INTRODUCTION

Courts often need to determine the impact of an incident on the capacity of an individual to be employed and to earn wages. Earning capacity is the legal concept that describes the process utilized to determine the impact of an incident on an individual’s ability to be employed and to earn wages. Rehabilitation counselors are utilized in the legal field to assess the impact of an incident on a person’s capacity to earn wages because participation in the rehabilitation counseling process results in identification as to what is likely to occur in regard to an individual’s employment and earnings.

Rehabilitation counselors are able to assess earning capacity because employment options available to the individual are identified during the rehabilitation counseling process. The wages that can be earned by working in the jobs available to the individual represent the individual’s earning capacity. Courts have accepted rehabilitation counselors as experts who are qualified to perform earning capacity assessments based on the rehabilitation counseling process, which satisfies court guidelines requiring a reasonable basis for expert opinion.
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Court guidelines also require that an expert’s analysis reflect what is likely to occur in regard to the situation being assessed by the expert. To meet these guidelines, experts must use established methodology. The methodology available to rehabilitation counselors is the rehabilitation counseling process.

Because the rehabilitation counseling process provides the basis for earning capacity assessment, earning capacity assessments that are not based on rehabilitation counseling methodology lack foundation. Assessments that lack foundation do not accurately represent the person’s situation and provide no useful information for the decision making of the courts relevant to the person’s lost earning capacity.

The information in this book is based on the author’s knowledge gained from provision of earning capacity assessments for more than 5000 cases, over a thirty-year period of time, in numerous states and legal jurisdictions. The cases have been filed and tried in state and federal courts and have included assessments for various types of litigation including personal injury, medical malpractice, employment, dissolution, maritime, railroad, and so forth. While court systems and the types of cases for which analysis have been provided have varied, all court systems in which earning capacity assessments have been provided have held that analysis based on the rehabilitation counseling process meets court requirements. The remainder of this chapter provides a discussion of the use of earning capacity experts in litigation.

1A. THE NATURE OF LITIGATION

Generally speaking, attorneys are hopeful that after an individual’s situation has been thoroughly evaluated by an expert, the opinions of that expert will support positions that are favorable to their client. Defense attorneys are hopeful that experts will provide opinions that result in damages being limited, while plaintiff attorneys hope that expert opinions will support maximization of damages. Considering the desires of opposing counsels, the adversarial nature of litigation is evident.

The nature of litigation is part and parcel of an attorney’s role in litigation, because attorneys are advocates for their clients. For the expert, however, the adversarial and polarized nature of litigation can be difficult.

While attorneys are advocates for their clients, experts are not advocates. Experts function to provide thorough, objective, and accurate assessment of the individual’s situation for the court’s decision making. An
expert is counted on by the court, the attorneys, and the attorneys’ client, to thoroughly and accurately assess an individual’s situation.

If the adversarial and polarized nature of litigation plays a role in the expert’s analysis, the analysis is unlikely to accurately reflect the individual’s situation. Accurate representation of the situation by the expert is necessary if the court and associated parties are to make reasoned determinations and decisions about the individual’s situation.

To provide accurate representation of the plaintiff’s situation, the expert’s opinion must be reasonably based. Unless the opinion is reasonably based, the opinion is unlikely to accurately reflect the person’s situation.

Experts that adhere to the established methodology of their profession provide opinions that are reasonably based. Experts that adhere to the methodology of their profession provide opinions that avoid the adversarial and polarized nature of litigation.

If advocacy and/or bias play a role in the expert’s assessment, the assessment will not reflect what is likely to occur in regard to the person’s situation. The primary responsibility of an expert is to ensure that the assessment provided accurately reflects what is likely to occur in regard to the plaintiff’s life. While the adversarial and polarized litigation environment is an inherent part of assessing an individual’s earning capacity, accurate assessors of an individual’s employment and earnings situation adhere to accepted rehabilitation counseling methodology to obviate bias and the polarized nature of litigation.

1B. VARIATION IN OPINION

The facts of an individual’s employment situation are the facts of that individual’s employment situation. Because thorough and accurate analysis is based on the facts of the person’s situation, and because the experts’ analysis should utilize the same evaluative process for all earning capacity assessments, if the facts of the situation are the same, in theory the opinions of experts hired by opposing sides in the litigation should be reasonably the same. While experts should reach similar conclusions when presented with the same set of facts about an individual’s earning capacity, seldom are the opinions offered by two experts identical.

Variation in opinions frequently occur when one expert’s opinions are based on accepted methods of practice and the opposing expert does not adhere to established guidelines and methodology. When expert opinions are based on the same set of assumptions about the individual, the
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assessment that utilizes established methodology should accurately reflect the individual’s situation. The opinions of the expert who does not utilize established methodology lack foundation and are unlikely to accurately represent the person’s situation.

