

**DAMAGE CONTROL:  
MITIGATING COSTS FOR VOCATIONAL EXPERTS  
PURSUANT TO LABOR CODE SECTION 5811**

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**Introduction**

*The case in chief has not resolved and discovery is ongoing. Applicant's Attorney files a \$10,000.00 lien for fees incurred by Applicant's vocational rehabilitation expert. The invoice attached to the lien includes charges for the expert's examination of the Applicant, report preparation, and even a retainer fee. Shortly thereafter, Applicant's Attorney files a Petition for an Order directing Defendants to advance the expert's cost for trial preparation and testimony at trial. Must the Defendants pay for all of these charges? If so, are the Defendants obligated to pay the lien and advance costs prior to the resolution of the underlying case?*

This hypothetical scenario has resonated with Defendants with increasing frequency over the last several months, as they navigate through an emerging aspect of workers' compensation practice. Not surprisingly, in the wake of *Ogilvie I* and *II*, more and more Applicant Attorneys are employing vocational experts to prepare reports addressing Applicant's diminished future earning capacity ("DFEC") to rebut the rating under the 2005 Permanent Disability Rating Schedule ("PDRS"). Discerning when and how to adjust these costs can be problematic, especially when discovery is ongoing, and the extent of Defendants' liability is unclear. While it is well established that Applicant has a right to reimbursement for vocational experts, the question becomes when are Defendants obligated to pay, and how much? Knowing when and how much of the expert's cost Defendants have to pay can help limit exposure on these liens and avoid a possible penalty situation.<sup>1</sup>

**Applicant's Vocational Expert May Be Entitled To Be Reimbursed By Defendants For The Reasonable Costs Associated With Her Services**

If Applicant satisfies certain evidentiary prerequisites, Defendants will be obligated to reimburse Applicant's vocational rehabilitation expert, under Labor Code Section 5811 and the *Costa v. Hardy Diagnostic en banc* Appeals Board case.

Labor Code Section 5811 confers on the WCAB the discretion to award costs between the parties. In *Costa v. Hardy Diagnostic* (2007) 72 CCC 1492, the Appeals Board *en banc* held that an Applicant's vocational expert costs are allowable under Section 5811, as vocational experts may be appropriate expert witnesses to present evidence on and/or in rebuttal to a permanent disability rating under the new permanent disability rating schedule. Indeed, the Board in *Costa* held that the Applicant's vocational expert was entitled to reimbursement from Defendants for reasonable costs associated with her testimony under Section 5811, even where her report was

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<sup>1</sup> See *Malmuth v. WCAB (Barrios)* (2009) 74 CCC 654, wherein the WCAB upheld a WCJ's Labor Code Section 5814 penalty award against the State Compensation Insurance Fund for unreasonable failure to pay vocational rehabilitation expert witness fees associated with expert's services regarding Applicant's diminished future earning capacity.

excluded from evidence and the expert failed to rebut the permanent disability rating. The Board justified its holding based on the assumption that some of the expert's work in preparing her report may have facilitated her testimony at trial.<sup>2</sup> This is consistent with the plethora of case law stating that the WCAB is unencumbered by evidentiary or procedural formalities in conducting its business. However, while it is clear that inadmissibility is not a defense to reimbursement, there are some limits to the WCAB's discretion to award these 5811 costs.

### **Parameters of WCAB's Discretion To Adjust And Award Costs under *Costa***

Defendants may argue that, under *Costa*, the WCAB's discretion to award vocational expert costs under Section 5811 is tempered under the following circumstances. First, the WCAB has discretion to balance the amount of a vocational expert's costs against the benefit obtained. This is particularly useful where Applicant's expert has charged an inordinate fee for her report, but failed to rebut the PDRS. While the WCAB will likely order Defendants to pay some of the expert's cost, based on a loose assumption that it facilitated her testimony, Defendants can argue that only a fraction of the total fee is due.

Second, as with medical-legal costs, reimbursement will not be allowed if the expert's report or testimony is premised on facts or assumptions so false as to render it worthless. Defendants might employ this argument in instances where Applicant has insisted on a vocational expert but *Ogilvie* does not apply, such a zero earnings cases, or where Applicant's loss of earning capacity is due to prior injuries, non-industrial conditions or non-medical factors. Going hand-in-hand with this proposition is the notion that the vocational expert's report and/or testimony must at least have the potential to affect a permanent disability rating in order for her costs to be recoverable. On the facts of any particular case, Defendants may be able to argue that the expert's services yielded minimum value to Applicant's claims, and that the expert costs should either be disallowed, or reduced significantly.

### **Whether Defendants Are Obligated To Pay Applicant's Vocational Expert Costs Depends Upon Applicant's Ability To Satisfy The Standards Set Forth in *Costa***

As a threshold matter, an Applicant must qualify a witness as an expert before the WCAB will allow costs for reports or testimony. The qualifications of each purported expert must be determined on a case-by-case basis. Once Applicant has qualified the vocational witness as an expert, the WCAB may exercise its discretion to allow Section 5811 by utilizing standards similar to those for allowing medical-legal costs under Labor Code Section 4621(a). Accordingly, the Applicant, or expert, must establish that the experts' expenses were reasonable and necessary at the time they were incurred. As with medical-legal costs, vocational expert's expenses may be reimbursable even if the Applicant is unsuccessful on his or her claim.

