

Attorneys

Litigation as to whether or to what extent a plaintiff can work takes place in several types of cases, e.g., workers' compensation, torts, short- or long-term disability, divorce, ADA, Social Security and probably in others. Some cases require estimation of economic loss. This discussion describes how to assess occupational potential in terms of potentially appropriate jobs and how to check compensation rates for those jobs in the labor market. That information feeds into analysis of economic loss. It takes time to progress from beginners' compensation rates to at least median rates. The PAQ database reflects education and training times for 2,491 occupations, which can factor into economic loss calculations. Attorneys typically leave vocational workups to vocational experts, but attorneys can use scientifically-developed, web-based occupational information to help them shape referrals to those experts and to structure questions for direct and cross-examination on vocational issues. A primary purpose of this discussion is to show what this kind of information looks like and how it applies to cases that involve vocational issues.

Occupational information is not ordinarily available. It requires systematic effort on the part of employers to generate information for job-related decision-making.

“The essential principle in the evaluation of any selection procedure is that evidence be accumulated to support an inference of job-relatedness. Selection procedures are demonstrated to be job-related when evidence supports the accuracy of inferences made from scores on, or evaluations derived from, those procedures with regard to some important aspect of work behavior (e.g., quality or quantity of job performance, performance in training, advancement, tenure, termination or other organizationally pertinent behavior)”.¹

The PAQ and the O*NET (pronounced OH net) <http://online.onetcenter.org> are sources of standardized definitions of job elements and classifications that are scientifically well accepted and widely used. More than 300,000 jobs have been analyzed with the PAQ² in public utilities, cities, counties, hospitals, educational institutions, manufacturing, pharmaceuticals, retail organizations, airlines, banks, electronics, airports, and other organizations.

¹ Society for Industrial and Organizational Psychology, Inc. (2003). *Principles for the Validation and Use of Personnel Selection Procedures* (4th ed.). Bowling Green, OH (Author), pp. 3-4.

² Jeanneret, P. R. & Strong, M. H. (2003). Linking O*NET Job analysis information to job requirement predictors: An O*NET application. *Personnel Psychology*, 56, 465-492.

The O*NET, the occupational information system of the U.S. Department of Labor, replaces the *Dictionary of Occupational Titles* (DOT), which was last revised in 1991. Since the PAQ is one of the building blocks of the O*NET, the two systems are highly-related^{3,4} and are consistent with criteria for admissibility of scientific evidence stated in the Daubert decision:⁵

“(Federal Rules of Evidence)—especially Rule 702—place appropriate limits on the admissibility of purportedly scientific evidence by assigning to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The reliability standard is established by Rule 702's requirement that an expert's testimony pertain to ‘scientific...knowledge,’ since the adjective ‘scientific’ implies a grounding in science's methods and procedures, while the word ‘knowledge’ connotes a body of known facts or of ideas inferred from such facts or accepted as true on good grounds. The Rule's requirement that the testimony ‘assist the trier of fact to understand the evidence or to determine a fact in issue’ goes primarily to relevance by demanding a valid scientific connection to the pertinent inquiry as a precondition to admissibility.... Faced with a proffer of expert scientific testimony under Rule 702, the trial judge, pursuant to Rule 104(a), must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate.”

To get a sense of the broad scope covered by PAQ/WRQ job elements, consider this list of [150 job elements](#) and their PAQ ratings in one of the jobs in the database. If a particular job is relevant in a particular case, it might be useful to determine whether or not the job is one of 2,491 in the database. If it is in the database, the attorney can enter its DOT code into an O*NET Crosswalk as described above and structure job-related questions for direct and cross examination.

³ Jeanneret, P. R. & Strong, M. H. (2003). Linking O*NET Job analysis information to job requirement predictors: An O*NET application. *Personnel Psychology*, 56, 465-492.

⁴ Peterson, N. G., Mumford, M. D., Borman, W. C., Jeanneret, P. R., Fleishman, E. A. (1999). *An Occupational Information System for the 21st Century: The Development of the O*NET*. Washington, DC: The American Psychological Association.