When the opinions of earning capacity experts are not the same, the court and the attorneys involved cannot determine the credibility and accuracy of the opinions offered unless they have a thorough understanding of the basis of the opinions offered by the opposing experts. Without a reasonable understanding of the rehabilitation counseling process, and the interface between the rehabilitation counseling process and earning capacity assessment, the parties involved are not in a position to adequately analyze the adequacy of the assessment as to the impact of the incident on the person’s earning capacity.

A second reason the opinions of earning capacity experts vary is that there are usually a number of assumptions on which the earning capacity analysis can be based. When earning capacity assessments are based on differing assumptions, the assumptions can be structured to create more than one lost earning capacity scenario. Because analyses based on differing assumptions result in a number of earning capacity scenarios being plausible, when more than one set of assumptions is utilized to assess a person’s earning capacity, more than one monetary figure represents the person’s potential lost earning capacity.

When opinions offered for different scenarios vary, each scenario can generate a plausible lost earning figure to represent the impact of the incident on the person’s earning potential, if the scenarios are reasonably based and utilize established methodology. Because there are a number of potential earning capacity scenarios, earning capacity experts often provide a range of monetary values that represent the person’s potential lost earnings.

The range of earning capacity opinions and the associated range of potential lost earnings that are determined by the expert to reflect the person’s situation is not the type of information courts or attorneys prefer to have available for decision making. Courts desire information that can be utilized to make black-and-white determinations about the person’s situation. Earning capacity determinations that provide a range of lost earnings, rather than providing a single monetary value to represent an individual’s lost earnings, puts the court and attorneys in the position of determining which of the potential scenarios is most likely to occur. However, the facts of the person’s situation do not always allow for provision of one opinion
based on one set of assumptions that precisely and accurately reflects what is likely to occur in an individual’s world.

When an expert offers more than one opinion in regard to the person’s earning capacity, each opinion offered by the expert can be accurate if the assumptions utilized as the basis for each opinion are representative of the person’s situation, and if the expert has adhered to the usual and accepted practices of the expert’s profession to provide the opinions offered. Without an understanding as to the basis utilized to accurately determine earning capacity (understanding of the relationship between the rehabilitation counseling process and earning capacity assessment), however, courts and attorneys are not in the position to ascertain the adequacy of the assessments provided or to determine the scenario that reflects what is most likely to occur in the individual’s life.

In summary, it is common that a number of different circumstances impact an individual’s earning capacity. Because life’s circumstances result in varying assumptions as to what may occur in regard to a person’s employment and earnings, a number of lost earning scenarios reflect what is likely to occur in the person’s life. If the assumptions for each scenario are determined to accurately reflect what may occur in the person’s life, the person’s potential lost earning capacity is represented by the range of lost earnings that are defined by more than one scenario rather than being represented by one specific opinion and one monetary value. Although the courts and the attorneys desire black-and-white information from experts on which to base monetary decision making, the person’s situation often dictates that a range of options are likely to occur. Having a range of options to consider makes determining what is likely to occur in the person’s world grey, rather than black and white.

1C. LACK OF FOUNDATION

As discussed, the assumptions that must be utilized by an expert when assessing an individual’s earning capacity can impact an expert’s ability to provide a single answer as to the value associated with the lost earning capacity an individual may experience as a result of an incident. A second common occurrence that impacts an expert’s ability to assess lost earning capacity is the lack of adequate data to perform the assessment. Despite having inadequate data to accurately assess an individual’s lost earning capacity, experts often are inclined to offer analysis.
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An analysis that is not based on a complete set of facts cannot be accurate, and therefore is of little or no use to the court’s understanding.

Though the type of data that may be unavailable for a specific case cannot be predicted, there are a number of commonly encountered situations. For example, when assessing the earning capacity of an older, experienced worker, there may be a lack of a history of reported earnings for the period of time the person was employed prior to the date of the incident.

This missing information is problematic to completion of an accurate preincident earning capacity assessment. As will be explained in subsequent chapters of this book, an older experienced worker’s preincident earning capacity is most commonly represented by the worker’s reported past earnings. For younger workers who are not established in the workforce, preincident earning capacity is often determined by using a representation as to what the worker could have earned, but this is an unusual method for older experienced individuals. An older experienced worker’s preincident earning capacity is almost always based on what has been earned (reported earnings), rather than by a representation as to what the individual could have earned. Without a documented representation of the older experienced worker’s reported earnings, the expert lacks a basis to establish the person’s preincident earning capacity.

