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The Workers' Compensation Newsletter

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THE RISE OF REBUTTING THE PDRS AND DERAILING THE PATH TO A 100% AWARD

By Trisha Toyne, LFLM San Diego

The 2021 Summer CAAA Convention took place virtually, and while we always anticipate permanent disability will be a hot topic, this year's Convention "zoomed" straight to strategies on achieving higher permanent disability awards. The Convention focused on using vocational evidence to achieve a 100% award. This unsurprisingly coincides with the seeming reemergence of applicant attorneys using vocational evidence to significantly increase permanent disability that we are already seeing in 2021.

Several foundational cases have laid the groundwork that (1) vocational evidence can be utilized to rebut the permanent disability rating schedule (PDRS); and (2) what vocational evidence must contain to successfully rebut the PDRS. These seminal cases include *Mihesuah v. WCAB* (1976) 55 Cal. App. 3d 270; *Richard LeBoeuf v. WCAB* (1983) 34 Cal. 3d 234; *Gill v. WCAB* (1985) 167 Cal. App. 3d 306; *Ogilvie v. WCAB* (2011) 197 Cal. App. 4th 1262; and *Contra Costa County v. WCAB (Dahl)* (2015) 240 Cal. App. 4th 746.

It is well established that an injured worker's diminished ability to compete in the open labor market and their amenability to rehabilitation are factors to be considered in a permanent disability rating. Further, an injured worker's diminished future earnings must be directly attributable to the work-related injury and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or lack of education. (*Ogilvie*, 197 Cal.App.4th at pp. 1266, 1274-1275, 1277.) Knowing that the applicant's bar has made pursuing vocational evidence a priority, it is important for defense practitioners to have a strategic tool chest ready to defend against these reports when they are inevitably used to try and increase exposure.

Unpacking a Vocational Rehabilitation Report

Labor Code section 5703(j) specifically allows the reports of vocational experts to be admitted at trial. It further provides that direct examination of a vocational witness is not allowed at trial except upon a showing of good cause. The report must include a statement in the body of the report that the contents of the report are

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true and correct, to the best knowledge of the vocational expert. If the report fails to include this statement, **the *report is* inadmissible.**

8 CCR section 10685 reiterates that written reports are preferred when producing vocational evidence. Section 10685(b) provides the requirements for what a vocational expert report must contain, including mandatory declarations, disclosure of the expert's qualifications, a history from the employee, a review and summary of medical and non-medical records, and disclosure of the names and qualifications of every person who performed any services in connection with report.

If a report fails to comply with Section 10685(b), the ***report may* be deemed inadmissible**, and admissibility of the report is ultimately up to the trier of fact. It is therefore recommended to confirm all vocational expert reports fully comply with 8 CCR section 10685 before attempting to admit them into evidence. The admissibility of the report due to the technical requirements of the code section may not win the day, unfortunately, as the court may give leave for the parties to remedy a procedural defect in a vocational report.

A vocational expert report must also be based on substantial vocational evidence. This analysis is similar to the analysis of substantial *medical* evidence in that, a vocational expert report must not be speculative, must be based on pertinent facts and on an adequate examination and history. The report should set forth how and why the expert arrived at their conclusions. To assist in an analysis as to the substantiality of a vocational expert report, a practitioner should analogize to substantial medical evidence and look to the case *Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604.

A vocational report should also address vocational apportionment. Medical apportionment differs from vocational apportionment. A vocational expert must therefore consider all factors that are causing diminished future earning capacity. *Target Corporation v. Workers' Comp. Appeals Bd. (Estrada)* (2016) 81 Cal. Comp. Cases 1192. Other recent cases have shown that the failure to distinguish between orthopedic and vocational apportionment can have dire consequences on the value of a case. (*Wiest v. Cal. Dept. of Corr. And Rehab.* June 29, 2021, ADJ10863577 (SDO) Order Denying Reconsideration; see also: *Lamas v. Allen Construction,* May 24, 2021 ADJ7644093 (VNO) Order Denying Reconsideration).

