

## Evaluating Workers' Compensation Claims for Permanent and Total Disability in California: A Vocational Rehabilitation Methodology

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**Abstract.** For many years, vocational experts have been retained to provide opinions regarding the level of an applicant's permanent disability. This article addresses the development of opinions by vocational experts for use in establishing permanent disability ratings for workers' compensation claims in California. The services of vocational experts are needed increasingly in the California workers' compensation system. However, there is no established methodology for conducting a vocational rehabilitation evaluation to assist the parties in determining the level of permanent disability for individuals with serious disabilities in this particular setting. An evaluation methodology is proposed in this article to address this need a lot from litigated cases. A general outline of suggested topics and issues can be included.

### Introduction

In California, the Supreme Court case of *LeBoeuf v. WCAB* (1983) confirmed the importance of considering an injured worker's ability to benefit from vocational rehabilitation services in establishing an equitable permanent disability rating. More specifically, the value of vocational expert testimony was firmly established in that decision as the court considered the testimony of both the applicant's vocational expert and the defense vocational expert regarding the applicant's ability to benefit from vocational rehabilitation in rendering its decision.

Vocational rehabilitation is traditionally considered in light of how services assist individuals with a disability in their efforts to return to suitable employment. As an example, the California Workers' Compensation Institute (1989) learned that 84% of injured workers in California returned to work following the completion of a vocational rehabilitation plan. However, this article addresses the implications of an injured worker's inability to return to

work through vocational rehabilitation efforts. In this instance, an individual's inability to benefit from vocational rehabilitation services is the critical factor to be considered. In addition, the economic value of a finding of permanent and total disability has elevated the importance of this issue for all involved parties. Currently, the maximum weekly permanent disability benefit is \$230.00 in California. At and above a rating of 70%, the injured worker qualifies for a lifetime pension. In addition, a permanent disability rating of 100% (permanent and total disability) is paid for life at the temporary disability compensation rate. This rate was \$490.00 per week in 2002. As a result of a recent change in the law, this benefit is scheduled to increase gradually to \$840.00 per week in 2005 (Nguyen, 2002). Therefore, it is easy to see why financial considerations are significant to the parties and judges where a potential rating of 100% is at stake.

The purpose of this article is to present a methodology that vocational experts can follow in conducting a vocational rehabilitation evaluation to

assist the parties or the court in arriving at an equitable permanent disability rating. A review of the literature regarding this matter has found no commonly accepted vocational rehabilitation evaluation methodology for determining disability in state workers' compensation cases. Weed and Field (2001) noted that determining the amount of disability for an individual with a work injury falls within the sphere of the vocational counselor; but, "little discussion is available in the literature to address this significant issue" (p. 13). Weed and Field (2001) described a variety of approaches to earning capacity analysis, including Labor Market Access, RAPEL, and others. These approaches do not specifically describe a method for determining permanent disability in California workers' compensation cases. As an example, the Access to the Labor Market and Placability elements of the RAPEL method can be used, but Earnings Capacity is not considered since the only concern in California permanent disability cases is the ability of the injured worker to compete in the open labor market. Also a Rehabilitation Plan is not a consideration if the injured worker is determined to be unable to benefit from vocational rehabilitation services.

Toppino and Boyd (1996) described a foundation and methodology for vocational experts to use in establishing a basis for loss of earning capacity. Many of the elements of the methodology outlined by Toppino and Boyd (1996) are also used in the methodology proposed in the current article, such as review of medical reports, restrictions and capacities, diagnostic interview, and transferable skills analysis. However, their methodology addresses loss of earning capacity while the current article emphasizes employability in the open labor market.

Furthermore, Toppino and Agrusa (2000) provided a methodology for assessing employability in quantifying mitigation earning capacity. Specific elements to be considered include the medical records, workers' compensation and Social Security records, work tolerance and psychometric test results, demographic factors, transferable skills, and private labor market survey data. However, what is still needed is a specific process for establishing a percentage of access to the labor market according to medical restrictions and vocational factors. Vocational feasibility factors also need to be addressed as well as public sources of labor market data.

