

The Reasonable Availability of Jobs

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Rehabilitation counselors and those with forensic practices and who provide expert witness services are often confronted with explaining the concepts of employability and placeability. The first relates to the ability and capacity to be employed in the competitive labor market, with attendant factors such as education and training; the second is defined by the degree to which there is opportunity for employment, including jobs existing in significant numbers (Sawyer & Sawyer-Little, 2003). The conundrum is that the two terms are mostly understood as a dichotomy of characteristics that describe a rehabilitant, individually, and in the context of his environment. Frequently, what needs to be explicitly stated has been determined by case law in the workers' compensation arena. The standard of practice in one state is examined as well as useful findings in the literature that facilitate understanding the dynamics of the labor market. Vocational rehabilitation counselors with forensic practices are also often tasked by trial attorneys with some version of the "able bodied versus the disabled" hypothetical. An understanding of the dynamic labor market provides a skillfully nuanced answer.

Workers' compensation practice varies by statute, regulations and case law. It is probably safe to say that no two states are exactly alike. A nod toward the diversity was given in a listing of 10 court decisions from around the country (Neulicht et al, 2007). Two of those court decisions listed are from Arizona, and, based on earlier precedent, provide specific guidance to vocational experts on determining the availability of jobs.

In Arizona, the courts require that both supply and demand be considered in determining injured workers' ability to compete for employment. This is a "competitive labor market" model dating back to 1957 (*Davis v. Industrial Commission*). The supply of workers and the demand (jobs) must be explicitly stated. In a nutshell, a great number of openings for a specific job category and a small number of qualified applicants per job opening present a good scenario for an injured worker to successfully return to the work force.

In the case of *Dye v. Industrial Commission* (AZ 1975), the judge wrote, "If there are 50 openings for a dishwasher which are drawing 5,000 applicants, it cannot be said that one chance in a hundred makes the job reasonably available."

Arizona worker's compensation law generally rules that there should be no more than 10 qualified applicants per job opening for the likelihood of a prospec-

tive employer giving the injured applicant as much consideration as those who have experienced no industrial injury.

The guidance is drawn from *Zimmerman v. Industrial Commission* (AZ 1983) in which the court held that evidence which established only that the claimant would be one out of 11 qualified applicants for a single position was insufficient to prove the injured worker could sell his services with regularity in a competitive labor market. The case involved testimony that there were 63 applicants for a position, 50 of whom were qualified and 10 of whom were interviewed. The prospective employer indicated that the claimant would probably have been interviewed for this position (thereby becoming the 11th man).

The need for information regarding the number of applicants was reaffirmed the same year in *Roach v. Industrial Commission* (AZ 1983). A number of cases discuss the role of the vocational expert but *Roach* and *Zimmerman* are the cases cited and referred to most often (Bakkenson, 2003). Typically, a labor market study of employers elicits information including current openings, most recent opening and hire, annual openings and number of qualified applicants per position.

The State Bar of Arizona provided the following summary in the *Arizona Workers' Compensation Hand-*

book: Testimony that a job is “constantly available,” has a “high rate of employee turnover,” or had X openings in a one-year period have been held insufficient without evidence of how many jobs would be eliminated by the injured worker’s restrictions, whether employers would give the employee equal consideration notwithstanding his or her permanent impairment, and the number of applications per opening.

One Arizona attorney regards this as the Roach/Zimmerman *qualified applicant* analysis. What the employer says in response to the question “How many people do you get applications from who actually have the physical and mental capabilities, education, and training to do the available job?” may produce a purely subjective response from the employer but the court needs to hear if they get zero or hundreds or something in between.

Little has been published in the applied literature about the determinants of the number and quality of job applicants, the number of interviews and offers made, and the way in which employers selected workers from among a pool of job applicants.

One study that tried to answer these questions (Manning, 2000) focused on firms operating in relatively low-wage sectors with basically unskilled jobs. The major findings were:

- The average number of applicants per vacancy is slightly under 3;
- The number of applicants is influenced by the wage offered;
- The number of applicants play a role in widening the quality of applicants;
- Job applicants who are not currently employed appear to be at a disadvantage in getting a job interview, but having made it to the interview stage, appear not to suffer any further disadvantage in getting a job offer;
- Average of 1.4 interviews per vacancy;
- Workplaces with a central location or accessible by public transportation attract more applicants than those in less accessible locations;
- Primary reason for not being interviewed: lack of experience.