To determine an individual’s lost earning capacity, preincident earning capacity is compared to post incident earning capacity. If an individual’s preincident earning capacity cannot be established, there is no benchmark for comparison with that individual’s post incident earning capacity. Without an accurate representation of an older experienced worker’s preincident earning capacity, it is difficult to accurately assess the impact of the incident on that individual’s earning capacity.

When the worker’s reported earnings are not available, earning capacity experts sometimes utilize information other than past earnings to represent an older, experienced worker’s preincident earning capacity. Occasionally an older experienced worker’s preincident earning capacity may be appropriately based on a wage representation other than reported earnings for the time frame that preceded the incident. These situations are rare and require careful analysis on a case-by-case basis.

In most instances, when an older experienced worker’s preincident reported earnings history is not available for review, accurate determination of the worker’s lost earning capacity is not possible because the database available for analysis is incomplete. There are other types of information that must be available for use if an earning capacity assess-
ment is to accurately represent the impact of the incident on the individual’s life. As when an older experienced worker’s preincident earning base is not available or when other types of required data are missing, an accurate analysis of the individual’s lost earning capacity may not be possible.

When difficulties are encountered evaluating a person’s earning capacity because a complete set of data does not exist, experts sometimes attempt to fill the information void in other ways. When faced with an inadequate database, some earning capacity experts will state that the person’s future earning capacity has been reduced by a percent of what the person would have earned had the incident not occurred.

The “reduced percent of income” methodology has been researched many times. Although this type of opinion appears to provide earning capacity information that is easily understood in a litigation context, the information provided is not of use in determining an individual’s lost earning capacity because the reduced percent of income analysis lacks foundation.

Research has been conducted to determine the availability of information that can be used as the basis of a “reduced percent of income” approach. It has been consistently evident from the research that there is no data available that can be utilized to credibly determine the percent by which a person’s earnings will be reduced. Because there is no data on which to base the analysis, there is no foundation for an earning capacity opinion based on a “reduced percent of income” analysis. “Reduced percent of income” opinions are without foundation.

When faced with a lack of required data, experts sometimes revert to the “because I am the expert” opinion. Opinions based on an expert’s experience can be credible if the experience of the expert with individuals who have characteristics closely related to the plaintiff is extensive and longitudinal. That is not usually the situation. Unless the expert has extensive experience specific to the plaintiff and extensive experience with situations similar to the plaintiff’s situation, opinions based on “professional judgment” lack foundation as well.

It would be convenient for courts and the parties involved in litigation if these types of approaches were useful, but they are not. Such opinions lack factual foundation, and thus do not accurately represent the person’s situation, meaning the opinions are of no value in determining the financial impact of an incident on the person’s earning capacity. This does not mean that in all instances provision of an accurate earning capacity assessment is not possible when there is a lack of required data.
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When data is nonexistent or is not complete enough to perform the assessment, if there are assumptions that reasonably represent what may occur in the person’s life, an earning capacity assessment can be completed based on those assumptions. The accuracy of the assessment is dependent on whether the assumptions utilized reasonably represent what may occur in the person’s life.

When data is lacking, the reasonableness of assumptions utilized by the expert to perform each analysis is determined by the judge, jury, attorneys, and the like. The reasonableness of the assumptions reflects the credibility of each assessment. In these situations, it is helpful for the parties attempting to determine the monetary value of the incident on the person’s earning capacity to understand the relationship between the rehabilitation counseling process and determining a person’s earning capacity.

Although the information in this section of the book has not covered all of the issues relating to earning capacity assessment, it does provide examples of a few important concepts and considerations commonly encountered in determining the impact of an incident on an individual’s capacity to earn wages.

1D. AREA OF EXPERTISE

Rehabilitation counselors are experts in regard to determining the jobs a person is qualified to perform and how much the person can earn if actually employed in the jobs that the person is qualified to perform. A worker’s ability to perform the work in jobs for which the person is qualified can be impacted by residual medical and psychological problems. Rehabilitation counselors do not possess the expertise to determine the impact of medical and psychological residuals on the person’s capacity to function in jobs for which the worker is qualified.

Rehabilitation counselors must utilize information from psychological and medical service providers to assess the impact of medical and psychological residuals on the person’s employment capacity in order to evaluate an individual’s earning capacity. Often, the information available from medical and psychological service providers is not complete enough to determine the impact of residuals from the incident on the worker’s capacity to function in jobs available to the worker.