Each state has developed and implemented by leg-

islation its own method of determining permanent disability in workers' compensation cases. Because of space limitations, this article focuses on the California system.

While conducting vocational rehabilitation evaluations for permanent disability rating purposes since 1979, the author has observed considerable variability in evaluation methods by rehabilitation counselors and vocational experts retained to develop opinions and provide testimony regarding an injured worker's employability in the open labor market. Some vocational experts conduct a very thorough evaluation which addresses numerous factors. Other vocational experts approach the evaluation quite differently. Some vocational experts do not interview or test the applicant, even when they are retained by the applicant. Some vocational experts conduct a comprehensive transferable skills analysis while others do not, or use a cursory, non-scientific approach. Some vocational experts perform a systematic analysis of the applicant's employability in the open labor market, including an opinion on the percentage of occupations the applicant can perform within the medical restrictions. Many vocational experts provide no such opinion. Some vocational experts conduct labor market research to support their opinions while others do not.

The field of vocational rehabilitation, and in particular expert testimony, would be best served by a comprehensive, well-researched well-researched evaluation that can be used to provide opinions regarding an applicant's medical and vocational employability. Furthermore, Shahnasarian and Lassiter (2002) identified a need for a vocational evaluation method that is viewed as objective and impartial by litigation attorneys. This article proposes an evaluative process that will fulfill this need.

Recent federal cases which address the admissibility of expert testimony (*Daubert*, 1993; *Kumho*, 1999) require that expert witnesses understand the reliability of the methodology they use to develop opinions as well as how that methodology fits the facts of a particular case. While the current article addresses workers' compensation cases in California, which are not subject to federal rules and case law, vocational experts in these cases are likely to find judges to be equally concerned about the reliability of a particular methodology in deciding whether to accept the opinions of the vocational expert.

## History of the Problem

### *Vocational Expert Testimony*

Vocational experts have a long history of providing opinion testimony regarding the vocational impact of an impairment. Dunleavy (1999) described the history of the extensive use of vocational experts for Social Security disability determinations. According to the Social Security Administration, vocational experts "are professionals who provide impartial expert opinion evidence at the hearing level of the Social Security disability claims process" (Social Security Administration, 1990, p. i). Further, vocational experts are responsible for providing factual information and expert opinions regarding the "existence and incidence of jobs in the labor market, work settings, and the skill level and physical demands of jobs" (Social Security Administration, 1990, p. 9). A working knowledge of the concept of transferability of skills is also required. According to Field and Sink (1981), vocational expert testimony in determining a disability by the Social Security Administration is one of the most established approaches. The Social Security disability program "serves as a referent for all other hearing programs" (p. 6). Vocational expert opinion testimony has also been used in workers' compensation cases in California regarding the issue of disability determination. The California Labor Code, Section 4660 (Moffat, et al., 2003) requires that:

In determining the percentage of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market. (p. 298)

Interestingly, Governor Schwarzenegger has proposed that Labor Code Section 4660 be modified by, among other things, deleting consideration of an injured employee's diminished ability to compete in an open labor market (Maldonado, 2003, as proposed). Diminished ability to compete is replaced with adaptability to perform a given job in the proposal. This new concept is undefined.

The *Schedule for Rating Permanent Disabili-*

*ties* (California Division of Workers' Compensation, 1997) was developed to assist in determining the percentage of permanent disabilities. This schedule aids the Disability Evaluation Unit of the California Workers' Compensation Appeals Board in rating permanent disabilities. Moreover, an injured worker's ability to benefit from vocational rehabilitation services was determined to be a critical factor in establishing a permanent disability rating under *LeBoeuf v. WCAB* (1983). In this case, the California Supreme Court clarified this issue as follows:

Similarly, the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating. Just as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating. (p. 594)

The California Supreme Court concluded:

A permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability. A prior permanent disability rating and award which fails to reflect that fact is inequitable. (p. 597)

The outcome of vocational rehabilitation can be used to argue for an increase or a decrease in the permanent disability rating (*Gill v. WCAB*, 1985). According to Silberman and Silberman (2000), testimony by a vocational rehabilitation counselor can be used to challenge a rating from the Disability Evaluation Unit. Oppenheimer (2003) recommended that rehabilitation professionals be used to clarify the extent of psychiatric permanent disability.