The number of applicants playing a role in *widening the quality of applicants* mirrors the Arizona rulings that a great number of applicants puts the injured worker at a competitive disadvantage and affects the reasonable availability of jobs for injured workers. Otherwise, the average number of applicants per vacancy found in Manning’s study would satisfy the 10 or less number in Zimmerman.

The number of qualified applicants is not intended to be controlling in all circumstances. At the June 18, 2010 IARP Arizona Chapter Annual Conference, one vocational expert cited the rule of thumb as “anything under 10” but said administrative law judges under-

stand the number of qualified applicants will be higher given the current economic conditions affecting the entire labor force. Up to 20 qualified applicants per position could be considered acceptable given the case law. Given high or low unemployment, the injured worker’s probability of finding employment should equal the uninjured job seeker’s probability of finding employment (Bakkenson & Lollich, 2010).

The Supreme Court of Arizona, on review of an Industrial Commission award, will not set aside the award if it is based upon competent or substantial evidence; evidence on the number of jobs available, the number of applicants, and the willingness of employers to hire someone with a previous disability (*Roberts v. ICA*, 1989).

Historical Trends and the Deskilling of the Workforce

Historically, one would expect there to be less than 10 applicants per job opening. The Job Openings and Labor Turnover Survey (JOLTS), U.S. Department of Labor, Bureau of Labor Statistics, began in December 2000. Over the course of the entire data series, the number of job seekers per opening has ranged from 1.1 unemployed workers per job opening (December 2000) to a peak of 6.2 unemployed workers per job opening (July and August 2009). Of course, there has been a dramatic upswing in the number of job seekers per job opening since the start of the recent recession and the news media has reported many incidents of hundreds, if not thousands, of applicants for a handful of jobs in different areas of the country. When the current recession officially began in December 2007, the JOLTS jobs openings data, combined with Current Population Survey (CPS) unemployment levels were already reflecting the effects of an economic contraction (BLS news release, March 2010).

Prior to the recession there has been the macroeconomic trend of skilled workers gaining in real terms and less-skilled workers experiencing large real wage losses (Juhn, 1992). Employment polarization (Autor et al., 2006) is widespread across industrialized economies. Automation and offshoring of routine work has displaced many white-collar and blue-collar workers into lower-skilled service occupations. Workers with less than a four-year degree have been the hardest hit. Employment losses during the recent recession have been far more severe in middle-skilled white- and blue-collar jobs than in either high-skill, white-collar jobs or in low-skill service occupations (Autor, 2010).

Trends in the U.S. labor market reinforce the increasing reliance on postsecondary education as the threshold for workforce development. The shift to service jobs and service functions has reduced the kinds of skills learned through training and tend to favor the general cognitive, problem-solving, and interpersonal

skills associated with postsecondary education. On-the-job training ladders out of low-wage jobs are collapsing as entry-level manufacturing jobs decline (Carnevale, 1999).

Beware the Hypothetical Applicant

According to the survey results of another study (Pager & Quillian, 2005), employers reported interviewing an average of eight applicants for the last non-college jobs they had filled. The independent variable in this study was the ex-offender status of the job applicants and so did not directly address the likelihood of a prospective employer giving an injured applicant as much consideration as those who have experienced no industrial injury. The authors underscored the importance of using great caution in relying on employers' self-reports as an accurate reflection of behavior. When considering a hypothetical applicant, employers do not have to take into account alternative possibilities among the applicant pool. The hypothetical applicant may exceed the minimum threshold for acceptability even if in actuality there tend to be other applicants who are better qualified. The very framing of a hypothetical vignette by a vocational expert may artificially exaggerate the difference between survey and field (or actual) results.

The Measurement Error of Circumstance

Given the many factors at play in any given hiring situation (e.g., the urgency with which the position must be filled, the number and quality of other applicants), any single observation regarding an employer's likelihood of hiring an injured worker may be subject to the "measurement error of circumstance" (Pager & Quillian, *supra*). In actual employment situations, the applicant's characteristics are judged not only according to some minimum threshold, but also relative to the pool of available applicants, and to the specifications of a job. Many more contingencies are at play, and the presence of a criminal record or a physical impairment may become, rationally or not, a salient criterion by which to weed out less-qualified applicants. The contingencies of the hiring process may render hypothetical scenarios irrelevant.

