

“Getting the MOST out of your Vocational Expert: *Almaraz/Guzman & Ogilvie*”

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Abstract: California Workers' Compensation's recent "en banc" decisions have generated a debate regarding the use of expert testimony, particularly Vocational Experts. Issues at hand range from topics of expert roles, qualifications, standards of practice, to understanding the discipline from which services emanate. Presently, much confusion and perplexity surrounds this arena of "vocational testimony" in regards to the Vocational Expert's work and costs. This article outlines a thorough review of the academic training and experience that differentiates a "Qualified Rehabilitation Representative" from a "Vocational Expert" and simultaneously highlights the appeal of Vocational Experts. It is this author's opinion that the continuation of educational seminars and articles will allow professionals to share pertinent data, enabling a knowledgeable and realistic appreciation of the Vocational Expert's purpose, as well as contribution to legal venues. It is the intent of this article to assist in the dissemination of the role of the Vocational Expert, while maximizing the benefit to the parties requesting such services.

Introduction:

In the many years I have assisted Attorneys and Administrative Law Judges working within the confines of the California Workers' Compensation System, I have noted that often there is confusion as to the utilization of Vocational Expert services to assist the parties; and ultimately the Trier-of fact, to resolve vocational issues. Typical issues that arise involve an individual's ability to re-enter the open labor market, an individual's earning capacity, whether a specific job title or occupation is feasible, how functional limitations impact employability, who are "similarly situated employees", how to defend or refute the FEC ranking, or comprehending the transferable skills analysis process.

Issues raised are generally accompanied by additional inquiries, some of which attempt to understand vocational issues through the perspective of other legal systems, such as; Family Law, Social Security Administration, Employment Law, and Personal Injury cases.

Contributing to the misunderstanding of the role of a Vocational Expert is referencing the past Vocational Rehabilitation program in Workers' Compensation under Labor Code 139.5. This was a service-delivery system to

injured workers through “Qualified Rehabilitation Representative” (QRR). However, the scope and purpose of services, counselor credentials required, and cost structure was unique to that process only as indicated by legislative mandate and administrative guidelines. This Vocational Rehabilitation program did not require QRRs to be academically trained in rehabilitation, nor did it adhere to any methodological standards of the field.

The intent of this article is to allow the parties **to get the most out of your Vocational Expert** through the understanding of the role of the Vocational Expert in a litigious forum. Although, the California Workers’ Compensation System is an Administrative Law venue, many describe it as “simpler” and “less sophisticated” than other legal systems. As such, it presents its own unique definitions and interpretation of “disability” and vocational terms, such as “earning capacity” in a legislatively mandated manner. This, in turn, thrusts basic issues into the realm of the complex. It is in these instances, when the opinions of Vocational Experts are sometimes procured to assist the parties. Thus, the following rendering of the role of past Vocational Rehabilitation and present the Vocational Expert services is offered to foster a greater understanding of this unique discipline.

History of Vocational Rehabilitation:

The field of Vocational Rehabilitation has a rich and colorful history. During World War I, Congress passed several laws to assist disabled war Veterans through the establishment of state and federal Vocational Rehabilitation programs. This included the “Smith-Hughes Act” in 1917, a forerunner of federal funding for educational rehabilitation programs. The Soldier’s Rehabilitation Act of 1918 (Smith-Sears Act), provided “*vocational rehabilitation and return to employment of disabled persons discharged from the military or naval forces of the United States*”. This meant that rehabilitation counselors worked with disabled individuals to return them to productive employment, in spite of the physical disabilities from which they suffered.

In 1920, the Vocational Rehabilitation Act (Smith-Fess Act) began the practice of offering public rehabilitation programs in the United States. This Act provided funding to assist individuals with physical disabilities through vocational guidance, training, occupational adjustment, and placement services. In 1943, the Social Security Act added medical components and admitted the mentally ill to the Vocational Rehabilitation process (previously only physical disabilities were handled).

