Admissibility of Vocational Opinions and Vocational Apportionment Revisited: Implications of Recent Court Decisions on the Evaluation of Employability and Earning Capacity

Eugene E. Van de Bittner, Ph.D., CRC
and
Jill A. Moeller, M.R.C., CRC

Mirfak Associates, Inc., Walnut Creek, California

Abstract. This article summarizes significant court decisions regarding the admissibility of vocational opinions after Senate Bill 863 (2012). Significant court decisions regarding vocational apportionment are also summarized. Implications for practice are described, which incorporate the judicial guidance in the court decisions.

About the Authors

Eugene E. Van de Bittner, Ph.D. has a B.S. degree in business administration, M.Ed. degree in vocational rehabilitation, and a Ph.D. degree in rehabilitation. He is a certified rehabilitation counselor, a certified life care planner, a certified vocational expert and a certified international psychometric evaluator. He served as president of the California Association of Rehabilitation and Reemployment Professionals (CARRP) in 1983. He was president of the American Board of Vocational Experts in 1997. He has also served on the Ethics Committee of CARRP and ABVE and currently serves on the Credentials Committee for ABVE. He is the current Chair of the Legislative Committee for the California Chapter of the International Association of Rehabilitation Professionals. He is the author of several peer-reviewed, published journal articles related to the evaluation of employability and earning capacity. He has testified at the Workers' Compensation Appeals Board throughout Northern California, as well as at Superior Court in California, and at U.S. District Court. He is a frequent invited presenter on topics related to employability and earning capacity.

Jill A. Moeller, M.S. has a B.S. degree in social science and a Master of Rehabilitation Counseling degree. She is a certified rehabilitation counselor. She is a recipient of the Horizon Award and the 26 Club Award for the Wyoming Department of Vocational Rehabilitation. Ms. Moeller has provided well-developed opinions regarding employability and earning capacity for complex medical-legal permanent disability cases. She has worked on 100% disability cases in the California Workers' Compensation system. She has worked on civil cases related to disability and employment law.

Admissibility of Vocational Opinions and Vocational Apportionment Revisited: Implications of Recent Court Decisions on the Evaluation of Employability and Earning Capacity

Introduction

Regarding the admissibility of vocational opinions, Van de Bittner and Moeller (2016) presented methods for rebutting a scheduled rating after California Senate Bill 863 (SB 863) (2012). SB 863 addresses employees injured on or after January 1, 2013. No court decision regarding the admissibility of vocational opinions had been issued at the time that article was written. Since then, several court decisions have been rendered on this topic. The decisions will be summarized below, along with a summary of two more general court decisions related to the rebuttal of a scheduled rating with vocational opinions.

Regarding vocational apportionment, Van de Bittner (2015) wrote:

> Vocational apportionment refers to a pre-existing or non-industrial medical factor or a non-industrial vocational factor that impacts an applicant's or plaintiff's employability or earning capacity. (p. 7)

The methods by which vocational experts analyze vocational apportionment have continued to evolve in relation to recent court decisions. Several significant court decisions regarding medical and vocational apportionment will be summarized following the court decisions on the admissibility of vocational opinions after SB 863 (2012). The primary focus of the discussion of admissibility of vocational opinions and vocational apportionment in this article is the California workers' compensation system. However, the same or similar issues apply to other state workers' compensation systems and can apply to other venues.

Admissibility Defined and Admissibility of Evidence

According to *Black's Law Dictionary* (Garner, 1999), "admissibility" is defined as, "The quality or state of being allowed to be entered into evidence in a hearing, trial, or other proceeding" (p. 50). Regarding vocational expert evidence in California workers' compensation matters, Labor Code section 5703(j) (Melchoir, 2021) states, "If vocational expert evidence is otherwise admissible, the evidence shall be produced in the form of written reports" (p. 356). Regarding the California Superior Court, Evidence Code of California section 350 (Hoover, 2007) states, "No evidence is admissible except relevant evidence" and that, "Except as otherwise provided by statute, all relevant evidence is admissible" (p. 7). According to Rule 402 of the Federal Rules of Evidence (Cornell Law School, 2021), relevant evidence is admissible unless provided otherwise by the United States Constitution, a federal statute, the Federal Rules of Evidence, or other rules prescribed by the United States Supreme Court.

Admissibility Court Decisions

There have been court decisions in five California workers' compensation cases that addressed the admissibility of vocational evidence for work injuries that occurred on or after January 1, 2013. They will be discussed in chronological order.

In *Cardenas v. Hayward Sisters Hospital* (2017), the workers' compensation judge (WCJ) found that both vocational experts in the case had provided reports that would have been considered probative evidence in a case involving an injury before January 1, 2013. But, the WJC also found that vocational evidence could not be considered because Labor Code Section 4660.1 in SB 863 (2012) did not state specifically that diminished ability to compete in an open labor market or diminished future earning capacity could be considered in determining the percentage of permanent disability for an injured worker. Additionally, the WCJ wrote that vocational evidence could not be considered in reference to the injured worker's claim for permanent total disability under Labor Code section 4662(b) (Melchoir, 2021) since he was precluded from considering vocational opinions.