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<sup>2</sup> See also *Barr v. WCAB* (2008) 164 Cal. App. 4<sup>th</sup> 173, wherein the Court of Appeal remanded one of Applicant's cases to the WCAB to exercise its discretion to award costs of the vocational expert's report, even if it might have been inadmissible. The Court held that the WCAB retains discretion to award costs whether or not the report itself is admissible.

However, the WCAB has held in *Mendoza v. WCAB (Chevy's Restaurant)* (2008) 73 CCC 300, that Defendants are not obligated under Labor Code Section 5811 or *Costa* to **advance** costs for future vocational expert witness testimony regarding diminished future earning capacity. This holding rests on the absence of statutory authority for ordering Defendants to pay such costs prior to an evaluation of the relevance and necessity of expert testimony.

### **It Is Against Workers' Compensation Law And Policy To Require Payment Of A Retainer As A Prerequisite To Preparation Of A Report**

Defendants should vigorously defend against a lien that incorporates a retainer by citing the language in *Costa* and *Mendoza*. Specifically, Defendants should argue that Applicant's request for reimbursement of an expert's retainer should be denied because the WCAB has no way of determining if the expert's services will be reasonable and necessary as required by *Costa*. Ordering Defendants to pay a retainer would completely erode the framework set forth in *Costa* which demands that the expert's expenses be evaluated on a case-by-case basis, at the time they are incurred. Defendants should never be ordered to pay a retainer because the WCAB cannot assess the reasonableness and necessity of a cost before it has been incurred.

Furthermore, vocational experts' insistence on retainers is contrary to the established workers' compensation practice within the entire community. Both Applicants and Defendants have been held hostage by experts who have exploited parties by refusing to offer reasonable rates, and/or lien a portion of their fees. In an effort to combat this practice and to promote procedural uniformity, Defendants should insist that the amount of an expert's reimbursement be based on work already performed, and not anticipated future costs.

For instance, some WCABs have already ordered Defendants to pay reasonable costs incurred by experts in preparing DFEC reports, prior to the resolution of the underlying case.<sup>3</sup> At first glance, this approach seems inherently in conflict with *Mendoza*. However, *Mendoza* only held that Defendants were not obligated to **advance** experts' costs. Defendants are, and should be, obligated to compensate Applicant's expert for the **reasonable** costs associated with the evaluation and report, after the evaluation has taken place and the report generated, as is done with medical evaluators. If, thereafter, the expert objects and claims additional amounts are due, Defendants should demand that the expert file a lien for the remaining amount.

This is consistent with the approach Defendants already employ for medical-legal evaluations, whereby evaluators are paid a reasonable fee, based on the report they generated, within a reasonable period of time after the report is issued. There is absolutely no reason why vocational experts should be treated differently than other evaluators. Most importantly, this approach promotes accountability by placing the WCAB in an optimal position to evaluate the reasonableness and necessity of vocational experts' expenses. The WCAB cannot discern

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<sup>3</sup> Some WCJs in the Southern California Appeals Boards have ordered Defendants to pay for the costs of Applicants' expert's reports, after the reports have been generated, while discovery is ongoing. In contrast, the Appeals Boards in Northern California tend to lien these costs, and determine the reasonableness and necessity of all the vocational expert's costs following the resolution of the underlying claims.

whether an expert's report and/or testimony has the potential of affecting the PDRS, pursuant to *Costa*, unless the report has already issued and/or the testimony already given.

In addition, because vocational expert costs are analyzed under standards similar to those of medical-legal costs, Defendants should insist that retainers are never subject to reimbursement. Defendants are not required to pay retainers to physicians for their preparation of medical-legal reports and, therefore, Defendants should not be required to front Applicant's vocational expert's costs.

### **Conclusion: Is the Sky the Limit under *Ogilvie I & II*?**

In sum, the WCAB has discretion to allow Applicant's vocational rehabilitation expert's costs pursuant to Section 5811, under standards analogous to medical-legal costs under Section 4621. Admissibility is not a prerequisite to reimbursement, as even inadmissible reports might be valuable in helping an expert prepare for a hearing or to foster settlement negotiations. However, Defendants are not without recourse, and may reduce their exposure significantly by appealing to the standards set forth in *Costa*. The costs of evidence and or/in rebuttal to a permanent disability rating must be reasonable and necessary at the time that they are incurred and such determinations are made on a case-by-case basis. Accordingly, Defendants should adamantly refuse to pay any charges for future expenses or retainers. There is absolutely no need for vocational experts to utilize retainers and, to the extent that some have already insisted on them, Defendants should advocate strenuously for their abolition.

Vocational evaluators are making demands for retainers (and charging possibly exorbitant fees) because there has been no scrutiny of their actions and they are trying to leverage parties to meet their demands because of the need created by *Ogilvie I* and *II*. In other words, the sky's the limit as far as their demands and their charges go. If and when the Board puts its foot down and bans retainers, they will magically disappear. Forcing this issue to the Board will establish parameters for seemingly exorbitant fees for services. *Costa* is the beginning of this story, not the end.