the schedule, labeled "other cases."[39] Compensation for this category of disability again was related to wages before and after the injury.[40] Compensation, however, was not for mere wage loss, but for "loss of wage-earning capacity."[41]

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loss of one or both eyes. Act of April 15, 1912, ch. 837, § 5(III), 1912 Md. Laws 1624, 1627.

37. *Id.*

38. Act of April 16, 1914, ch. 800, 1914 Md. Laws 1429 (creating the State Industrial Accident Commission and the State Accident Fund). This act was declared constitutional in Solvuca v. Ryan & Reilly Co., 131 Md. 265, 101 A. 710 (1917). The purpose of this act was to "protect capital and labor, employer and employee, and the State, against waste and distress incident to modern industry," Liggett & Meyers Tobacco Co. v. Goslin, 163 Md. 74, 80, 160 A. 804, 807 (1932), and to "provide a speedy and inexpensive method by which compensation might be made to [employees] or those dependent upon them without the delay of long and tedious litigation," Brenner v. Brenner, 127 Md. 189, 193, 96 A. 287, 288 (1915). This purpose was further explained in Queen v. Agger, 287 Md. 342, 343, 412 A.2d 733, 733-34 (1980) (to "provide workers with compensation for loss of earning capacity"); Edgewood Nursing Home v. Maxwell, 282 Md. 422, 426, 384 A.2d 748, 751 (1978) (to "protect workers and their families from the hardships inflicted by work-related injuries"); Bethlehem-Sparrows Point Shipyard, Inc. v. Damasiewicz, 187 Md. 474, 480, 50 A.2d 799, 802 (1947) (to "provide compensation for loss of earning capacity").

39. This portion of the statute stated:

> Other Cases. In all other cases in this class of disability the compensation shall be fifty per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, if less than before the accident (but not to exceed twelve dollars per week), payable during the continuance of such partial disability, but not to exceed $3,000.00, and subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest.

Act of April 16, 1914, ch. 800, § 35(3), 1914 Md. Laws 1429, 1453. This provision was declared constitutional in Allen v. Glenn L. Martin Co., 188 Md. 290, 52 A.2d 605 (1947). For a history of this section with examples of its application, see M. PRESSMAN, WORKMEN'S COMPENSATION IN MARYLAND § 3-4(2) (2d ed. 1977).

40. "Average weekly wages" were defined in another section of this statute as those earned by a full-time employee. Act of April 16, 1914, ch. 800, § 62(8), 1914 Md. Laws 1429, 1463; *see* Stevenson v. Hill, 171 Md. 572, 189 A. 910 (1937); Campbell Coal Co. v. Stuby, 159 Md. 280, 150 A. 878 (1930); Merrill v. State Military Dept., 152 Md. 474, 136 A. 897 (1927); Picanardi v. Emerson Hotel Co., 135 Md. 92, 108 A. 483 (1919); WORKMEN'S COMPENSATION, *supra* note 1, § 60.11(a).

41. Miller v. McGraw Co., 184 Md. 529, 540, 42 A.2d 237, 243 (1945); Baltimore Tube Co. v. Dove, 164 Md. 87, 98-99, 164 A. 161, 165 (1933); Baltimore Publishing Co. v. Hendricks, 156 Md. 74, 79, 143 A. 654, 655 (1928); Jirout v. Gebelein, 142 Md. 692, 697, 121 A. 831, 833 (1923); *see* Townsend v. Bethlehem-Fairfield Shipyard, Inc., 186 Md. 406, 47 A.2d 365 (1946); Oros v. Mayor of Baltimore, 56 Md. App.

In 1947, the definition of nonscheduled permanent partial disability was amended to provide for impairment of "industrial use of the employee's body" as a result of the injury.[42] To determine industrial loss,