In *Morgan v. Saint Mary's Medical Center* (2018), the WCJ determined that vocational reports were not subject to exclusion from evidence if the case-in-chief proceeds to trial on a future date. The WCJ deferred a decision on the admissibility of vocational expert reports until the time of trial in the case-in-chief. The applicant (injured worker) was permitted to obtain a report from a vocational expert. The WCJ noted that a scheduled rating under Labor Code section 4660.1 (Melchoir, 2021) was rebuttable and noted further that vocational evidence (vocational expert reports and opinions) was relevant in reference to Labor Code section 4662 (Melchoir, 2021) and *LeBoeuf v. WCAB* (1983).

In *Hanus v. URS/AECOM Corporation* (2018), a panel decision (involving three commissioners) by the Workers' Compensation Appeals Board (WCAB) denied the defendant's Petition for Reconsideration when it found that Labor Code section 4660.1 (Melchoir, 2021) did not preclude rebuttal of a scheduled rating with vocational evidence. The WCJ also determined that the applicant was 100% disabled based on an individualized vocational assessment that included medical and vocational factors in reference to *Contra Costa County v. WCAB and Doreen Dahl (Dahl)* (2015).

In *Hennessey v. Compass Group* (2019), another panel decision, the WCAB found that the applicant could use vocational evidence in an attempt to rebut a scheduled permanent disability rating for a work injury occurring on or after 1/1/2013 pursuant to Labor Code section 4660.1 (Melchoir, 2021). The WCAB rejected the defendant's assertion that removing language in this section regarding diminished future earning capacity caused vocational evidence to be irrelevant and inadmissible. The WCAB explained that Labor Code section 4660.1 (Melchoir, 2021) standardized the adjustment factor for diminished future earning capacity from a range of 1.1-1.4 to 1.4 for all injuries, which supported the admissibility of vocational expert reports for an injury on or after 1/1/2013.

In *The Conco Companies v. WCAB (Sandoval)* (2019), a petition for writ of review denied decision, the WCAB affirmed the WCJ's finding that there was no basis for the

defendant's objection to the admissibility of the applicant's vocational expert's report in relation to a 1/23/2015 work injury. The WCAB rejected the defendant's assertion that changes in Labor Code section 4660 (Melchoir, 2021) regarding diminished future earning capacity made vocational evidence irrelevant and inadmissible. Labor Code section 4660.1 (Melchoir, 2021) standardized to 1.4 the adjustment factor for diminished future earning capacity. A petition for writ of review was denied by the Court of Appeal for several reasons. The issue regarding admissibility of vocational evidence was not raised first at trial, but in a request for reconsideration. Additionally, the argument was found meritless in reference to Labor Code section 5703(j) (Melchoir, 2021) and California Code of Regulation section 10606.5 (Melchoir, 2021).

In *County of Alameda v. WCAB (Williams)* (2020), a petition for writ of review denied decision, the WCAB affirmed the WCJ's finding that the applicant, who was injured on 8/4/2015, was 100% disabled in reference to *Ogilvie v. WCAB* (2011) and *LeBoeuf v. WCAB* (1983), based on a combination of medical and vocational evidence. The WCAB found that Labor Code section 4660.1 (Melchoir, 2021) did not preclude consideration of vocational evidence in attempting to rebut a scheduled disability rating.

In *State Compensation Insurance Fund v. WCAB (Ortega)* (2020), another petition for writ of review denied decision, the WCAB affirmed the WCJ's award of 80% permanent disability, after psychiatric apportionment, based on the opinions of the psychiatric agreed medical evaluator (AME) and the applicant's vocational expert. In addition, the WCAB cited *The Conco Companies v. WCAB (Sandoval)* (2019) and *Hennessy v. Compass Group* (2019) while agreeing with the WCJ that vocational evidence is admissible and may be considered by the WCAB in determining an injured worker's ability to participate in vocational rehabilitation pursuant to *LeBoeuf v. WCAB* (1983).

There are two additional court decisions that have general applicability to the admissibility of vocational evidence. The first is *Department of Corrections and Rehabilitation v. WCAB (Fitzpatrick)* (2018), which concluded that Labor Code section 4662(b) (Melchoir, 2021) did not provide a second path to argue permanent total disability. Any claim for permanent total disability is subject to Labor Code section 4660 (Melchoir, 2021). Mr. Fitzpatrick was injured on 12/7/11. Therefore, his claim falls under the 2005 *Schedule for Rating Permanent Disabilities* (California Division of Workers' Compensation, 2005). The Court of Appeal in *Fitzpatrick* (2018) did not state whether its findings apply to injuries on or after 1/1/2013.