To assist in a vocational expert being able to adequately address vocational apportionment, it is important to ensure a medical evaluator address causation of each permanent work restriction, the cause of the permanent work restriction and any apportionment to the permanent work restriction.

It can be quite costly to proceed with vocational expert evidence as vocational expert fees are medical-legal expenses, so long as they are reasonably obtained (i.e. they have the potential to affect the outcome of the case at the time they were obtained).

Recent Noteworthy Cases

There are several recent noteworthy cases that further expand on the seminal cases addressing rebuttal of the

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PDRS with the use of vocational evidence. The majority of these cases are unfortunately considered as victories for applicants, as they were successful in obtaining 100% permanent total disability awards with the use of vocational evidence. While the cases below have not been designated as significant panel decisions, and are therefore not binding, applicant attorneys will certainly be citing these cases as persuasive authority.

In *Thomas v. Peter Kiewit Sons, Inc.* (2021) 49 CWCR 49, applicant worked for the employer for 20 years, and sustained an admitted cumulative trauma injury to his lumbar spine, bilateral knees and skin. The orthopedic and dermatology medical legal reports rated to 72% pursuant to the 2005 PDRS. Neither medical legal evaluator expressed the opinion applicant was 100% disabled or otherwise precluded from the labor market.

The applicant obtained a vocational rehabilitation expert who relied upon the functional limitations imposed by the orthopedist evaluator. The vocational expert determined that the "synergistic effect" of the multiple body parts, compounded by the effects of applicant's chronic pain prevented him from competing in the open labor market.

The WCJ concluded that applicant's vocational expert report rebutted the 72% permanent disability rating assigned by the medical legal evaluators, and issued a 100% Award. Defendant sought reconsideration of the WCJ findings, asserted several arguments that the applicant's vocational expert report was not substantial evidence, and argued there were complications with securing rebuttal vocational evidence due to the COVID-19 global pandemic.

Defendant's Petition for Reconsideration was denied, and the WCJ's determination was affirmed.

The WCAB ultimately held that the applicant's vocational expert evidence sufficiently rebutted the PDRS, as the vocational expert used the medical evidence to find that the combination of applicant's knee and low back impairments caused a greater loss of function than they would individually. Additionally, applicant's trial testimony was credible regarding his chronic pain and ability to perform activities of daily living. Lastly, the defendant's due process rights were not violated as they did not exercise due diligence in securing rebuttal vocational evidence.

The applicant's bar notched another 100% victory in the case *Steven Schieffer v. State of California, Salina Valley Prison* (2021) Cal. Wrk. Comp. P.D. LEXIS 48. In this case, the applicant worked as a plumber for 38 years, but had only worked for Salinas Valley State Prison for four months before sustaining a specific injury to his

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knees and back. After the specific injury, applicant returned to work briefly, but was eventually unable to continue to work. The Qualified Medical Evaluator (QME) opined applicant also sustained a cumulative trauma injury to his knees and back. The QME opined the two dates of injury were "inextricably intertwined."

Applicant obtained a vocational rehabilitation expert who opined applicant was unable to return to work and was not amenable to vocational rehabilitation. Defendant obtained a vocational rehabilitation expert who opined applicant was qualified for basic office jobs. The QME was asked to comment on the parties' vocational expert reports as well as non-industrial apportionment. The QME never issued a supplemental report as his medical practice had closed. Thus, at trial, the defendant argued the record needed to be further developed and therefore requested a replacement QME. The WCJ denied the request and awarded 100% permanent total disability to the applicant.

The defendant's Petition for Reconsideration was denied, and the original Award was affirmed on the basis that applicant's vocational expert report was more substantial than defendant's vocational expert. Further, a replacement QME was unnecessary as the court interpreted the only remaining issue involved which vocational expert was more persuasive. This issue is to be decided by a WCJ, not a QME. The court also found defendant did not exercise due diligence in requesting a replacement panel as the QME had retired approximately one year before the case was submitted to trial.

The need for a replacement panel was outweighed by the Constitutional mandate for an expeditious, unencumbered, and inexpensive remedy. While the court has discretion to reopen discovery at the time of trial, the WCJ will weigh several options to determine whether to reopen discovery. These include the date(s) of the injury, whether there is "substantial medical evidence" already in the record upon which a decision can be made, and whether the parties have exercised due diligence.