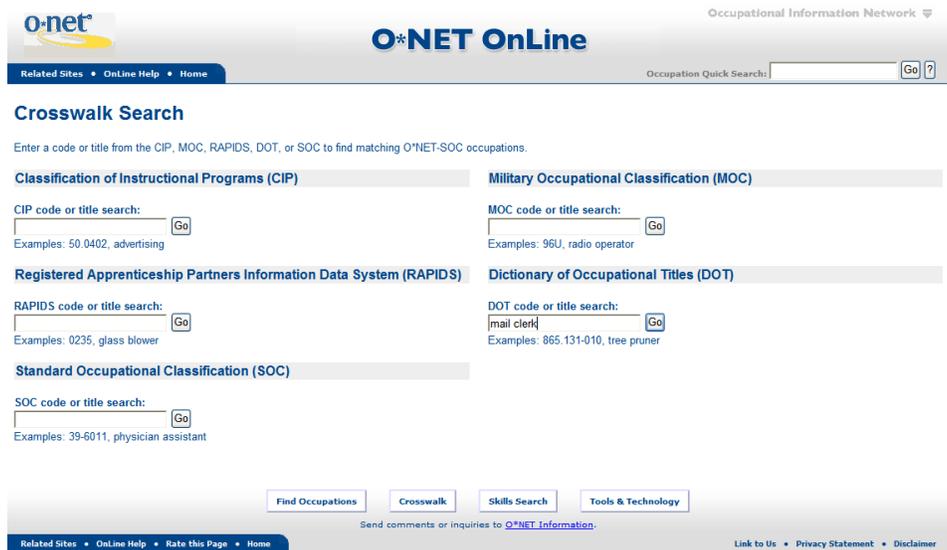
⁵ Daubert v. Merrell Dow Pharmaceuticals, Inc. (1993). 509 U.S. 579.

Each PAQ/WRA job element has its own [detailed definition](#) to increase common understanding of what each item measures and how to interpret its rating scale. It may be useful to print these 150 definitions one to a page and put them in a spiral binder.

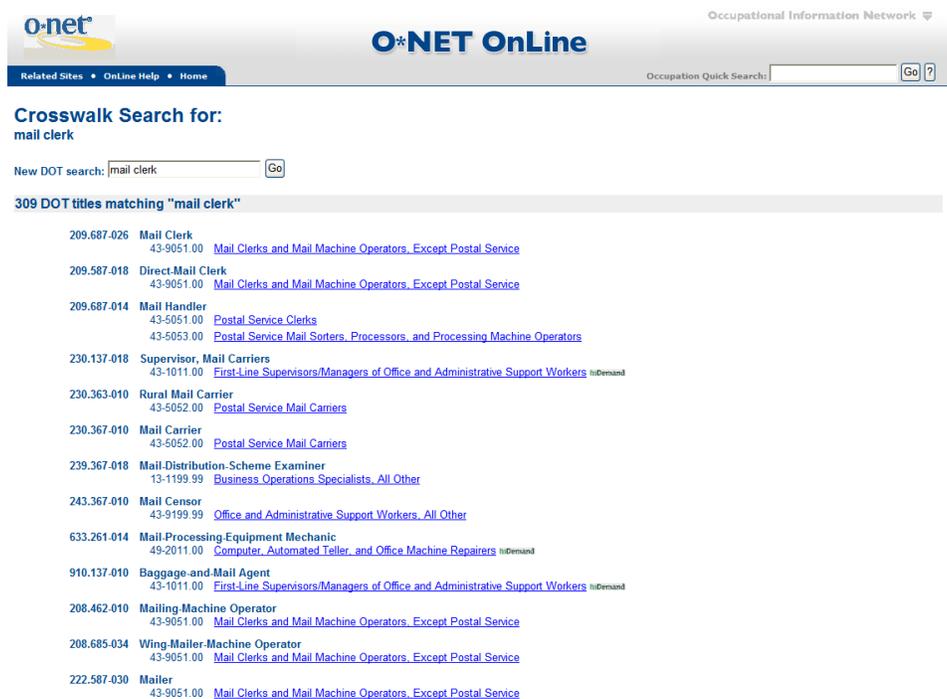
Clicking on <http://online.onetcenter.org> points to the opening page of the O*NET below (as it appeared on September 9, 2008):