Another court decision that has general applicability to the issue of admissibility of vocational evidence is *The People v. Marcos Arturo Sanchez (Sanchez)* (2016), a California Supreme Court decision that rejected part of the testimony of a gang expert in a criminal case because it represented case-specific hearsay evidence. Van de Bittner and Moeller (2019) explained how *Sanchez* (2016) impacted the admissibility of the opinions of vocational experts. Van de Bittner, Moeller, and Van de Bittner (2019) presented a labor market opportunity analysis as a method for analyzing the labor market for an evaluee in a manner that is not case-specific.

In summary, a review of the above court decisions has revealed that the WCAB considers vocational expert opinions relevant and admissible for applicants with a work injury on or after 1/1/2013. A petition for writ of review was denied by the Court of Appeal in the three most recent court decisions. Except for one trial judge decision, no court decisions were identified for the WCAB or the Court of Appeal that rejected the admissibility of vocational evidence for an applicant injured on or after 1/1/2013.

This concludes the discussion of recent court decisions that address the admissibility of vocational evidence for an applicant with an injury on or after 1/1/2013. The next section will focus on recent court decisions that address medical apportionment and vocational apportionment.

Apportionment Court Decisions Regarding Medical Opinions

In the review of recent court decisions that address apportionment, there are four recent court decisions that address medical apportionment. Following a discussion of these four court decisions is a review of 21 recent court decisions that address vocational apportionment.

In *City of Jackson v. WCAB (Rice)* (2017), a Court of Appeal decision, the qualified medical evaluator (QME) apportioned 49% of the applicant's permanent disability to heredity, genetics, and other personal history factors. The Court of Appeal concluded that the QME's reports were more than sufficient to meet the standard of substantial medical evidence. After comparing the reports of the QME with the findings in prior court decisions, the Court of Appeal explained, "Again, we see no relevant distinction between apportionment for a preexisting disease that is congenital and degenerative, and apportionment for a preexisting degenerative disease caused by heredity or genetics" (p. 8).

In *Hikida v. WCAB* (2017), a Court of Appeal decision, the applicant developed chronic regional pain syndrome (CRPS) from surgery for her carpal tunnel condition. The agreed medical evaluator (AME) found non-industrial apportionment for the carpal tunnel condition. However, the AME concluded that the applicant was permanently and totally disabled entirely because of the effects of the CRPS. The Court of Appeal ruled that any disability arising directly from the carpal tunnel surgery was not apportionable. Therefore, the applicant was found to be 100% disabled, without apportionment.

In *City of Petaluma v. WCAB (Lindh)* (2018), a Court of Appeal decision, the applicant sustained a head injury. The QME concluded that 85% of the applicant's permanent disability was due to a previously asymptomatic, underlying condition, and 15% of the applicant's permanent disability was due to the work injury. The WCJ rejected the QME's apportionment analysis and found 40% permanent disability without apportionment. The WCAB affirmed the WCJ's decision. However, the Court of Appeal ruled that apportionment is required if the disability resulted from both non-industrial and industrial causes and reinstated the QME's opinion on apportionment. The applicant's claim that there could be no apportionment to a pre-existing condition was rejected.

In *County of Santa Clara v. WCAB (Justice)* (2020), another Court of Appeal decision, the applicant sustained an injury to both knees following a fall at work. The applicant had total knee replacement surgery on both knees. The AME reported significant pre-injury degeneration in both knees and that the need for surgery was a result of underlying arthritis. Therefore, the AME opined that 50% of the bilateral knee disability was due to non-industrial degeneration in the knees. But, the WCJ cited *Hikida* (2017) and awarded permanent disability with no apportionment. The WCAB upheld the decision by the WCJ. However, the Court of Appeal found that apportionment of permanent disability was required, citing *Lindh* (2018), and explained that this case differed from *Hikida* (2017). The permanent disability in this case was not caused entirely by the industrial medical treatment. The Court of Appeal agreed with the AME's opinion on apportionment.

This concludes the review of recent significant court decisions involving medical apportionment. Next is a review of recent court decisions involving vocational apportionment, issues that address apportionment of employability, earning capacity, and amenability to rehabilitation.

Apportionment Court Decisions Regarding Vocational Opinions

This section begins with a review of *Kirkwood v. WCAB* (2015), in which a petition for writ of review was denied by the Court of Appeal. The applicant suffered a work injury to her right upper extremity and psyche. She had a prior non-industrial injury to her cervical spine and a below-the-elbow amputation of her left arm. Both parties retained vocational experts. The WCJ found permanent disability of 100%, without apportionment. The WCAB rescinded the WCJ's opinion and found that the report of the applicant's vocational expert was insufficient rebuttal evidence because the vocational expert disregarded the impact of the applicant's pre-existing, non-industrial amputation on her overall level of disability. The applicant appealed the WCAB's decision, and reconsideration was denied. The WCAB also explained that it was not necessary that the applicant's pre-existing amputation interfered with her ability to work at her job at the time of her subsequent injury in order for apportionment to apply.