Later the Vocational Rehabilitation Act of 1954 (Hill-Burton Act) gave financial support to develop the study of Vocational Rehabilitation into the future by enabling training, research, and establishment of comprehensive rehabilitation facilities. Soon afterwards, the development and implementation of graduate training programs in the Vocational Rehabilitation science emerged. This evolutionary process led to the development of a vast range of forensic vocational literature; beginning with the publication of the Dictionary of Occupational Titles (DOT) in 1939.

From 1955 to present day, federal and state legislatures continued to expand and protect the rights of disabled individuals. As with other disciplines, the advent of computerization and specialized software applications fuelled the growth and sophistication of not only service delivery, but also forensic methodology in Vocational Rehabilitation.

In the development of professional standards, formation of National credentialing commissions and boards emerged, such as; Certified Rehabilitation Counselor (CRC), Certified Disability Management Specialist (CDMS), the American Board of Vocational Experts (ABVE), and Life Care Planners (LCP) referring to public and private-sector professionals.

The Vocational Expert in California Workers' Compensation:

In the California Workers' Compensation System, prior to the 2004 reform, the QRR was established for the delivery of services in conjunction with its promulgated Vocational Rehabilitation program. However, it is important to note that these services were not based upon academic standards, and allowed a plurality of experiential backgrounds to fulfill the administrative mandates. This clearly differentiates the QRR from the Vocational Expert. It is during this time that neophyte Vocational Experts made their first appearances at the Workers' Compensation Appeals Board, opining regarding the "*LeBoeuf*" issue.

In contrast, the modern Vocational Expert works in Forensic Rehabilitation and has been defined by Dr. Joseph E. Havranek as "*rehabilitation principles applied to law*" (Havranek, 2007). Thus, Vocational Experts engaged in Forensic Rehabilitation that can be involved in many types of cases, dealing with numerous issues, from either side of a case. The issue most commonly is the extent of occupational disability and earnings impact on an individual following his/her industrial injuries. Therefore, the purpose in the utilization of a Vocational Expert in this regard is to:

“...provide the jury and/or judge with an objective account of how much the injured employee’s future earning capacity has been affected, so that fair compensation can be awarded where liability for the injury has been established” (Harper, 1985)

In summation, it can always be stated that, *“the role of the Vocational Expert in all litigation matters involves presenting all applicable data in a parsimonious manner utilizing universal standards as well as objectivity”* (Havranek, 2007).

The Vocational Expert labors in one of the most flexible areas of Expert testimony, as vocational issues incorporate several overlapping elements of damages:

- a) **“Past and future**
- b) **Physical/psychological/emotional injuries**
- c) **Functional impairments**
- d) **Employment**
- e) **Earning capacity**
- f) **Enjoyment of life**
- g) **Intellectual impairment (Deutsch, 1990)”**

These areas have been well known in legal venues for many years, but relatively unknown in the California’s Workers’ Compensation System.

Today, the California Workers’ Compensation System is performing in a post-2004 reform style, devoid of Vocational Rehabilitation service-delivery via the QRR. Yet, occasionally, the parties still face a *“LeBoeuf”* issue and employ Vocational Expert services. The emergence of the recent “en banc” decisions of *Costa*, *Almaraz/Guzman*, and *Ogilvie* presents new legal challenges to the parties. At issue are concepts which are new to the Workers’ Compensation daily jargon, such as; Earning Capacity, *Diminished Future* Earning Capacity, the RAND study, Past/Present/Future earning losses, Similarly Situated Employees, use of the AMA Guides, Activities of Daily Living, and the inherent meaning and implication of Impairment, Disability, and Permanent Disability. Therefore, in the midst of understanding an individual’s “disability”, the parties are once again seeking Vocational Expert services to assist in presenting, defending, or rebutting positions. The complexity of this new system once again gives rise to inquiry into the standards of practice, methodology, credentials, certifications, and experience-level of Vocational Experts.