One limitation of the above study and a cautionary that may be well regarded by vocational experts is that each employer was visited only once. Rehabilitation counselors, job placement specialists and vocational experts need to nurture employer contacts. Employers who state they are very likely to hire injured workers are otherwise somewhat likely and those who state they are somewhat likely, a vague quantifier, are probably not significantly different than those who state they are somewhat unlikely to hire an injured worker. On the other hand, it is not uncommon

to identify small employers who have some type of disability themselves and actually have a preference or openness to hiring a disabled worker who is otherwise qualified for the opening.

Labor Market Search in the Age of the Internet

The CRCC Code of Professional Ethics that took effect January 1, 2010 includes the following statement in the section on professional responsibility and bases for intervention/credible resources: "Rehabilitation counselors ensure that the resources used or accessed in counseling are credible and valid (e.g., Internet link, books used in bibliotherapy)." In practice, rehabilitation counselors have the skills for determining and ensuring the skills and credibility of their clients and are less well-versed and adept in the incredible and ever changing Internet landscape. The widening use of the Internet by both job seekers and employers has given rise to the acronym, LFA (lesser-qualified frequent applicant). Electronic resume posting systems and online applications increase the possibility of individuals applying to the same job many times, or applying to many different jobs in the same job family over a period of time.

A study of Internet job seekers (Feldman & Klass, 2002) found that one-third reported there was not enough information about the positions to which they were applying to. Applicants may apply to jobs without clearly understanding the level of the job or the qualifications necessary for that position. Organizations often assume that an individual is interested in a particular job but individuals may file multiple applications for which they are not qualified for.

The Internet and other means of automation are considered particularly efficient when applicant pools are large. For big companies there are potential consequences of including unqualified frequent applicants in analyses since specification of the applicant population is of special importance to the Equal Employment Opportunity Commission (EEOC). It has been found that many applicants apply to multiple positions and intentionally ignore the extent to which they are actually interested and qualified for a job, simply because the time, effort, and expense they must put forth to file an application has decreased (Dunleavy et al, 2008). However, an employer may require a reasonable set of basic qualifications before a job seeker is formally considered an applicant.

The EEOC has issued statements defining who is an Internet applicant so that organizations can collect relevant demographic data from applicants and conduct adverse impact analyses. An individual is considered an Internet job applicant when (1) they submit an expression of interest in employment through the internet or related electronic technologies, (2) the em-

employer considers the individual for employment in a particular position, (3) the individual's expression of interest indicates that the individual possesses the basic qualifications for the position. On 03/17/08, the EEOC Commission voted not to finalize the document, Definition of "Job Applicant for Internet and Related Electronic Technologies. The existing definition of "applicant" continues to apply to traditional, hard-copy applications. The precise definition depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending on the employer's practice.

An application typically would require a worker to submit a written application form; casual inquiries over the phone or personal visits that do not involve a written application are not ordinarily classified as job applications (Holzer et al, 1991). The authors believed the question concerning the number of persons who applied for the last position filled should measure the number of individuals formally applying for the position. They found 11.49 applications per opening for minimum wage jobs and 9.18 applications for more than minimum wage jobs. Those applying for minimum wage jobs had less than one year work experience on average. This study is more than 20 years old and it should be noted that minimum wage employment accounted for more than 15 percent of hourly paid workers in 1980-81. The percentage has slipped steadily in subsequent years to where minimum wage employment was 4.9% of hourly paid workers in 2009 (U.S. Department of Labor, Bureau of Labor Statistics, 2010). It is hard to imagine that today there would be more applicants for minimum wage jobs than jobs paying above minimum wage.

The Qualified Applicant Pool

The Dunleavy research noted that a qualified applicant pool size common in human resources practice is 20. From that pre-determined number, HR departments select most applicants (75% and above); half the applicants (50%) or few applicants (10% to 25%). The lower the selection ratio the more favorable the situation is for the employer. These parameter descriptors may be useful to vocational experts in framing questions to obtain the best responses from employers.

More recently, the Wall Street Journal (04/19/10) reported that with unemployment hovering around 10%, HR managers are inundated with responses to every job posting. Some companies hire outside firms to post jobs and sort through resumes, presenting only a dozen or so candidates for consideration.

Large firms are more visible, pay better and are better known by job seekers compared with small firms. Small firms and low-wage industries attract fewer job applicants. Large firms may maintain a greater inventory of applications in their files compared with small firms. Large employers are also more likely than small employers to report that they interviewed applicants who had previously applied for positions in their firm. Therefore, the hiring rate of large companies may fluctuate more than the hiring rate of small employers (Holzer et al, *supra*).