In *Flowserve Corporation v. WCAB (Espinoza)* (2016), a writ of review denied decision, the applicant sustained an injury to his right shoulder, left knee, left lower extremity, and back. He also had a cumulative trauma (CT) injury to his bilateral shoulders, left knee, left lower extremity, back, and right knee. The applicant had industrial and non-industrial factors of disability that precluded him from returning to work, including his age; limitations on sitting, standing, and lifting; his limited education in Nicaragua; lack of transferable skills; and lack of stamina. The vocational expert doubted whether training could be completed or whether any employment could be sustained, given the applicant's lack of stamina. The vocational expert explained that the applicant's total loss of earning capacity was attributable to the industrial injuries. The WCJ relied on the opinion of the vocational expert to conclude that the applicant was 100% disabled. The WCAB affirmed the WCJ's decision.

In *Winningham v. WCAB* (2016), a writ of review denied decision, the applicant sustained an injury to his brain, central nervous system, psyche, eye, digestive system, and cognitive system, and sustained medical conditions including meningitis, headaches, and vertigo. He also

had a non-industrial brain tumor. The WCJ determined that the AMEs described apportionment appropriately. However, the WCJ did not rely on the applicant's vocational expert's report because it did not adequately discuss apportionment. The WCAB affirmed the WCJ's decision.

In *Edwards v. WCAB* (2016), a writ of review denied decision, the WCAB affirmed the WCJ's decision that the applicant's vocational expert relied on impermissible vocational factors in opining that the applicant was 100% disabled. The WCJ noted that the vocational expert's opinion was based in part on impermissible factors, including the applicant's subjective complaints, significant academic and intellectual limitations, and a history of primarily unskilled work.

In *Target Corporation v. WCAB (Estrada)* (2016), a writ of review denied decision, the applicant sustained a CT injury to his low back, neck, left knee, bilateral shoulders, lower extremities, thoracic spine, left elbow, left forearm, left wrist, stomach, and psyche, and sustained medical conditions including sleep disturbance, diabetes, and hypertension. The WCJ relied on the opinions of the applicant's vocational expert in determining that the applicant was 100% disabled, without vocational apportionment. The WCJ stressed that an apportionment analysis is required and that it should be a separate, vocational analysis and should not rely exclusively on each medical cause of impairment. The vocational expert indicated that there was no medical opinion that non-industrial medical problems would have terminated or shortened the applicant's worklife. The WCJ found no substantial medical evidence supporting non-industrial apportionment.

In *Rodriguez v. YRC Worldwide* (2017), the applicant's vocational expert reported that the applicant was 100% disabled because of the impact of medication usage. The WCJ relied on this opinion to find permanent total disability. But, the WCAB disagreed because the applicant used medication for both industrial and non-industrial conditions. The case was returned to the trial level for further development of the medical record regarding the effects of the industrial medications used by the applicant on his permanent disability.

In *Singh v. State of California* (2017), a panel decision, the applicant's vocational expert opined that the applicant was unable to compete in the open labor market based on the effects of two specific work injuries, a cumulative trauma injury, and vocational factors affecting employability. The WCJ awarded 100% permanent disability. However, the WCAB determined that the vocational expert's opinions did not constitute substantial evidence since the vocational expert's report failed to address whether the applicant's diminished future earnings were directly attributed to the applicant's work-related injury and not due to non-industrial vocational factors such as proficiency to speak English and lack of education. Additionally, the applicant's vocational expert did not address the applicant's ability to participate in vocational rehabilitation. The WCAB amended the WCJ's decision and found 53% permanent disability for the first injury, 47% permanent disability for the second injury, and 67% permanent disability for the cumulative trauma injury, for a combined permanent disability of 95%.

In *Gibbs v. State of California* (2018), a panel decision, the WCAB found that the applicant was 100% disabled based on the opinions of the orthopedic AME with the opinions of the applicant's vocational expert, despite 10% apportionment of permanent disability to pre-

existing spondylolisthesis. The WCAB concurred with the WCJ's finding that there was no legal basis for apportionment since the orthopedic AME did not provide an explanation for his apportionment determination. Also, the AME in psychology did not adequately identify the basis for apportionment. Therefore, the vocational expert was not required to consider the apportionment determinations of the orthopedic AME or the apportionment determinations of two other AMEs.

In *Sandoval v. WCAB* (2018), a petition for writ of review denied decision, the WCJ rejected the report of the applicant's vocational expert. The applicant could not speak, write, or read English and had limited education. The vocational expert determined that these non-industrial factors, in combination with industrial factors, made the applicant unemployable. The WCJ concluded that the applicant did not meet his burden of proving that he was 100% disabled solely due to his industrial injury. The WCAB wrote that the applicant was required to show that his diminished future earning capacity was entirely due to his industrial injury. Because the vocational expert included impermissible non-industrial factors in determining vocational non-feasibility, the expert's report did not rebut the scheduled rating.

In *Ramirez v. Alco Iron & Metal Co., Inc.* (2018), a panel decision, the WCJ found that the applicant was 100% disabled based on the opinions of the applicant's vocational expert and one scenario of a transferable skills analysis conducted by the defense vocational expert. Regarding apportionment of impermissible non-industrial vocational factors, the WCJ rejected the defense vocational expert's comparison of pre-injury and post-injury earning capacity, expected earnings without impermissible non-industrial vocational factors. The WCJ explained that a vocational analysis needs to be individualized. The WCJ wrote, "The proper analysis for determining the industrial loss of earnings/job market access post-industrial injury follows:" (p. 11):

1. What was applicant's labor market access / earnings capacity pre-injury including all non-industrial factors (i.e. education, skill, literacy, economic conditions)?