Silberman and Silberman (2000) noted that judges must consider the testimony of a vocational rehabilita-

tion counselor, although they are not required to rely upon it. However, in *Travis v. HIIH America* (2001), a WCAB Panel rescinded a judge's finding of 100% permanent and total disability in a case involving latex allergy. The panel ruled that the judge should have considered the testimony of a vocational rehabilitation specialist to insure that the permanent disability rating is rationally related to the injured worker's diminished capacity to compete in the open labor market. Moreover, in *Merino v. WCAB* (2001), the court ruled that an opinion about an applicant's ability to compete in the open labor market is beyond the expertise of the treating physician. This opinion must be provided by a vocational rehabilitation specialist.

Interestingly, not all jobs are considered to be part of the open labor market. As an example, in *Spartech Plastics v. WCAB (Ochoa-Pena)* (1998), the court found Ochoa-Pena to be 100% disabled even though he was performing most of his pre-injury duties. The court held that he was working in a "protected" environment since he was allowed to rest in an air-conditioned office at will, generally 3 to 4 10 to 15 minute breaks each day in addition to his lunch break. He also never worked outside more than 30 minutes a day because the sun bothered him.

In deciding how the testimony of a vocational rehabilitation counselor or vocational expert should be used, Silberman and Silberman (2000) suggested that it is best to start early in the process. Moreover, while a vocational expert's testimony can be used to rebut the testimony of a rating specialist, Silberman and Silberman (2002) have suggested it is best to have the rehabilitation counselor testify in the case in chief so the judge can utilize that opinion in formulating the rating instructions. The counselor should be knowledgeable of the medical work restrictions and the labor market and be able to explain to the judge the interrelationship between them (p. 3:23).

#### *Non-industrial Factors*

Interestingly, non-industrial factors such as illiteracy, limited occupational skills, limited educational background, and language barriers, which can affect vocational feasibility, often are not viewed as relevant or are given little weight by judges in claims for permanent and total disability. In *Morales v. WCAB* (1996), the WCAB concluded that limited transferable

skills and very limited English language skills preexisted the industrial injury and therefore should not be considered in determining the permanent disability rating. In *Montiel v. WCAB* (1997), the court ruled that limited language and math skills and other limitations which impact employment in the open labor market were not necessarily industrial. Issues such as an accent, age, lack of typing skills and lack of transferable skills were found to be non-industrial factors which mitigated against a *LeBoeuf* finding in *Zuther v. WCAB* (1998).

In *Chavez v. WCAB* (1997), the court ruled that an applicant's disinterest in telemarketing, which might have constituted gainful employment, was an insufficient reason for rejecting this job goal. As such, Chavez was not found to be permanently and totally disabled. In *Keltner v. WCAB* (1999), an opinion by a vocational rehabilitation counselor that the applicant was not feasible for vocational rehabilitation because of personal motivational factors was found by the court to be unrelated to the applicant's industrial injury.

A finding by the Rehabilitation Bureau that an applicant could not be rehabilitated was not sufficient to increase a permanent disability rating to 100% in *James v. WCAB* (1986). Age, illiteracy, limited work experience, and lack of motivation were cited as reasons for James' inability to be rehabilitated. Finally, in *Espinoza v. WCAB* (1994), the court concluded that an applicant's inability to read or write should not be considered in determining an applicant's claim for permanent and total disability.

#### *Measurable Labor Market Access*

It is important for vocational experts to provide measurable opinions regarding the portion of the labor market in which an applicant can or cannot compete. In *Kirkorian v. State of California and State Compensation Insurance Fund* (1985), the court did not find the vocational rehabilitation counselor's testimony to be persuasive that the applicant was precluded from a measurable part of the labor market. In *Whitley v. Diamond International Corporation* (1985), the court concluded that health, medical and vocational factors should be considered in determining a permanent disability rating, including an opinion by a rehabilitation counselor on an applicant's post-injury access to the labor market.