To look at an example of O*NET information, consider the case of an Accounting Clerk who lost her sitting tolerance because she had chronic low back pain and needed to change occupations. On a search for jobs that require only half as much sitting as Accounting Clerk, the WRQ report listed job of Mail Clerk. To generate O*NET information on the Mail Clerk job, clicking **Crosswalk Search** points to a page like the one below with



“mail clerk” in the **Dictionary of Occupational Titles (DOT)** data blank. Clicking the **Go** button points to a



Crosswalk Search for mail clerk (above), on which the first hotlinked classification is **Mail Clerks and Mail Machine Operators, Except Postal Service**. Clicking that hotlink points to the following screen:

The screenshot displays the O*NET OnLine interface. At the top, there is a navigation bar with 'Related Sites', 'OnLine Help', and 'Home'. A search box labeled 'Occupation Quick Search' is present. The main heading is 'Summary Report for: 43-9051.00 - Mail Clerks and Mail Machine Operators, Except Postal Service', with a 'Updated 2007' note. Below the heading, a brief description of the job is provided. A 'View report:' section contains three tabs: 'Summary' (selected), 'Details', and 'Custom'. A horizontal list of hotlinks includes: 'Tasks', 'Knowledge', 'Skills', 'Abilities', 'Work Activities', 'Work Context', 'Job Zone', 'Interests', 'Work Styles', 'Work Values', 'Related Occupations', and 'Wages & Employment'. The 'Tasks' section lists several duties, such as sealing envelopes, affixing postage, and sorting mail. The 'Knowledge' section states 'No knowledge met the minimum score.' The 'Skills' section lists 'Active Listening'.

Hotlinks to Tasks, Knowledge, Skills, Abilities, Work Activities, Work Context, Job Zone, Interests, Work Styles, Work Values, Related Occupations, and Wages and Employment are barely visible in this document a third of the way down from the top of that page. Tabs to enable viewing **Summary**, **Details**, or **Custom** reports are located just above those hotlinks. Printing a **Summary** report may require 10 pages to print the information on pages and topics activated by hotlinks listed above. A **Details** report might take 30 pages. This information is used to compare with individual capabilities and tolerances to perform the tasks, possess specific knowledge or the possibility of acquiring that knowledge, skills, abilities and other characteristics specified under the hotlinks.

The O*NET offers rich information in itself and useful hotlinks to information beyond the O*NET. However, it does not provide a method for searching on occupations that are appropriate for people with disabilities. It takes the WRQ to do that. Entering WRQ-reported DOT codes or job titles into the O*NET **Crosswalk Search** engine generates information that should be within the capabilities and tolerances of a person with a disability.

Examples of Forensic Applications of the WRQ: One important benefit of the WRQ is to list occupations that are potentially appropriate for an individual with a disability. Another benefit is that it equips the evaluator and the attorney with concepts and a widely used vocabulary of job analysis. Here are some case examples in which that function of WRQ applications.

A retail merchant sustained a permanent foot drop as a result of a bicycle-truck accident. An orthotic device that kept this individual's foot from dropping enabled him to continue riding his bicycle 10 miles one way to his store. The question arose as to what jobs might be appropriate in the future if his injured lower extremity got worse and affected his ability to stand and walk around his store. Agreement on procedures to identify potentially appropriate jobs if that happened enabled attorneys on both sides to examine the existence of jobs in the local labor market that require minimum standing, walking, or climbing (ladders, stairs, etc.) and to work out a settlement of that issue.