2. What is applicant's labor market access / earnings capacity post-injury including all non-industrial factors (i.e. education, skill, literacy, economic conditions)?

3. What is the ratio of the above? (p. 11)

The WCJ emphasized that the analysis post-injury must focus on damages caused by the injury. The WCJ provided the example of an unskilled applicant with pre-injury labor market access of 20% and post-injury labor market access of 15%. This would result in 25% permanent disability, not 85% permanent disability. A further analysis of diminished future earning capacity would be required, depending on the date of injury.

In *Hennessy v. Compass Group* (2019), a panel decision, the WCJ found that the applicant's vocational expert's reports did not constitute substantial evidence to rebut a scheduled permanent disability rating because the vocational expert did not explain whether

medical apportionment was considered and how it affected the expert's conclusions. This court decision was discussed above in the Admissibility Court Decisions section.

In *Bagobri v. AC Transit* (2019), a petition for reconsideration was denied by the WCAB. The WCJ concluded that the applicant was 100% disabled, without apportionment, and explained that an individualized vocational assessment is necessary. The WCJ found that the opinion of the defense vocational expert, which was essentially an opinion on vocational apportionment, was not based on substantial evidence. Among other things, the defense vocational expert wrote that it was not possible to apply apportionment to work restrictions. Instead of analyzing the applicant's actual work restrictions as provided by the functional capacity evaluation, the vocational expert modified the applicant's work restrictions to create work restrictions that the expert believed were a result of the industrial injury. The WCJ noted that since the expert's opinion was not based on the facts in the case, the vocational expert's opinion could not be followed.

In *Zmek v. State of California* (2019), a petition for reconsideration was denied by the WCAB. The WCAB affirmed the WCJ's finding that the applicant was 100% disabled, based on the opinions of the AME and the applicant's vocational expert. The WCJ disregarded the AME's opinion that there was 40% non-industrial apportionment. The WCJ also found the applicant's vocational expert's analysis of vocational apportionment to be more persuasive than the defense vocational expert's analysis. The WCJ explained that the defense vocational expert did not clarify why non-industrial factors were applicable to the total disability based on *LeBoeuf* (1983). The defendant did not meet its burden of proving non-industrial apportionment. For example, the defendant did not produce any medical evidence of work restrictions attributed to non-industrial medical factors of disability.

In *Allstate Insurance Company v. WCAB (Monrial)* (2020), a petition for writ of review denied decision, the WCJ awarded 91% permanent disability. However, the WCAB increased the award to 100% based on the opinions of the orthopedic AME and the applicant's vocational expert. The orthopedic AME concluded that the applicant was 100% disabled orthopedically and that permanent disability was 100% industrial. The applicant's vocational expert completed an individualized assessment and concluded that the applicant was unable to return to work in the open labor market, had no future earning capacity, and was not amenable to rehabilitation, without vocational apportionment. The opinions of the vocational expert were based on the results of the individualized assessment and relied on the orthopedic AME's opinion that all orthopedic impairments were industrial.

In *United States Fire Insurance Company v. WCAB (Bernasani)* (2020), a petition for writ of review denied decision, the WCAB affirmed the WCJ's award of 100% permanent disability. The orthopedic AME and the applicant's vocational expert concluded that the applicant was unable to return to gainful employment due to a limitation to sedentary work combined with a need for housekeeping services, transportation assistance, reliance on a cane, the use of prescription medication, and lack of transferable skills. The applicant's vocational expert concluded that the applicant was 100% disabled based solely on her work-related orthopedic limitations since the applicant's non-orthopedic impairments did not limit her ability to work in the same manner as her orthopedic impairments.

In *The Kroger Company dba Ralphs Grocery Company v. WCAB (Melton)* (2020), a petition for writ of review denied decision, the WCAB affirmed the findings of the WCJ that the applicant was 100% disabled based on the opinions of the AME and the applicant's vocational expert. The WCAB noted that the defendant had the burden of proving apportionment and the defendant did not meet this burden. The WCAB determined that 15% apportionment of fibromyalgia to non-industrial factors found by the AME was not substantial evidence since there was no evidence in the record that the applicant's pre-existing fibromyalgia had any effect on her earning capacity, and there was substantial evidence that the applicant's inability to participate in vocational rehabilitation was solely industrial.

In *Culver v. Initiative Foods* (2020), a panel decision, the WCJ found the applicant to be 100% disabled based on the opinion of a court-appointed independent vocational expert (IVE). The IVE concluded that the applicant was not amenable to vocational rehabilitation and had lost her earning capacity. Regarding vocational apportionment, the IVE found no vocational impact from pre-existing or non-industrial medical conditions in terms of physical or psychiatric impairment. The IVE determined that the applicant's diminished ability to compete in the labor market was solely due to the applicant's work injury.