### *Vocational Factors Affecting Employability*

In *South Coast Air Quality Management District v. WCAB (Zapfel)* (2001), the court relied in part on the conclusions of the vocational rehabilitation counselor in awarding permanent and total disability. The counselor reported the injured worker had extremely limited opportunity for employment following voice-activated computer training, that she had limited transferable skills in general office and clerical areas, and no competitive skills in the open labor market.

Other recent cases have clarified further the importance of testimony from a vocational expert as well as specific issues to be addressed in evaluating employability in the open labor market. In *C & C Industries v. WCAB (Fraga)* (2001), the court awarded 100% disability after considering the evidence of a vocational expert. Obstacles to vocational feasibility identified by the vocational expert were the applicant's level of discomfort, his level of disability, his need to take a large amount of medications, and his difficulty in driving safely because of his disability and side effects of medication. In *ARA Magazine & Book v. WCAB (Babinski)* (2001), the WCAB concluded that the evidence of the vocational expert supported the opinion of the agreed medical examiner that the applicant was unable to compete in the open labor market. The vocational expert based her opinions of non-feasibility on 6 factors including the AME's report, and the applicant's age (67), 6th grade education, medical restrictions (limited standing and walking), limited driving ability (4-5 miles from home), and lack of transferable skills.

In *General Motors Corporation v. WCAB (Dalrymple)* (1999), the applicant was found to be totally disabled due to the combined effects of physical and mental injuries, despite completing a rehabilitation plan. He was unsuccessful in his efforts to return to work through this plan, and the defendants did not offer any alternate plans that would have likely returned him to the labor market.

However, as noted in *Hall v. WCAB* (2000), a finding of non-feasibility does not automatically equate to non-employability to support a 100% rating. Moreover, as noted in *Teichman v. WCAB* (2002), an incomplete evaluation by a rehabilitation consultant was not sufficient to justify a 100% award. The rehabilitation consultant did not obtain a work tolerance evaluation, did not see the treating physician's report, considered

jobs which require training but not direct placement jobs, and did not conduct a labor market survey.

In *Crescent Jewelers v. WCAB (Gallegos)* (2001), the court found the applicant to be totally disabled when considering a combination of medical and vocational testimony. Medically, the applicant was limited to sedentary work, had to change from sitting to standing frequently, needed part-time work, and needed to elevate his legs above his heart. The rehabilitation counselor testified that the applicant could not participate in the open labor market and would be precluded from all work in the national economy. Further, he testified that intermittent jewelry repair did not represent competitive work.

In *T & D Tile Company v. WCAB (Teixeira)* (2002), the court gave equal weight to the vocational evidence, the medical evidence, and the applicant's testimony. Vocational factors affecting employability included intense pain and its effects on concentration, a need to lie down every 45 minutes, a need to change positions every 5 to 7 minutes, and problems with sitting and standing. The employment effects of these factors were found to be more predominant than the effects of lack of formal education or literacy.

In *Harris Corporation v. WCAB (Lee)* (2003), the WCAB found the applicant to be permanently and totally disabled even though the physicians did not find her to be 100% disabled. The WCAB found permanent and total disability based on a combination of medical and vocational factors, including the results of a functional capacity evaluation, the reports and trial testimony of the vocational rehabilitation counselor that the applicant could not benefit from vocational rehabilitation, and the applicant's testimony that her pain medications caused her cognitive impairment.

In *May v. WCAB* (2003), May, an emergency room physician, was awarded a 96.75% permanent partial disability as a result of multiple gunshot wounds and being dropped to the floor by hospital personnel following the shooting. May was not considered 100% disabled because he had considerable transferable skills and was able to earn over \$50,000 per year at three part-time jobs.

In summary, it is clear that an injured worker's ability or inability to benefit from vocational rehabilitation services is a critical component in determining an equitable permanent disability rating. Quantifiable opinions regarding labor market access are also critical.