Definition and Standards of the Vocational Expert:

Hence, we first must review the field of Vocational Rehabilitation's definition of a Vocational Expert:

"One who is very skilled, highly trained, and knowledgeable in the field of trades, professions, and occupations, with intent to be involved in assessment and/or testimony (in any form) in a litigious forum." (Havranek, 1988; Havranek, 1995)

The National Council on Rehabilitation Education (NCRE) has proffered the following definition of the Vocational Expert:

"An individual who has received an academic degree from an accredited education program accepted by the rehabilitation profession as denoting professional status; is certified and/or licensed to practice in accordance with the rehabilitation profession's national certification board or commission and/or the state's licensing board; maintains his or her certification and/or licensure by completing continuing education units approved by the certification/licensure boards for renewal of certification/licensure; and has completed the amount of time on the job specified by the profession as denoting achievement of journeyman status." (Vander Kolk, 1993)

Irrespective of which definition you select, both set forth the standards for Vocational Expert requirements. In addition to understanding these definitions, it is extremely important to remember that Vocational Experts present "Expert Witness Testimony", which must adhere to the federal and state codes of evidence. Chief among these is Federal Rules of Evidence Code 702, which reads as follows:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Additionally, the Expert must conform to the "*Frye/Kelly*" standard in California State Courts. Thus, the methodology utilized by a Vocational Expert must withstand this measurement to prove valid and acceptable.

In Vocational Rehabilitation, methodology means:

"The procedures used to conduct a study - the specific way used to review the literature, define the problem, gather data, analyze data and reach conclusions" (Lees-Haley, 1988).

As a result, the retaining attorney needs to verify that formulation of professional opinion by his/her Vocational Expert is based upon a “peer-reviewed” published methodology, versus merely basing the formulation on the individual’s experience and conjecture.

Adding to the above requirements, today’s Vocational Expert in Workers’ Compensation must adhere to the concept of “substantial evidence”¹ and “evidence-based” criteria existing in California’s Labor Code. In short, a greater amount of professional work and substantiation is presently required to support the Vocational Experts findings and produce a superior, more succinct vocational product, or report. For example, Labor Code Section 4604.4(b), reads:

“The recommended guidelines set forth in the schedule adopted pursuant to subdivision (a) shall reflect practices that are evidence and scientifically based, nationally recognized, and peer reviewed. The guidelines shall be designed to assist providers by offering an analytical framework for the evaluation and treatment of injured workers, and shall constitute care in accordance with Section 4600 for all injured workers diagnosed with industrial conditions.”

Here it is noted that the description and language used to describe the “evidence-based” medical practices mirrors the standards applied to Vocational Experts and their methods and techniques. As a result, it has been this Consultant’s practice for many years to adhere, not only to my own credentialing bodies requirements and the standards of care for the Vocational Rehabilitation industry, but also to all relevant statutory codes which govern “Experts” in any field (i.e.: Medical, Economics, Criminology, Accident Reconstruction, Photography & Video, Construction Defects, Metallurgy, Firearms & Weapons, Environmental Sciences, etc.).

Again, each field of study has its own academic requirements, credentialing bodies/certificating agencies, professional organizations, procedures, techniques, and methods. As in all legal venues, the California Workers’ Compensation system expects that its Experts’ opinions are founded not only on standardized methodology, but that it constitutes substantial evidence in order to assist the Trier-of fact. Regarding the former item (method, or methodology), I prefer and utilize the RAPEL methodology (Weed, 1994; 2001; 2004). This is a published, well-documented, and comprehensive approach that includes all elements required to determine labor market access, earning capacity, worklife expectancy, vocational rehabilitation plan, place-

¹ “Substantial evidence, of course, must be “ ‘of ponderable legal significance,’ ” which is reasonable in nature, credible and of solid value.” (*Kuhn v. Department of General Services*, 1994)

ability, and employability factors. Further clarified, Dr. Weed's widely used RAPEL methodology for determining appropriate vocational recommendations and development of professional opinions and stands for:

- **“R”** stands for the Rehabilitation Plan, which may include vocational assistance, tuition, rehabilitation technology equipment and supplies.
- **“A”** Access to the Labor Market, based on the concept of “employability,” determines worker traits, cognitive capabilities, and identification of jobs.
- **“P”** in RAPEL refers to Placeability, the real-world test of determining if the client can be successfully placed in a job.
- **“E”** refers to Earnings Capacity, based on the ability to earn an income, that earning capacity which the individual can reasonably attain and hold.
- **“L”** refers to the Labor Force Participation, or worklife expectancy. It may take longer to find a job or to enter the labor market than if the disability had not occurred.