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685, 690-91, 468 A.2d 693, 695-96 (1983); *see also* Benoni v. Bethlehem-Fairfield Shipyard, Inc., 188 Md. 306, 52 A.2d 613 (permanent partial disability award less than maximum available), *appeal dismissed*, 332 U.S. 749 (1947); Hyman v. Tyler, 188 Md. 301, 52 A.2d 610 (same), *appeal dismissed*, 332 U.S. 749 (1947); Gorman v. Atlantic Gulf & Pac. Co., 178 Md. 71, 12 A.2d 525 (1940) (compensation included awards for temporary total and permanent partial disability); Bethlehem Steel Co. v. Mayo, 168 Md. 410, 177 A. 910 (1935) (permanent partial disability award to unemployed laborer for loss of use of leg); Coca-Cola Bottling Works v. Lilly, 154 Md. 239, 140 A. 215 (1928) (employee's return to work prevented by physical loss). During this period, the right in Maryland to workmen's compensation lost its *dependence* on lost wages, but the *relation* to wage loss did not disappear. *See, e.g.*, Bethlehem-Sparrows Point Shipyard, Inc. v. Glass, 188 Md. 501, 507-08, 53 A.2d 405, 409 (1947) (impairment in terms of potential loss of earnings may be found, although no loss of earnings occurred); Allen v. Glenn L. Martin Co., 188 Md. 290, 300, 52 A.2d 605, 610 (1947) (same); Griffin v. Rustless Iron & Steel Co., 187 Md. 524, 531, 51 A.2d 280, 283 (1947) (right to file a claim does not depend on lost wages, but loss of function may be a deterrent from or denial of future promotion or employment); Baltimore Tube Co. v. Dove, 164 Md. 87, 98, 164 A. 161, 165 (1933) (loss of earning capacity, not loss of wages); Baltimore Publishing Co. v. Hendricks, 156 Md. 74, 79, 143 A. 654, 655 (1928) (same). Although the relation of compensation to wage loss became more indirect, there was still a direct correspondence between compensation and actual earnings, which were used to determine the *risk* of lost wages or earning capacity for insurance purposes. Stevenson v. Hill, 171 Md. 572, 576-77, 189 A. 910, 912-13 (1937).

> The system has as its foundation a correspondence between compensation to be paid and the amounts paid the active workmen according to the pay rolls. The actual earnings are to furnish the basis of calculating the fund to cover the compensation. . . . The actual earnings are taken as determining the risk of loss of earnings or capacity.

Id.; *see also* Picanardi v. Emerson Hotel Co., 135 Md. 92, 108 A. 483 (1919) (calculation of compensation award may include monetary value of fringe benefits provided by employer if such value was fixed by the parties at the time of hiring); WORKMEN'S COMPENSATION, *supra* note 1, § 57.21.

42. Act of May 7, 1947, ch. 895, § 35(4), 1947 Md. Laws 2126, 2129 (codified as amended at MD. ANN. CODE art. 101, § 36(4)(a) (1985)); *see* M. PRESSMAN, WORKMEN'S COMPENSATION IN MARYLAND § 3-4(2) (2d ed. 1977); *see supra* note 1. After the statutory test shifted from loss of earning capacity to loss of industrial use, the Court of Appeals of Maryland said in dicta that a claimant "need not show loss of wages *or earning capacity* in order to be entitled to compensation for an accidental injury." Belschner v. Anchor Post Products, Inc., 227 Md. 89, 92, 175 A.2d 419, 421 (1961) (emphasis added); *see* Baltimore Publishing Co. v. Hendricks, 156 Md. 74, 143 A. 654 (1928); Baltimore Tube Co. v. Dove, 164 Md. 87, 164 A. 161 (1933). The court of special appeals took the reverse position in *Hall*, acknowledging that industrial loss is essentially a "loss of wage-earner capacity." 60 Md. App. 260, 267, 482 A.2d 159, 163 (1984); *see* Cox v. American Store Equip. Corp., 283 F. Supp. 390 (D. Md. 1968); *infra* notes 52-55 and accompanying text; *see also* Queen v. Agger, 287 Md. 342, 343, 412 A.2d 733, 734 (1980) (one purpose of statute is to provide compensation for loss of earning capacity); Giant Food, Inc. v. Coffey, 52 Md. App. 572, 578, 451 A.2d 151, 155 (1982) (finding industrial loss is equivalent to finding loss of earning capacity).

In *Cox*, the United States District Court for the District of Maryland explained the difficulties in implementing this provision in the 1914 and 1947 laws. Pursuant to the 1914 statute, the Commission made a discretionary award based on the difference between average weekly wages and wage-earning capacity after the accident. A

the Commission considered, "among other things, the nature of the physical injury, the occupation, experience, training and age of the injured employee at the time of the injury."[43] Based on the assessment of loss, compensation paid was related explicitly to the worker's established weekly wages at the time of injury, and in certain instances was as much as full wages.[44] The claimant's injury in *Hall v. Willard Sand & Gravel Co.* came under the current version of this nonscheduled permanent partial disability provision.