Moreover, it is clear that opinions from vocational rehabilitation counselors and vocational experts can be useful to the parties in determining an equitable percentage of permanent disability for an injured worker.

### *LeBoeuf Evaluation Process*

When there is a question regarding whether or not an injured worker is permanently and totally disabled from work in the open labor market, the need for a clear, concise, and impartial methodology for conducting a vocational rehabilitation evaluation is apparent from the foregoing. A methodology that appears appropriate and pragmatic for this purpose is the *LeBoeuf Evaluation Process* as described in the following scenario.

The *LeBoeuf Evaluation Process* is a 9-step methodology for systematically evaluating an injured worker's employability in the open labor market. The process is outlined below.

#### A. Review Medical Records

Initially, all available medical, psychiatric and psychological records are reviewed that address the injury or injuries in question, the course of treatment, medications, and most significantly, any permanent work restrictions. Deposition transcripts of physicians, psychiatrists and psychologists are typically reviewed as well, particularly if opinions rendered therein vary from those provided in the reports.

#### B. Review School, Employment, and Vocational Rehabilitation Records

School and work records provide valuable information about the injured worker's employment skills that can be considered in relation to past, present, and future employability in the open labor market. When an individual is claiming 100% permanent and total disability, the vocational rehabilitation process will typically have been unsuccessful. While reviewing the vocational rehabilitation records, it is important to assess the injured worker's level of participation in, and commitment to, the process. It is also important to review the vocational rehabilitation counselor's ongoing assess-

ment of the injured worker's vocational feasibility (his or her ability to benefit from vocational rehabilitation services designed to help the injured worker qualify for employment in the open labor market). If the injured worker has been found to be vocationally infeasible, it is critical for the vocational expert to identify the reasons for this determination.

#### C. Review Deposition Transcripts and Videotapes

On some occasions, it will not be possible to interview the injured worker as a part of the vocational rehabilitation evaluation. In some instances, access to the injured worker for an interview and for vocational testing may not be permitted by the injured worker's attorney. In other instances, the injured worker may not be available for practical reasons, such as a relocation to another state. On such occasions, a careful review of the deposition transcript of the injured worker can provide valuable information that would typically be obtained during the course of an interview.

In some instances, videotapes of injured workers can also be made available for review by defense attorneys. Like the deposition transcripts, videotapes can provide a valuable source of information for the vocational expert to use in developing a composite picture of the injured worker as a potential applicant for employment. The vocational expert also may be asked to provide an opinion regarding occupations in the open labor market that are consistent with the activity level demonstrated by the injured worker on the videotapes.

#### D. Interview and Test the Injured Worker

A complete and thorough interview of the injured worker is the best way to obtain first-hand information from and about the injured worker to be used to develop opinions regarding employability. A comprehensive interview outline is recommended for this purpose. It should be designed to provide all of the information needed for a subsequent analysis of transferable skills and an ultimate analysis of employability.

Vocational testing provides a more detailed and specific measure of the injured worker's academic

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and employment skills and potential for training and employment. A comprehensive battery of tests is recommended for this purpose, including at a minimum, ability, aptitude, achievement, dexterity, and interest tests.

In some cases, it is necessary to supplement or substitute a standard battery of paper and pencil tests with a work tolerance evaluation. A 3- to 5-day work evaluation (performed by a certified vocational evaluator) would typically include simulated work activities in addition to paper and pencil tests. In some instances, a functional capacity assessment (a 3-4 hour measure of specific physical activities, usually performed by a physical or occupational therapist) can be considered as well. Adelman, Spitznagel, and Saxon (1997) confirmed the value of a work evaluation as a part of vocational rehabilitation services. Cohen and Yankowski (1997) clarified the value of a work tolerance evaluation and a physical capacity assessment for forensic vocational evaluations.

Should the injured worker not be available for the interview and the vocational testing, skill levels will then be established through a review of school, work and vocational rehabilitation records, as well as deposition transcripts. As an example, if an injured worker is not available for a full battery of vocational tests, the vocational expert can use the academic and aptitude levels required of jobs in the injured worker's work history or an average worker profile for a subsequent assessment of transferable skills and employability.