Transferable Skills Analysis:

As noted above, the role of a Vocational Expert is to assist the parties in understanding and/or de-mystifying, vocational concepts, and opining regarding vocational matters. Drawing from my many years of experience, a common area of confusion is the Transferable Skills process. It is not uncommon to hear Judges and Attorneys refer to the Transferable Skills Analysis (TSA) process as “inputting stuff into a computer”. Although computerized systems exist and are employed to expedite the TSA process, it is not solely the software system that needs to be understood. It is the definition and process of transferability that is primary and best described by Social Security Administration (SSA) regulations as:

An individual is considered to have skills that can be used in other jobs when the skilled and semi-skilled work activities you did in past work can be used to meet the requirements of skilled or semi-skilled work activities of other jobs or kinds of work. (U.S. Code of Federal Regulations)

Adding to this is the operational definition of transferable skills according to the U.S. Code of Federal Regulations (CFR)², indicates:

“Transferability is most probable and meaningful among jobs in which:

(I) The same or a lesser degree of skill is required;

(II) The same or similar tools or machines are used; and

² Also referred to as the “classic model” of Transferable Skills Analysis.

(III) The same or similar raw materials, products, processes, or services are involved.

There are degrees of transferability of skills ranging from the very close similarities to remote and incidental similarities among jobs. A complete similarity of all three factors is not necessary for transferability. However, when skills are so specialized or have been acquired in such an isolated vocational setting (like many jobs in mining, agriculture, or fishing) that they are not readily useable in other industries, jobs, and work settings, we consider that they are not transferable."

Therefore, an individual may have direct transferable skills according to the operational definition, or not. If the person has transferable skills, it is important to note that these skills do not imply immediate employability. This constitutes the starting point for labor market exploration [using data bases such as; Employment Development Department (EDD)-Labor Market Information Division (LMID) and Bureau of Labor Statistics (BLS)] leading to identification of appropriate jobs for re-entry into the labor market.

If the person does not have transferable skills, it is important to note that the individual is not entirely discredited from employability. However, what this does imply is that the individual requires vocational re-training to develop new skills in order to compete in the labor market. Vocational Experts lead the vocational exploration process by considering all aspects of informal and formal training. Thus, the labor market must be analyzed through government derived data and occupational research to include job openings, employer stated job requirements and performance criteria enabling the evaluation of factors of placeability (i.e.: the likelihood that the individual will be able to secure and maintain employment in that job).

Ultimately, one can see how an experienced Vocational Expert assists in de-mystifying complex concepts relevant to a case based upon recognition of standard of practice and definitions as seen in the transferable skills analysis process.

Vocational Expert and the AMA Guides:

Turning attention now to the "en banc" decisions noted above, the most recent *Almaraz/Guzman* decision states:

"(4) when determining an injured employee's WPI, it is not permissible to go outside the four corners of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment." (Page 3, Lines 5-7)

“Thus, the AMA Guides is an integrated document and its statements in Chapters 1 and 2 regarding physicians using their clinical judgment, training, experience and skill cannot be divorced from the balance of the Guides.” (Page 25, Lines 8-10)

Per the AMA *Guides*, Chapter 1 and 2, these describe the “method” of utilizing a Vocational Specialist (i.e.: Vocational Expert). Chapter 1 in the *Guides* goes so far as identifying Vocational Specialist's as "*usually*" required for better understanding of the impact of an injury on completion of essential functions of a job and an individual's ability to return to "*any job in his or her field*" (Page 14). In the *Guides* “Summary” of Chapter 1, on page 15, it goes on to state:

"Combining the medical and nonmedical information, and including detailed information about essential work activities if requested, is a basis for improved understanding of the degree to which the impairment may affect the individual's work ability".

Additional support for the method of using a Vocational Expert, as described in the *Guides* appears in Chapter 2, page 18, under “Examiners Role and Responsibilities”:

"In many cases, the physician may need to obtain additional expertise to define functional abilities and limitations, as well as vocational demands".