The final recent victory for applicant attorneys is the case *Jeronimo Heredia v. Treasury Wine Estates Corporation* (2021) Cal. Wrk. Comp. P.D. LEXIS 46. Applicant sustained an admitted specific injury to multiple body parts. Applicant's vocational expert opined that applicant was unable to return to work and was not amenable to vocational rehabilitation. Defendant's expert opined that applicant was qualified for basic office jobs.

Thus, this case involved a battle of the vocational rehabilitation expert reports. The WCJ found that applicant's vocational expert evidence was more substantial than defendant's vocational expert evidence, and therefore issued a 100% permanent total disability Award. In addition, the WCJ found that the 10% apportionment of applicant's permanent disability to non-industrial causes was not substantial medical evidence, as it did not set out the "how and why" as to how it was contributing to the applicant's impairment.

The defendant sought reconsideration, which was denied by the WCAB. The court held that applicant's vocational rehabilitation report was more substantial as the expert expressly performed an individualized vocational evaluation of the applicant, including his job duties, and work-related skills, in conjunction with his medically imposed functional limitations. In contrast, defendant's vocational rehabilitation expert report was not substantial, as it did not properly reflect applicant's medically imposed functional limitations. The report was also replete with assumptions that applicant was not motivated to work. However, the record lacked evidence to support this assumption.

Recent case law is not all bad news on the vocational rehabilitation front, as the WCAB overturned a 100% award in the case of *Walsh v. Skyline Steel Erectors*, 2021 Cal.Wrk.Comp. P.D. Lexis 84. While previous WCAB decisions have made a distinction between orthopedic apportionment and *vocational* apportionment, the *Walsh* panel found that the applicant's preex-

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isting non-industrial degenerative condition in the spine, must be considered and applied by vocational experts where substantial medical evidence supports the orthopedic apportionment. The parties' AME Dr. Sommer found that the applicant's low back impairment was caused 25% by non-industrial degeneration, and contrary to the conclusions in *Heredia*, the AME did provide the "how and why" the condition was contributing to the impairment, which was supported by references to diagnostic testing and imaging. Citing the *Borman* case (*Acme Steel v. WCAB* (2013) 218 CA4th 1137), the Board held that where vocational evidence demonstrates a complete loss of earning capacity, apportionment to the causative sources of the disability is required, even where the applicant has rebutted the scheduled rating.

Practice Tips

Considering these recent cases, what can defendants do to derail the path to a 100% permanent total disability award? It is recommended that close attention be paid to the medical reports of all treating and evaluating doctors, specifically regarding work restrictions and conclusions that an applicant is unable to compete in the open labor market. Defendants should obtain records of an injured worker's past medical history to help support arguments for non-industrial causation/apportionment. While medical apportionment may not defeat a vocational expert report, proving apportionment is defense's burden, and the medical reporting may ultimately be followed if vocational reports are not substantial. Factors of impairment should also be consistent with work restrictions; if they are not , consider developing the record with *sub rosa* investigations, supplemental reporting, cross-examinations, and functional capacity evaluations. Having an accurate picture of an applicant's physical abilities can undermine a vocational report that holds otherwise. The courts in the cases cited above used unrebutted trial testimony to support the conclusions of vocational evaluators.

Given the costs and extended litigation time associated with vocational evidence, reluctance to go down the vocational expert rabbit hole is certainly understandable. However, this year's CAAA presentation suggests we are ushering in an era of increased usage of vocational evidence. As such, the defense bar should approach all cases with an eye toward this potential issue, not just from a 100% permanent total disability standpoint, but also from a standpoint of increasing permanent disability to a life pension. When it appears a claim is heading toward a PDRS rebuttal, defense vocational experts should be expeditiously retained so as to avoid the outcome as noted in *Thomas*. Ultimately, the resurgence of vocational evidence in workers' compensation cases, and the WCAB's seemingly warm embrace of such evidence to support awards, should put defendants on guard for potentially large increases in exposure. ⌘

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