In 1975, although the method of determining industrial loss re-

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claimant's right of appeal was limited, however, to the factual determination of wage-earning capacity. The 1947 amendments preserved this right of appeal by giving the award a "direct relationship to the determination of industrial loss or earning capacity." *Cox*, 283 F. Supp. at 395; *see* M. PRESSMAN, WORKMEN'S COMPENSATION IN MARYLAND § 3-4(2) (2d ed. 1977); Boughman Contracting Co. v. Mellott, 216 Md. 278, 285, 139 A.2d 852, 855 (1958); Townsend v. Bethlehem-Fairfield Shipyard, Inc., 186 Md. 406, 421-22, 47 A.2d 365, 371-72 (1946); Miller v. James McGraw Co., 184 Md. 529, 539-40, 42 A.2d 237, 242-43 (1945); Baltimore Tube Co. v. Dove, 164 Md. 87, 99-100, 164 A. 161, 165-66 (1933); *Cf.* Bonner v. Celanese Corp. of Am., 195 Md. 9, 13, 72 A.2d 686, 688 (1949) (review to show award bore reasonable relation to injury suffered); Allen v. Glenn L. Martin Co., 188 Md. 290, 300, 52 A.2d 605, 609 (1947) (same).

43. Act of May 7, 1947, ch. 895, § 35(4), 1947 Md. Laws 2126, 2129-30. It was this clause in the current statute, MD. ANN. CODE art. 101, § 36(4)(a) (1985), to which the claimant in *Hall* looked for support. *Hall*, 60 Md. App. at 265-66, 482 A.2d at 161-62. *See infra* notes 59-60 and accompanying text.

44. The text of the subsection states:

> Other Cases. In all other cases of disability, other than those specifically enumerated disabilities set forth in Sub-section (3) of Section 35, which disability is partial in character, but permanent in quality, the Commission shall determine the portion or percentage by which the industrial use of the employee's body was impaired as a result of the injury, and in determining such portion or percentage of impairment resulting in an industrial loss the Commission shall take into consideration, among other things, the nature of the physical injury, the occupation, experience, training and age of the injured employee at the time of injury, and shall award compensation in such proportion as the allowable for permanent total disability determined loss bears to compensation, the said compensation to be paid weekly at the rate of sixty-six and two-thirds per centum of the average weekly wages, in no case to exceed twenty dollars per week, and not less than a minimum of ten dollars per week unless the employee's established weekly wages are less than ten dollars per week at the time of the injury, in which event he shall receive compensation equal to his full wages, but not to exceed $5,000.00, and subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest.

Act of May 7, 1947, ch. 895, § 35(4), 1947 Md. Laws 2126, 2129-30 (codified as amended at MD. ANN. CODE art. 101, § 36(4)(a) (1985)). The definition of average weekly wages was amended in 1947 to state:

> [A]nd if any employee shall receive wages paid in part by his employer and part by the United States under any veterans' benefit law enacted by Congress, the term "Average weekly wages" shall mean the total average weekly wages from both sources earned by such an employee when working on full-time.

Act of April 2, 1947, ch. 283, § 80(8), 1947 Md. Laws 452 (codified as amended at MD. ANN. CODE art. 101, § 67(8) (1985)).

mained the same, the base, minimum, and maximum numerical figures changed.[45] The state average weekly wage, as determined by the Maryland Department of Employment Security, was introduced as a factor limiting maximum compensation awarded and a claimant's actual wages were used to set the minimum level in a particular case.[46] Today, except for changes in base figures,[47] this subsection of Maryland's workmen's compensation law remains the same.[48]

In holding that the claimant was entitled to present direct evidence to the jury of his loss of wage earning ability, the court in *Hall* referred to the purpose of workmen's compensation as expressed by the court of appeals prior to the 1947 amendments — to compensate workers for lost earning capacity resulting from job-related injuries.[49] In addition, the court relied on *Cox v. American Store Equipment Corp.*,[50] where the United States District Court for the District of Maryland interpreted Maryland's nonscheduled permanent partial disability provision.[51] According to the *Cox* decision, Maryland law required the Commission to determine the effect of an injury on an employee's subsequent ability to

45. Act of May 15, 1975, ch. 639, 1975 Md. Laws 2962, 2964 (codified as amended at MD. ANN. CODE art. 101, § 36(4)(a) (1985)). By this time, the provision for the average weekly wages a full-time employee earned had been amended to include "tips and the reasonable value of board, rent, housing, lodging, or similar advantages received from an employer." Act of April 22, 1949, ch. 257, § 67(8), 1949 Md. Laws 656 (codified as amended at MD. ANN. CODE art. 101, § 67(8) (1985)); *see* M. PRESSMAN, WORKMEN'S COMPENSATION IN MARYLAND § 3-12(2) (2d ed. 1977).