Therefore using the “four corners” of the *Guides* may include considering the opinions of Vocational Experts. This seems obvious, since an individual's *impairment* is measured using the AMA *Guides*; whereas *disability* is converted by the 2005 PDRS, which is prima facie evidence with each element being subject to rebuttal. So the question arises to who is better qualified to measure the impact of an injury on work other than a Vocational Expert?

Commonly Utilized Vocational Terms & Definitions:

Based upon California's prior Vocational Rehabilitation program, many vocational terms became commonly utilized by Workers' Compensation practitioners. However, these terms lacked full academic definitions, which is vitally important in the forensic work of a Vocational Expert. The discrepancies in vocational language and definitions must be clearly outlined to gain a better understanding of the world of the Vocational Expert and to see how their services can benefit the parties. Therefore, I find it useful and beneficial to offer the following definitions of common vocational terminology utilized, which are frequently misunderstood:

Vocational Evaluation (the individual):

**“A process that attempts to assess and predict work behavior and vocational potential through the application of a variety of techniques and procedures.”
(Nadolsky, 1971)**

Functional Capacity Evaluation (the physical ability):

“Functional capacity evaluation (FCE) is a systematic method of measuring an individual’s ability to perform meaningful tasks on a safe and dependable basis. FCE includes all impairments, not just those that result in physical functional limitations.” (Matheson, 1996)

Work Evaluation (specific work samples):

“A work evaluation center is a facility which provides specific objective measurement of behaviors through direct observation and standardized testing. For example, in addressing issues of physical tolerance, a work evaluator will observe and record the duration, frequency, and position of the injured worker’s activities through a ten-day period. Work evaluators observe general work behaviors in a similar manner during the administration of work samples and vocational tests. (Capurro & Westman, 1995-2003)

Professional Opinion:

“The chief value of an expert’s testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus the opinion of an expert is no better than the reasons upon which it is based.” (PEOPLE vs. BASSETT, 1968)

Clinical Judgment:

“Clinical judgment requires that the final opinion be predicated on valid, reliable and relevant foundational information and data that are scientifically established through theory and technique building which has been tested, peer reviewed, and published, with known error rates, and is generally accepted within the professional community. In cases where any of the above factors do not apply, but other factors have greater relevance, the expert will rely on these factors within a methodological approach, based upon the expert’s knowledge, skill, experience, training, or education in order to assist the trier of fact to reach a conclusion.” (Choppa, et al, 2004)

Employability:

“Employability is the estimation of one’s potential for employment within a specific labor market.” (LMA Plus, 1999)

Vocational Testing:

“A vocational testing profile of a client is developed using tests of intelligence, achievement, aptitude and personality as well as other tests measuring interests and aptitudes.” (Deutsch & Sawyer, 1991)

Placeability:

Refers to the client's or worker's potential to be placed in a job within a given labor market. (LMA Manual 1999) or the likelihood that a client will actually secure and maintain work in a specific occupation. The dynamics of placeability include the availability of jobs in a certain geographic area; the client's age, sex, race, employer attitudes; and specific hiring requirements.

Examples of Earning Capacity definitions:

"Loss of Earning Capacity is the difference in monetary value between the occupations the injured party could pursue before and after the injury and subsequent disability. It is operationally defined as the comparison between what an individual can reasonably be expected to earn post-injury." (Havranek, 2007; Isom, 2005)

"Wage Loss represents that period between when an accident or illness occurs and an individual can no longer work his or her customary occupation, until the time that individual can go back to work or the treating physician knows and/or reports that the individual can no longer return to his or her normal and usual occupation" (Isom, 2005)

"Earning capacity is the expected earnings of a worker who chooses to maximize the expectation of actual earnings." (Horner & Slesnick, 1999)

"Earning capacity is the ability of the individual to obtain and to hold the highest paying job to which he/she would have access." (T. Field & R. Weed, 2001)

Conclusion:

As a final note, I have functioned as a Vocational Expert for 19 years, not just in Workers' Compensation, but in other legal venues as well. In my opinion, based upon the complexities of today's Workers' Compensation issues, I find that adhering to the standards comparable to that of civil matters has become a necessity for Vocational Experts even in the compensation arena. While that certainly places a premium on those Vocational Experts who possess the skill and ability to function at that level, it raises the issue of professional costs.