#### E. Evaluate Self-initiated Efforts to Return to Work

It is important to explore thoroughly all efforts on the part of the injured worker to return to work both through formal vocational rehabilitation activities as well as through self-directed return to work efforts. Some of this information will be available in the vocational rehabilitation and medical records. Details can be obtained through the injured worker directly or through a review of deposition transcripts.

Another source of this information is the vocational rehabilitation counselor who provided the vocational rehabilitation services. However, before contacting this counselor, it is critical to connect

with the referring attorney to learn whether contacting the counselor is permitted, and if so, what protocol should be followed.

Often, many years will transpire between the completion of vocational rehabilitation services and the time of the vocational evaluation for permanent disability purposes. It is important for the vocational expert to clarify any work or work-like activities that the injured worker has completed in the interim. As an example, it is important to ask about any volunteer activities and to the extent to which the injured worker was able to participate in them. School, child care, and elder care activities can also provide a rich source of information regarding the activity and skill levels of injured workers following vocational rehabilitation in those instances where they were unable to maintain regular employment.

In some instances, injured workers are referred for evaluation of their employability in the open labor market absent their participation in vocational rehabilitation services. Referring attorneys will typically indicate that vocational rehabilitation was not attempted because the injured worker was too disabled to participate in such activities. In these instances, an assessment of self-directed return to work efforts and informal, work-like activities are even more important in developing opinions regarding employability.

#### F. Complete a Transferable Skills Analysis

A current transferable skills analysis is then completed and compared with other information available to that point. The *McCroskey Transferable Skills Program* (2001), *Labor Market Access Plus '99* (Field, 1999), *OASYS* (Gibson, 2002), and similar scientifically-based programs, are resources that are available to vocational experts for this purpose. This can be combined with a manual review of skills from the injured worker's work history through the *Enhanced Guide for Occupational Exploration* (1995).

#### G. Determine Vocational Feasibility

Vocational feasibility addresses the individual's ability to benefit from vocational rehabilitation

services when considering all medical and vocational information. Vocational feasibility factors used in making the determination of feasibility or non-feasibility should be noted. The vocational expert should explain whether rehabilitation services can help the injured worker develop skills and other traits needed to compete for employment in the open labor market. In California workers' compensation, in determining an injured worker's ability to benefit from a vocational rehabilitation plan, rehabilitation counselors are required to evaluate vocational feasibility while considering the following factors (California Division of Workers' Compensation, 2001):

- Perception of physical capacities
- Medical issues
- Financial issues
- Dependent care issues
- Transportation issues
- Legal issues
- Family issues
- Perception of current ability to benefit from participation in vocational rehabilitation
- Interest in continued participation in vocational rehabilitation
- Readiness for employment
- Other factors - define

## H. Analyze Employability

### 1. Labor Market Access

The first part of the employability analysis involves an assessment of the injured worker's labor market access, when considering medical and vocational factors.

#### a. Medical Labor Market Access

Medical labor market access addresses the availability of occupations in the open labor market that are compatible with the medical restrictions of treating and evaluating physicians. The primary consideration is the physical ability to perform work activities. The vocational suitability of any occupations identified as being physically appropriate is a secondary consideration.

##### 1) Establish Work Restriction Scenarios

Often there are conflicting medical opin-

ions regarding permanent work restrictions. As an example, the treating physician may limit the client to sedentary work with an opportunity to change positions at will. However, a consulting physician may preclude the same client from heavy work. Therefore, it is often best to establish scenarios for assessing employability based on the opinions of different physicians, such as the treating physician, an agreed medical evaluator, or a qualified medical evaluator. The opinions of psychiatrists, when available, can be interspersed appropriately with the scenarios for the physical work restrictions.