46. Act of May 15, 1975, ch. 639, § 36(4)(a), 1975 Md. Laws 2962, 2964 (codified as amended at MD. ANN. CODE art. 101, § 36(4)(a) (1985)). The statute relates compensation to wages "established" by the employee: "[I]n no case shall the employee receive less than a minimum of fifty dollars per week unless the employee's established weekly wages are less than fifty dollars per week at the time of injury in which event he shall receive compensation equal to his weekly wages." *Id.*

47. Act of May 17, 1976, ch. 652, § 36(4)(a), 1976 Md. Laws 1809, 1810 (percentage loss of industrial use related to a number of weeks instead of dollar amount); Act of April 2, 1982, ch. 17, § 36(4)(a), 1982 Md. Laws 72, 104 (no change) (codified as amended at MD. ANN. CODE art. 101, § 36(4)(a) (1985)).

48. MD. ANN. CODE art. 101, § 36(4)(a) (1985); *see* M. PRESSMAN, WORKMEN'S COMPENSATION IN MARYLAND § 3-4(2) (2d ed. 1977). For a history of § 36(4)(a) from 1914-46, see Townsend v. Bethlehem-Fairfield Shipyard, Inc., 186 Md. 406, 47 A.2d 365 (1946).

49. Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 265, 482 A.2d 159, 162 (1984). Before Maryland's legislature approved the 1947 amendments, adopting the "industrial loss" language, the purpose of the Workmen's Compensation Act expressed by the Court of Appeals of Maryland was to "provide compensation for loss of earning capacity resulting from accidental injuries sustained in industrial employment." Bethlehem-Sparrows Point Shipyard, Inc. v. Damasiewicz, 187 Md. 474, 480, 50 A.2d 799, 802 (1947). More recently, the court recognized that workmen's compensation is "one facet of an overall system of wage-loss protection, and that the underlying principle of the system is to restore to the worker a portion of wages lost by physical disability, unemployment, or old age." Mazor v. Department of Correction, 279 Md. 355, 363, 369 A.2d 82, 88 (1977).

50. 283 F. Supp. 390 (D. Md. 1968).

51. MD. ANN. CODE art. 101, § 36(4)(a) (1985).

work and earn a wage.[52] The federal court found this assessment of industrial loss "in essence a determination of loss in wage-earning capacity."[53] This was the same position suggested by the court of appeals in *Queen v. Agger*,[54] and reached by the court of special appeals in *Oros v. Mayor of Baltimore*[55] and *Giant Food, Inc. v. Coffey*.[56]

The *Hall* court adopted Professor Larson's statement of the law describing preinjury and postinjury earnings as evidence of the degree of earning capacity impairment.[57] After affirming the relevance in Maryland of wage-earning ability to the disability concept,[58] the court concluded that a jury should be allowed to consider the difference between a

52. Cox v. American Store Equip. Corp., 283 F. Supp. 390, 394 (D. Md. 1968). The court compared industrial loss under Maryland's statute with loss of "wage earning capacity" in § 908(c)(21) of the District of Columbia Compensation Act, Longshoremen's & Harbor Worker's Compensation Act, 33 U.S.C. § 908(c)(21) (1982). Under the Longshoremen's Act, wage-earning capacity is determined on the basis of actual earnings or from factors or circumstances affecting the capacity to earn, such as the nature of the injury, degree of physical loss, usual employment, and future effect of disability. *Id.* § 908(h). The factors considered under the Maryland statute to determine industrial loss include, "among other things, the nature of the physical injury, the occupation, experience, training and age of the injured employee at the time of injury." MD. ANN. CODE art. 101, § 36(4)(a) (1985). The court found that these factors presented "no material difference in the determination of 'industrial loss' under the Maryland statute and 'loss of wage-earning capacity' under the Federal act." *Cox*, 283 F. Supp. at 395.

53. *Id.*

54. 287 Md. 342, 343, 412 A.2d 733, 734 (1980); *see* Bethlehem-Sparrows Point Shipyard, Inc. v. Damasiewicz, 187 Md. 474, 480, 50 A.2d 799, 802 (1947).