Cases occur in which medical outcome is uncertain and will take some time to resolve, but in which the injured party is eager to settle. In such cases, occupational possibilities under different potential treatment outcomes may be examined based on advice from the treating physician(s). A worker sustained an alkali burn to one of his corneas and constantly shed tears that clouded his vision. By examining various school, job, and medical records, and by conferring with the injured worker, his wife, and his ophthalmologist, WRQ items could be rated and item limits set. The ophthalmologist described the three most-likely medical outcome scenarios. The first (and worst case) scenario reflected the status quo and required no treatment. The second involved successful cornea transplantation that could result in binocular vision correctable to 20/20. The third scenario was failure of corneal transplantation and removal of the affected eye. Each scenario suggested its own set of item limits and output reports, providing the attorneys information for settling the occupational issue and helping the rehabilitation counselor analyze the labor market for potentially appropriate job openings for when the individual was ready to return to work. The key in this case was conferring with the ophthalmologist to understand likely treatment outcomes and then translating that information into WRQ ratings and limits.

When ability to work is litigated, individual circumstances relative to rules of evidence, discovery cutoff date, access to the plaintiff or claimant by the defense, and other factors, may vary the order of events in the evaluation process, as compared to a health care environment. For example, a nine-year old hit the windshield in a car crash. The radiologist saw no abnormality in the brain scan. As time passed, the child did well in school and eventually married. She and her husband belonged to a religious sect that prohibited her from working outside her home. In her early 20s, she developed a brain tumor. A neurosurgeon removed the tumor, but she lost her speech and some fine motor control. The radiologist who failed to see the slow-growing tumor when she was nine was sued for malpractice. The lawsuit included an allegation of vocational disability. By the time the defense became aware of the WRQ, several depositions had been taken and the discovery cutoff date had expired. WRQ ratings could be generated based on reading medical records and depositions, but would be lower quality than if the plaintiff could be examined. The defense counsel approached the trial judge and requested reopening of discovery. The judge

required the plaintiff and her husband to be examined with the WRQ in the plaintiff's attorney's office, and for the examination to be videotaped. The plaintiff's [self-ratings](#) were combined with ratings of her capabilities and tolerances by her husband and adjusted by the examiner, based on his experience. A vocational expert hired by the plaintiff reported that she scored well on a reading test. The WRQ output report listed the job of proofreader, which was consistent with her score on the reading test, and in demand in the local labor market.

Cases that require estimation of wage loss require listing potentially appropriate jobs on the WRQ, checking them on the O*NET, clicking on the Wages and Employment hotlink and viewing compensation rates in a given state at the 10th, 25th, median, 75th and 90th percentiles, as well as growth rates for these jobs. Training time can be estimated from both the WRQ and the O*NET.

The more clearly that occupational information can be stated, the more useful it is. Since the PAQ is so widely used and so well regarded scientifically, it offers a stable platform for application and discussion. It also is also a bridge to the O*NET, which is the nation's largest and most comprehensive source of occupational information. The WRQ, developed in concert with the authors of the PAQ, uses a subset of PAQ items and various methods of retrieving information from the PAQ database-searching algorithms to retrieve occupational information to facilitate settlement or winning in court. The WRQ appears consistent with Dunnette and Borman's⁶ portrayal of an idealized counseling and job placement system (as such a system might be applicable to individuals with disabilities):

(a) Employers cooperate in describing all jobs with standard task checklists which are scorable according to previously derived behavioral and attribute categories. (b) 'Counselees'...use similar checklists to record previous work and nonwork experiences, preferences, and estimated capabilities. (c) Counselees' responses are scored according to the above job and attribute categories and the scores referred to a data bank for job matching; a preliminary listing of jobs appropriate for each counselee is provided. (d) Final steps in the process utilize additional assessment procedures (job samples, job knowledge tests, simulations, aptitude tests) to provide the individualized information necessary for joint decision making" (p. 485).

⁶ Dunnette, M. D. & Borman, W. C. (1979). Personnel selection and classification systems. *Annual Review of Psychology*, 30, 477-525.