In *Winn v. O.G. Packing Company, Inc.* (2020), a panel decision, the WCAB amended the decision by the WCJ to find the applicant was 100% disabled, with apportionment to non-industrial causes. The case was returned to the WCJ for a final award of permanent disability after apportionment. The WCJ found that the applicant's vocational expert's report failed to reflect that the applicant was amenable to rehabilitation, since he had completed a vocational rehabilitation plan in 2006, and because the expert did not appropriately apply the current apportionment standards. The neurology AME found 20% apportionment to pre-existing non-industrial factors. The psychiatry evaluator found 25% apportionment to non-industrial factors. The WCJ found the applicant's vocational expert's opinion was not substantial evidence in part because the expert failed to consider the 20% neurological apportionment and 25% psychiatric apportionment. The WCAB did not agree with the WCJ's determination that the applicant was amenable to rehabilitation since he was able to participate in vocational rehabilitation 10 years earlier. The WCAB concluded that the applicant was 100% disabled, but for apportionment to non-industrial neurological factors. The WCAB decided not to rely on the apportionment opinion of the psychiatric evaluator in determining the extent of the applicant's permanent disability. Therefore, the WCAB reduced the applicant's 100% permanent disability by 20%, based on the 20% apportionment found by the AME in neurology.

In *Braziel v. Money Mailer of Agoura* (2020), a panel decision, the WCJ found the applicant to be 100% disabled due to an injury to her cervical spine, right shoulder, sleep, and psyche. The WCAB affirmed the WCJ's decision. The WCAB concluded that the applicant's vocational expert properly considered apportionment when the expert found that the applicant was unable to benefit from vocational rehabilitation or return to the labor market, based on the effects of the industrial injury. The vocational expert explained that 10% orthopedic apportionment was minimal in light of the high WPIs, the work restrictions, the applicant's chronic, constant neck pain, and use of opioid medication. Similarly, the vocational expert addressed 25% psychiatric apportionment in relation to a GAF of 50, numerous severe work

function impairments, overall marked permanent mental impairment, orthopedic and psychiatric WPI ratings, noticeable cervical dystonia, and tremors. The WCAB determined that the vocational expert had properly considered whether medical apportionment affected the expert's conclusion that the applicant was not amenable to vocational rehabilitation and how non-industrial medical apportionment affected the conclusions.

In *Brazil v. San Mateo County Transit District* (2020), a panel decision, the applicant sustained an injury to her back, right knee, and psyche. The WCJ found the applicant to be 100% disabled, with no basis for apportionment. The opinions of the defense vocational expert were not considered substantial evidence since the expert had not addressed apportionment. The opinions of the applicant's vocational expert were considered substantial evidence. The applicant's vocational expert considered the 5% apportionment to the lumbar spine to be modest in concluding that the applicant was 100% disabled. The WCJ concluded that the applicant's 100% permanent disability would not be reduced by apportionment to non-industrial factors.

In *Duarte v. Life Generations Healthcare* (2021), a panel decision, the applicant, a certified nursing assistant, sustained an injury on 9/24/14 to her neck, right upper extremity, and back. A QME in neurology reported that the applicant was unable to return to work as a certified nursing assistant and that she was restricted from repetitive flexion and extension maneuvers or rotation of the cervical spine. She was also precluded from repetitive bending at the waist or twisting. She needed to avoid pushing, pulling, or lifting more than 15 pounds. Regarding her right shoulder condition, she was unable to lift more than 5 pounds with the right upper extremity and was unable to reach above shoulder height with the right upper extremity repetitively. The applicant had a prior work injury on 10/31/10, when she sustained an injury to her cervical spine and right shoulder. The orthopedic AME for the prior injury found permanent work restrictions that included a preclusion from repetitive head and neck movements, repetitive work above shoulder level, and very heavy work.

The applicant's vocational expert reported that the applicant was not amenable to rehabilitation and was unable to sustain employment in the open labor market due to the 9/24/14 work injury alone. The vocational expert opined that there was no vocational apportionment since the vocational expert did not find any record of a labor-disabling limitation prior to the 9/24/14 injury. The WCJ determined that the vocational expert's report did not constitute substantial evidence since the vocational expert did not comment on the pre-existing work restrictions that the vocational expert had reviewed in the QME's reports. The WCJ also found that the vocational expert's reports were based on an inaccurate history and speculation. As a result, the vocational expert's reports were insufficient to rebut the scheduled rating.

This concludes the review of recent significant court decisions involving vocational apportionment. Next, this article comments on the implications for practice by vocational experts from the review of the court decisions involving the admissibility of vocational opinions after SB 863, medical apportionment, and vocational apportionment.

Implications for Practice

The first implication for practice from the initial set of court decisions is understanding that the opinions of vocational experts may be admissible. The most significant court decisions in this regard are *The Conco Companies v. WCAB (Sandoval)* (2019), *County of Alameda v. WCAB (Williams)* (2020), and *State Compensation Insurance Fund v. WCAB (Ortega)* (2020). Necessary components of a vocational expert evaluation and report are described in California Code of Regulations section 10685 (Melchoir, 2021).