##### 2) Determine Labor Market Access Under Each Scenario

Computer programs such as the *McCroskey Transferable Skills Program* (2001), *Labor Market Access Plus '99* (Field, 1999), *OASYS* (Gibson, 2002), and others may be used for a general assessment of an injured worker's access to the labor market. These types of programs can be modified easily for different scenarios of medical restrictions. It is necessary to use publications such as the *Employment Statistics Quarterly* (U.S. Publishing Company, 2002) and publications from the California Employment Development Department to quantify further the percentage of jobs in the open labor market that the injured worker can perform under each of the medical scenarios identified above. Specific examples of occupations are listed together with the number employed by occupation, physical demand, and skill level.

Additional publications can be used to refine further opinions regarding an injured worker's labor market access. As an example, the Bureau of Labor Statistics (2001, January 29) provides information regarding part-time employment. In addition, the Job Accommodation Network (800-232-9675) is a source of information regarding home-based employment.

##### b. Vocational Labor Market Access

Vocational labor market access takes into consideration both medical and vocational factors. As such, vocational labor market access begins with a consideration of the restrictions of the physicians. In addition, vocational factors such as the injured worker's work history, test scores, transferable skills, personal presentation, demonstrated ability to perform work-like activities, the effects of pain and medication, the effects of outward signs of disability, and the requirements of employers for occupations are also considered in assessing the injured worker's vocational labor market access. Vocational feasibility, one's ability to benefit from the provision of vocational rehabilitation services, is also considered in assessing the injured worker's vocational labor market access.

An opinion is then developed regarding the injured worker's ability to work at occupations in the open labor market when considering all medical and vocational factors. Specific examples of any occupations that the injured worker can perform in the open labor market should be identified. Any necessary accommodations should also be described. Should it be determined that the injured worker is not employable in the open labor market, specific reasons for unemployability should be cited. Should it be determined that the injured worker is unable to work at occupations in the open labor market, an opinion can be provided regarding the person's ability to perform sheltered or non-competitive work. If so, specific examples should be provided.

## 2. Labor Market Survey

The second part of the employability analysis involves a labor market survey of employers and recruiters for jobs that appeared most suitable in the labor market access study. Newspapers, Internet search engines, and other secondary sources of job openings are surveyed to determine whether job openings exist for any occupations that are found to be compatible with the medical restrictions under each scenario when assessing labor market access. Employers and placement agencies can be contacted by telephone or in person as a further means of determining whether or not suitable

openings exist for occupations identified under each of the medical scenarios. The labor market research will focus on those occupations that appear most suitable under each scenario.

The need for labor market research is typically greater when the vocational expert is retained by the defense. In this instance, specific labor market research will likely be necessary to defend opinions regarding the availability of jobs in the open labor market with physical demands that are compatible with the medical restrictions and vocational limitations. Labor market research is usually not as critical when the vocational expert is hired by the applicant and concludes that the applicant is unemployable within the medical restrictions. However, labor market research in this instance can be valuable in rebutting a contention of a defense vocational expert that specific jobs are available in the open labor market.

### I. Report the Findings

A summary of the vocational rehabilitation evaluation findings is then developed into a written report with the conclusion that the individual is employable or not employable in the open labor market. If employable, the report will demonstrate specific examples of jobs available to the injured worker through direct placement or placement following specific vocational training. In some instances, the referring attorney will ask that a formal written report not be prepared. Should that be the case, it is important to prepare clear handwritten or typed notes for use during deposition or trial testimony.

### *Summary*

A literature review found that vocational experts have been retained to provide opinions regarding the employability of individuals with disabilities in administrative law settings for many years. This has become more common in California workers' compensation since *LeBoeuf v. WCAB* (1983). Claims for permanent and total disability are expected to increase because of recent legislation that has raised weekly benefits for injured workers with a permanent and total disability while the benefits for vocational rehabilitation services

have been eroded. There will be a concurrent increase in the need for knowledgeable and skilled vocational experts to evaluate the employability of applicants for permanent and total disability benefits and testify regarding their findings at depositions and trials.

There is no complete, thorough, and established methodology for vocational experts to follow in evaluating employability for applicants for permanent and total disability in the California workers' compensation system. The current article has proposed one such methodology that can be used by vocational experts for this purpose.

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