55. 56 Md. App. 685, 691, 468 A.2d 693, 696 (1983).

56. 52 Md. App. 572, 578, 451 A.2d 151, 155 (1982).

57. Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 266-67, 482 A.2d 159, 162-63 (1984). Larson states:

> Apart from schedule and disfigurement allowances, "compensation is awarded not for the injury as such but rather for an impairment of earning capacity caused by the injury." However, as stressed above, post-injury earnings and earning capacity are not synonymous. Earnings equal to preinjury earnings are the strongest evidence of nonimpairment of capacity, but they are not conclusive.

WORKMEN'S COMPENSATION, *supra* note 1, § 57.31; *see* Zeigale's Case, 325 Mass. 128, 129-30, 89 N.E.2d 264, 265 (1949) (dimunition of earning capacity must be shown); Eckman v. Ex-Cell-O Corp., 58 Mich. App. 94, 96, 226 N.W.2d 855, 856 (Mich. App. 1975) (it is essential to show causal connection between physical loss and inability to obtain employment); Hill v. J. P. Stevens & Co., 360 So.2d 1035, 1036 (Ala. Civ. App. 1978) (both bodily disability and loss of ability to earn must be determined).

58. Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 266-67, 482 A.2d 159, 163 (1984). The court deferred to Larson's guidance in the determination of disability:

> The key to the understanding of this problem is the recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: The first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is de facto inability to earn wages, as evidenced by proof that the claimant has not in fact earned anything.

Id.; WORKMEN'S COMPENSATION, *supra* note 1, § 57.11, at 10-6, 10-7.

claimant's wages at the time of injury and subsequent to the injury.[59] Moreover, this evidence of actual wages was held to be included in the "among other things" clause of Maryland's compensation statute[60] as one relevant factor to be applied in determining overall loss of earning capacity.[61] Thus, the circuit court's exclusion of this material and probative evidence[62] was impermissible, and the exclusion was reversible error in light of the "extremely difficult task" of apportioning the claimant's disability in relation to his ability to work.[63]

According to *Hall*, this principle of comparing actual wages at the time of an injury with postinjury wages has been applied explicitly in most jurisdictions and "implicitly recognized in Maryland."[64] The court's acknowledgment in this case amounts to a forceful expression of Maryland's consistent refusal to award compensation for nonscheduled permanent partial disabilities on the basis of physical loss divorced from wage-earning ability. Maryland's original wage-loss position[65] has been

59. "[A]n employee's ability to work necessarily requires that the trier of facts be permitted to consider among other facts the amount of wages the claimant earned both before and after the accident." Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 268, 482 A.2d 159, 163 (1984).

60. *Id.* at 265, 482 A.2d at 162; MD. ANN. CODE art. 101, § 36(4)(a) (1985); *see supra* note 43 and accompanying text.

61. Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 266, 482 A.2d 159, 162 (1984). In Oros v. Mayor of Baltimore, 56 Md. App. 685, 468 A.2d 693 (1983), it was stated that "to the extent that age is consideration, wage loss is arguably contemplated by the ["among other things"] formula, at least in the calculation of the percentage of the future wages lost." *Id.* at 691, 468 A.2d at 696. In Cox v. American Store Equip. Corp., 283 F. Supp. 390 (D. Md. 1968), the court concluded that consideration of the factors requires a "determination of the effect an injury will have on the employee's ability to work and earn a wage after sustaining an injury." *Id.* at 394. The court explained that because nonscheduled injuries do not carry the presumption of lost earning capacity, a "factual determination must be made." *Id.* In *Hall*, without the comparison of actual wages, the jury determined the degree of disability "almost exclusively on the showing of anatomical loss . . . too narrow a basis for the determination of industrial loss." 60 Md. App. 260, 266, 482 A.2d 159, 162 (1984).

62. Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 267-68, 482 A.2d 159, 163 (1984).

63. *Id.*

64. *Id.* at 264-65, 482 A.2d at 162. Although no supporting Maryland citations were given, reference was made to Larson's display of the weight of authority in WORKMEN'S COMPENSATION, *supra* note 1, §§ 57.11 n.2, 57.31 n.91. Larson explains that when evidence reveals earnings prior to and after the accident are equal such evidence creates a "presumption which may be overcome by other evidence showing the actual earnings do not fairly reflect claimant's capacity." *Id.* § 57.31, 10-122, 10-123. This was the type of reasoning the claimant presented to the court of special appeals in *Hall*. Instead of disallowing such testimony on the basis of possible undue sympathy from the jury, the court should recognize procedural safeguards, such as cross examination, jury instructions, and independent evidence, to safeguard against the prejudicial effect of such testimony. *See* Appellant's Brief at 12-13, Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 482 A.2d 159 (1984).