One requirement for a vocational expert report to be considered substantial evidence is that it be based on an individualized analysis, as described in *Contra Costa County v. WCAB and Doreen Dahl (Dahl)* (2015). Another requirement for substantial evidence is that opinions of employability, earning capacity, and amenability to rehabilitation emanating from the vocational analysis should be based on medical and vocational factors due to the industrial injury and not due to non-industrial factors. This concept was described in *Ogilvie v. WCAB* and *City and County of San Francisco v. WCAB* (2011), commonly referred to as *Ogilvie III*, where the California Court of Appeal determined that:

> *. . . While some of the briefing provided to the court may be read to suggest that under LeBoeuf a disability award may be affected when an employee is not amenable to vocational rehabilitation for any reason, the most widely accepted view of its holding, and that which appears to be most frequently applied by the WCAB, is to limit its application to cases where the employee's diminished future earnings are directly attributable to the employee's work related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency to speak English, or an employee's lack of education . . .* (p.11)

Related to the above, a vocational rehabilitation evaluation should involve a comparison of pre-injury and post-injury employability, earning capacity, and amenability to rehabilitation, while focusing on factors attributed to the work injury rather than non-industrial factors.

Another implication for practice from the review of the court decisions is that vocational experts need to consider and conduct a probative analysis of apportionment of both medical and vocational factors for their opinions to be considered substantial evidence. It is necessary for vocational experts to consider whether apportionment affects their conclusions regarding employability, earning capacity, and amenability to rehabilitation and how apportionment of non-industrial factors affected their conclusions. The Vocational Apportionment Analysis Process (Van de Bittner, 2015), as modified to include step 5, can assist vocational experts in developing vocational apportionment opinions. The steps are as follows:

1. Review records regarding medical factors affecting apportionment.

2. Review records regarding vocational factors affecting apportionment.

3. Clarify the impact of medical and vocational factors affecting apportionment on employability.

4. Clarify the impact of medical and vocational factors affecting apportionment on earning capacity.

5. Clarify the impact of medical and vocational factors affecting apportionment on vocational feasibility and amenability to rehabilitation.

The medical and vocational facts pertaining to an applicant are unique for each case. Therefore, it is not possible to recommend a numeric formula for analyzing vocational apportionment that will apply to every case. However, in some cases, the applicant had a pre-existing injury to the same body part. If the medical records contain a medical opinion on work restrictions for the prior injury, the vocational expert can develop an opinion regarding the percentage of labor market access that the applicant was precluded from for the pre-existing work restriction. The percentage of diminished labor market access for the pre-existing injury represents the vocational apportionment attributed to the pre-existing injury.

Similarly, some applicants have pre-existing non-industrial vocational factors like those described in *Ogilvie III* (2011). Regarding illiteracy or proficiency to speak English, a vocational expert can use government data to clarify diminished labor market access or diminished earning capacity attributed to the impermissible vocational factor while using a high school diploma or a GED certificate as a threshold. The percentage of diminished labor market access or diminished earning capacity represents vocational apportionment attributed to the impermissible vocational factor.

The vocational apportionment analysis represents one component of a complete and thorough individualized vocational rehabilitation evaluation, as follows:

1. Record review
2. Interview
3. Vocational testing
4. Transferable skills analysis
5. Employability analysis
    a. Labor market access, placeability, and sustainability analysis
    b. Labor market opportunity analysis
6. Earning capacity analysis
7. Vocational feasibility and amenability to rehabilitation analysis
8. Vocational apportionment analysis
9. Report preparation

Summary

A review of court decisions involving work injuries on or after January 1, 2013 revealed that the opinions of vocational experts are admissible if they are considered substantial evidence. Four recent court decisions were reviewed regarding medical apportionment, and 19 court

decisions were reviewed regarding vocational apportionment. The primary revelation of this review is that vocational experts need to conduct a probative analysis of vocational apportionment for their opinion to be considered substantial evidence.

References

Allstate Insurance Company v. WCAB (Maria Monrial), California District Court of Appeal, B301775, 85 CCC 133 (2020).

Bagobri v. AC Transit, Panel Decision, WCAB No. ADJ2559682 (2019).

Braziel v. Money Mailer of Agoura, Panel Decision, WCAB No. ADJ368953 (2020).

Brazil v. San Mateo County Transit District, Panel Decision, WCAB No. ADJ681983, 2020 WL 7418088 (2020).

California Department of Corrections and Rehabilitation v. WCAB (Dean Fitzpatrick), California District Court of Appeal, C085850 (2018).

California Division of Workers' Compensation. (2005). *Schedule for rating permanent disabilities.* Sacramento, CA: Publications & Information Unit.

Cardenas v. Hayward Sisters Hospital dba St. Rose Hospital, Findings, Award, and Order, WCAB No. ADJ9116513 (2017).