So, how much will the Vocational Expert cost? Due to the complexities listed previously, now it becomes apparent that Vocational Expert work is a laborious process requiring extensive research per each individual case. The labor/cost factors can be considerable to concisely present evidentiary opinions. This is a point that evades the parties at times, including the Administrative Law Judges who do not see the required hours to develop sound opinions. This is not merely "plugging in" data from selected sources to arrive at a particular outcome: it is individualized, objective research and analysis.

The cost will depend upon the individual case's content and issues being addressed.

Vocational Evaluation of an individual requires not just following a method but it demands a sophisticated, analytical thought process. Therefore, the costs of Vocational Expert services are predicated on the "individual" case being handled. For example, did the Vocational Expert review 3 inches of paper or 2 storage boxes full of medical/psychological records? And, yes, this is a requirement for development of a clinical judgment, and to address the issues of substantial evidence.

I offer that in attempting to understand the Vocational Expert's work and costs, a perspective similar to that used when considering the work of Psychologists is helpful. That is, Vocational Rehabilitation, as a discipline, conforms to the American Psychological Association (APA) standards of measurement and evaluation. This results in a comprehensive individual evaluation considering medical, psychiatric, and psycho-social factors of disability, before applying this to the "world of work". This requires highly specialized training being taught only in certified University graduate programs (CORE – Council on Rehabilitation Education) and most recently (CACREP – Council for Accreditation of Counseling and Related Educational Programs), continued education in the field, and professional affiliations to enable the Vocational Expert to remain apprised of advancements in technology, new research, and future trends. With this in mind, it is difficult to comprehend assertions from the parties that Vocational Expert costs are unreasonable.

In contrast, in order to reduce costs in the Workers' Compensation venue, Vocational Experts are sometimes pressured to expedite vocational findings. Nonetheless, this reduction cannot result in incomplete, unsubstantiated, and incompetent work. This type of request violates industry standards and ethics. Perhaps, with greater understanding of the services and professional contributions offered by Vocational Experts, this situation can be avoided moving forward.

The field of Vocational Rehabilitation is complex, and occasionally, vastly misinterpreted, particularly in Workers' Compensation, where under-qualified individuals have been routinely promoted to the status of an "Expert" following the demise of the former Vocational Rehabilitation process. These individuals have difficulty utilizing, explaining, and referencing the body of forensic data and literature, which was not required for their prior function as a QRR. For example, when in the past provision of Vocational Rehabilitation services was

that understanding the pro's and con's of various worklife tables required? Or that when was the proper methodology for determining an individual's earning capacity in question? And was a QRR ever concerned with "publishing or perishing"? Or which is the most accurate source of wages for farm industry workers? The *Occupational Employment Survey* from the U.S. Bureau of Labor Statistics? Or the *Current Population Survey* from the U.S. Census Bureau?

I suggest that a good rule of thumb, when considering the credibility attributes of a Vocational Expert being considered for retention is to refer to the "Four P's". That is, the:

- 1) **Professional Affiliations** – (ongoing participation and leadership).
- 2) **Peer-Review** – (adherence to professional standards).
- 3) **Public Speaking** –(Formal educational instruction in industry seminars).
- 4) **Published** – (Association literature to professional journals).

Thus, whether your vocational issue arises out of defense or rebuttal of an *Ogilvie* matter, or a prior *LeBoeuf* issue, **I trust the above information will better enable the reader to understand who a Vocational Expert is, what he/she does, what qualifications are required, and how they are able to assist in Workers' Compensation cases.** In addition, I hope my explanation addresses why a Vocational Expert must go to such great efforts (hours) to research, develop, and defend professional opinions in today's Workers' Compensation climate. It is with this understanding that will allow the parties to **get the most out of a Vocational Expert.**

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