65. *See supra* notes 35-37 and accompanying text.

modified by expanded schedule benefits,[66] but the basis for the sceduled and nonscheduled compensation awards has never been limited to physical injury.[67] From actual wage loss (1912),[68] to "loss of earning capacity" (1914),[69] to "industrial loss" (1947),[70] Maryland has maintained an economic theory as well as a medical theory of compensation.[71] Moreover, four out of the five express factors to be included in evaluating nonscheduled permanent partial disability—occupation, experience, training, and age—are tied intimately to the wage level of a particular worker in particular employment settings.[72] Although state averages for weekly wages have been included in the formula for evaluating disability since 1975, the averages are applied in direct relation to the worker's actual wages.[73]

The overwhelming impact of the relevance of actual wage information in determining earning capacity is evidenced by the total absence of contrary argument before the court of special appeals. In its failure to persuade the court that the claimant's testimony was immaterial,[74] the employer conceded to the weight of authority among other jurisdictions[75] as well as Maryland's own long standing application of the wage-loss concept. Even though evidence of actual wages is only one among a number of factors relevant to the determination of wage-earning capac-

66. *See* MD. ANN. CODE art. 101, § 36(3) (1985); M. PRESSMAN, WORKMEN'S COMPENSATION IN MARYLAND § 3-4(1) (2d ed. 1977 & Supp. 1980).

67. *Contra* Cody v. Jayhawk Pipeline Corp., 222 Kan. 491, 493, 565 P.2d 264, 267 (1977) (the court stated that the "primary purpose of . . . workmen's compensation . . . is to compensate an injured workman for his physical injuries."); *see* WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(f) n.15. In contrast, workmen's compensation in Maryland has been viewed as:

> one facet of an overall system of wage-loss protection . . . the underlying principle of the system is to restore to the worker a portion of wages lost by physical disability, unemployment and old age. It follows that although two or more causes of wage loss may coincide, the benefits need not cumulate, for the worker experiences but one wage loss.

Mazor v. Department of Correction, 279 Md. 355, 363, 369 A.2d 82, 88 (1977); *see* WORKMEN'S COMPENSATION, *supra* note 1, ch. XVIII.

68. *See supra* notes 35-37 and accompanying text.

69. *See supra* notes 38-41 and accompanying text.

70. *See supra* notes 42-44 and accompanying text.

71. *See* WORKMEN'S COMPENSATION, *supra* note 1, § 57.11 (discussing the integration of medical disability and earning impairment components).

72. For a discussion of the impact of age, training, and hours on earning capacity, see WORKMEN'S COMPENSATION, *supra* note 1, § 57.33; Larson, *supra* note 10, at 524 n.94. For an argument relating age to loss of earning capacity and wage loss, see Oros v. Mayor of Baltimore, 56 Md. App. 685, 691, 468 A.2d 693, 696 (1983).

73. *See supra* note 46 and accompanying text.

74. The employer argued that the circuit court judge did not err by excluding the evidence of prior wages because the information was included in the employee's original claim filed with the Commission, and the claim was admitted into evidence as an exhibit. Even if it was error, the employer went on to argue, it was harmless because the jury didn't need that information to reach its finding. Appellee's Brief at 6-14, Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 482 A.2d 159 (1984). For the claimant's reply that the error was prejudicial, see Reply Brief of Appellant at 2-8, Hall v. Willard Sand & Gravel Co., 60 Md. App. 260, 482 A.2d 159 (1984).

75. *See supra* notes 27-29 and accompanying text.

ity, Maryland's consistent association of workmen's compensation with a claimant's economic reality forbids exclusion of such pertinent information from the trier of fact when it is apportioning disability. Indeed, had the trial judge overruled the objection in the first instance, this wage-loss principle may have been implemented without further notice or appeal. As a result of *Hall*, however, Maryland's position in the present movement to restore the centrality of earning impairment principles[76] rests no longer on implication, but on overt judicial action.

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76. *See* WORKMEN'S COMPENSATION, *supra* note 1, § 57.14(j), at 10-60; Larson, *supra* note 11, at 522-23.