City of Jackson v. WCAB (Christopher Rice), California District Court of Appeal, C078706 (2017).

City of Petaluma v. WCAB (Aaron Lindh), California District Court of Appeal, A153811, 83 CCC 1869 (2018).

Contra Costa County v. Workers' Compensation Appeals Board and Doreen Dahl, California District Court of Appeal, A141046 (2015).

Cornell Law School. (2021, February 4). *Federal rules of evidence*. Retrieved from https://www.law.cornell.edu/rules/fre/rule_402

County of Alameda v. WCAB (Horace Williams), California District Court of Appeal, AI60004, 85 CCC 792 (2020).

County of Santa Clara v. WCAB (Barbara Justice), California District Court of Appeal, H046562, 85 CCC 467 (2020).

Culver v. Initiative Foods, Panel Decision, WCAB No. ADJ899375 (2020).

Duarte v. Life Generations Healthcare, Panel Decision, WCAB No. ADJ10162723, 2021 WL 150541 (2021).

Edwards v. WCAB, California District Court of Appeal, A148040, 81 CCC 1035 (2016).

Flowserve Corporation v. WCAB (Cesar Espinoza), California District Court of Appeal, B275700, 81 CCC 812 (2016).

Garner, B. A. (Ed.) (1999). *Black's law dictionary* (8th ed.). West Group.

Gibbs v. State of California, Panel Decision, WCAB No. ADJ668989 (2018).

Hanus v. URS/AECOM Corporation, Panel Decision, WCAB No. ADJ9911872 (2018).

Hennessy v. Compass Group, Panel Decision, WCAB No. ADJ9219579, 83 CCC 1608 (2018).

Hikida v. WCAB, California District Court of Appeal, B279412 (2017).

Hoover, K. (Ed.). (2007). Standard California codes (2008 ed.). Matthew Bender.

Kirkwood v. WCAB, California District Court of Appeal, B264745, 80 CCC 1082 (2015).

LeBoeuf v. WCAB, 34 C3d 234, 193 CR 549, 48 CCC (1983).

Melchoir, J. M. (Ed.). (2021). *Workers' compensation laws of California* (2021 ed.). Matthew Bender.

Morgan v. Saint Mary's Medical Center, Findings of Fact and Opinion on Decision, WCAB No. ADJ10626542 (2018).

Ogilvie v. WCAB and *City and County of San Francisco v. WCAB*, A126344; A126427 (2011).

Ramirez v. Alco Iron & Metal Co., Inc., Panel Decision, WCAB No. ADJ3614941 (2018).

Rodriguez v. YRC Worldwide, Panel Decision, WCAB No. ADJ7141005 (2017).

Sandoval v. WCAB, California District Court of Appeal, A153813, 83 CCC 902 (2018).

Senate Bill 863 (2012). Retrieved on September 5, 2012 from leginfo.legislature.ca.gov/faces/billNavClient.xhtml

Singh v. State of California, Panel Decision, WCAB No. ADJ2653468 (2017).

State Compensation Insurance Fund v. WCAB (Ortega), California District Court of Appeal, H048222 (2020).

Target Corporation v. WCAB (Fidel Estrada), California District Court of Appeal, B277992, 2016 Cal. Wrk. Comp. LEXIS 131 (2016).

The Conco Companies, Zurich Insurance Company, administered by Travelers v. Workers' Compensation Appeals Board (Rafael Sandoval), California District Court of Appeal, A158412, 84 CCC 1067 (2019).

The Kroger Company dba Ralphs Grocery Company v. WCAB (Brenda Melton), California District Court of Appeal, B301624 (2020).

The People v. Marcos Arturo Sanchez, California Supreme Court, S216681 (2016).

United States Fire Insurance Company v. WCAB (Monica Bernasani), California District Court of Appeal, G058672, 85 CCC 222 (2020).

Van de Bittner, E. E. (2015). Vocational apportionment: An analysis of medical and vocational factors affecting apportionment of employability and earning capacity. *Journal of Forensic Vocational Analysis, 16*(1), 7-17.

Van de Bittner, E. E. & Moeller, J. A. (2016). Appropriate use of vocational opinions to rebut a scheduled rating in California workers' compensation claims for permanent partial disability after *Dahl* and after Senate Bill 863. *Journal of Forensic Vocational Analysis, 16*(2), 37-47.

Van de Bittner, E. E., Moeller, J. A., & Van de Bittner, S. K. (2019). Developing vocational and life care plan opinions after *The People v. Marcos Arturo Sanchez* (2016) that do not rely on hearsay evidence: A recommended approach. *The Rehabilitation Professional*, *27*(1), 5-21.

Winn v. O.G. Packing Company, Inc., Panel Decision, WCAB No. ADJ2027759 (2020).

Winningham v. WCAB, California District Court of Appeal, A148686, 81 CCC 828 (2016).

Zmek v. State of California, Panel Decision, WCAB No. ADJ8493350, 2019 Cal. Wrk. Comp. P.D. LEXIS 552 (2019).