When information from medical and psychological service providers is not complete enough to allow specific determination as to the impact of the incident residuals on an individual’s employment capacity, the earning
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capacity expert cannot provide the determination as to the impact of the residuals of the incident on a worker’s employment capacity. For example, an individual’s medical records may indicate limited use of that individual’s back but will not indicate whether that individual can bend, stand, or lift for extended periods of time. When information from medical and psychological service providers requires clarification to understand the impact that medical/psychological residuals have on the individual’s capacity to function, earning capacity experts will sometimes interpret available medical data to offer an opinion.

This type of interpretation of the available data results in the expert working outside of the expert’s field of expertise. For instance, when information from one medical service provider indicates a lifting tolerance of 10 pounds and a second medical service provider indicates a lifting tolerance of 30 pounds, if an expert were to use 20 pounds as the worker’s lifting tolerance, the lifting tolerance offered by the expert is an analysis as to the impact of the medical condition on the worker’s capacity to function physically. That is a medical analysis, not a vocational analysis. Rehabilitation counselors are not qualified to determine the impact of a medical condition on the person’s physical capacity.

When two varying sets of physical functioning information is available for use in determining the person’s earning capacity, the earning capacity expert can provide two credible analyses. The analyses will be based on the available medical information. One analysis will use a 10-pound lifting tolerance. The second analysis will use a 30-pound lifting tolerance. The rehabilitation counselor is not qualified to incorporate the two sets of medical information to provide one analysis. Combining two differing sets of medical information to create one analysis illustrates the use of medical data in a manner that results in an earning capacity assessment without appropriate basis.

It is not possible to describe all of the instances in which earning capacity experts attempt to create information that is not available. Usually these types of analyses occur when the information provided by medical and psychological service providers does not precisely delineate the impact of the incident on the person’s capacity to function. Although the information available to an earning capacity expert may not provide the basis necessary for one specific analysis, rehabilitation counselors are not qualified to interpret the medical information.

When there is a variation in available data, an earning capacity expert can provide analysis based on what each medical and psychological service
provider has determined the impact of the incident to be on the person’s capacity to function. If the assumptions utilized in the analysis are correct, the analysis will accurately portray the person’s earning capacity. Whether an earning capacity analysis provides the best representation of an individual’s earning capacity depends on which set of medical or psychological information is determined by those such as the judge, jurors, and attorneys to accurately represent the worker’s situation.

In summary, earning capacity assessments based on medical and psychological information provided by medical and psychological service providers, rather than being based on the rehabilitation counselor’s interpretation of medical and psychological information, provide an earning capacity assessment that is in the area of the earning capacity expert’s field of expertise. Assessments performed in this manner have the required basis to offer accurate analysis of the worker’s earning capacity and meet court requirements. Earning capacity assessments based on medical and psychological interpretations made by the rehabilitation counselor are without foundation, and do not accurately reflect the worker’s earning capacity.

1E. CONCLUSION

When analyzing earning capacity opinions and examining earning capacity experts, attorneys will encounter variations in opinions even though the assumptions utilized by the opposing expert seem to be the same. To accurately assess an earning capacity opinion, or to examine an earning capacity expert in a manner that enables determination as to the validity of the opinions offered, in addition to understanding the relationship between earning capacity assessment and the rehabilitation counseling process, the attorney must understand the nuances created by litigation. Unless the examining attorney understands the role that bias and lack of information can play in the evaluation process, the attorney is not in the position to assess the accuracy of the opinions offered or to effectively examine the expert.

This text, in its entirety, provides an in-depth overview of the relationship between court requirements relevant to earning capacity assessment and rehabilitation counseling. The remainder of the book describes the relationship between rehabilitation counseling, earning capacity assessment, and court requirements for provision of expert testimony.

Understanding the information in this book will enable attorneys to determine the adequacy of earning capacity assessments. Understanding the earning capacity assessment process in light of court requirements will
enable attorneys to examine earning capacity experts as to the reasonableness and adequacy of the opinions offered.

The information in this chapter is intended to provide understanding as to why rehabilitation counselors are utilized by the courts to provide assessment of a person’s earning capacity and to provide understanding of some of the issues that can impact the accuracy of an earning capacity expert’s opinions. The chapter that follows begins a discussion of the relationship of rehabilitation counseling to court requirements for provision of earning capacity assessment. Courts require that the opinion of an expert reflect what is likely to occur in regard to the impact of the incident on the worker. Courts require that the expert’s opinion be based on the usual and customary methodology of the expert’s profession.

The usual and customary process utilized to determine a worker’s earning capacity is the rehabilitation counseling process. The chapter that follows describes the evolution of the field of rehabilitation counseling and begins the explanation as to why rehabilitation counseling is an established profession and begins the explanation as to why the courts have accepted rehabilitation counselors as experts who are qualified to provide earning capacity assessments.