In the literature, the number of positions available to the number of persons seeking those positions is sometimes referred to as the selection ratio. Everything else being equal an individual would be in a better competitive position if he/she were one of 1,000 who were competing for 900 positions, a selection ratio of 900/1,000 or .9 of a job per job seeker than he/she would be if there were only 100 seeking 10 jobs, a selection ratio of 10/100 or .10 (Dillman, 2009).

The hiring process has many variables, however, that are either not well understood or not even observed. First, selection ratio is too often used to mean hiring rate. Selection ratio in the literature of personnel psychology is a population parameter representing the proportion of acceptable applicants or the proportion of individuals in the population scoring above some cutting score (a score of 16 on the Wonderlic, for example). The selection ratio is the proportion of the identified population scoring above a cutting score. If the cutting score is set at the mean, the selection ratio in the population will be .50 or 50% of the population at any time. Decreasing the selection ratio is favorable to the hiring organization and there is no need to be concerned with either number of applicants or number hired at any point in time. A hiring rate, on the other hand, refers to the percentage of total applicants hired. Hiring rate is associated with a specific sample of applicants which in most cases will usually be a non-random sample from most populations (Alexander et al, 1983). If a potential job applicant from the population at large is discouraged by any means, he or she has self-selected out of the applicant pool. The non-randomness of applicant pools is further influenced by employers who hire through networks of existing employees, employment agencies, or selective publications. An employer sifting through an applicant pool may have no effect on the selection ratio but a major effect on the hiring rate at any later point in time.

The Job Offer, the Callback and the Vacancy Duration

Without observing actual hiring decisions, it is hard to measure employer behavior. Many of the qualities valued by employers for contemporary low-wage jobs

are difficult to evaluate from a written application or brief meeting. Research has shown that the traditional job interview is a poor indicator of a candidate's potential (Brecher et al, 2006). His study concluded that the structured interview reduces biases involved in interviewing applicants who have a physical disability. Asking if the interviewer structures the interview process can provide the vocational expert with some insight into employer tendencies; and may be more valid than asking a straight-ahead question on the likelihood of hiring a disabled worker which may only elicit a socially acceptable answer the questioner wants to hear.

A job offer may be of paramount importance to case closure but a dependent variable of equal importance is the callback. In the literature, a callback is a positive response of equal weight to a job offer (Pager, Bonikowski & Western, 2009). Typically, an employer will have evaluated the qualifications of several applicants prior to granting each interview and determining which applicant is most suited to the available position (Shannon & Stark, 2003).

Job openings are defined by the U.S. Department of Labor as meeting three conditions, one of which is that work could start within 30 days. The other two conditions are a specific position exists and the employer is actively seeking workers from outside their location to fill the position. Active recruiting may include advertising in newspapers, on television, or on radio; posting Internet notices; posting "help wanted" signs; networking or making "word of mouth" announcements; accepting applications; interviewing candidates; contacting employment agencies; or soliciting employees at job fairs, state or local employment offices, or similar sources.

Holzer et al also identified the "vacancy duration" or number of days when the employer started looking for someone to fill the opening and the time the new employee started work. The vacancy duration has a substantial, positive effect on the job application rate. The vacancy duration ranged from 12.19 to 15.31 days. Highly skilled jobs and those that require higher educational attainment generally have longer vacancy durations. Employers spend more time screening applicants with high skill requirements. The urgency with which to fill the position may be an advantage to an injured worker who is in the right place at the right time.

The Competitive Labor Market and the Reasonable Availability of Jobs

Dillman, an economist and forensic consultant in the area of personal injury litigation, uses the following example to explain the concept of labor market competitiveness to a jury composed of lay persons: "Assume that you are going to buy a washing machine.

You walk into a store and see two machines sitting side by side. One is brand new and the other rebuilt. Both machines do the soak cycle and the wash cycle fine but the rebuilt one sometimes requires rearranging the clothes during the spin cycle. However, if you keep at it long enough it will get the job done. Both machines cost the same. Which one would you buy?" (Dillman, *supra*).

Dillman's point is that juries do not have the necessary background to understand elaborate academic explanations. Certainly, the hiring process is more complicated, less understood and hidden from view than consumer behavior buying durable goods on a showroom floor. It does not take place in a static framework such as comparing washing machines side by side. That it takes place in a dynamic setting has been elegantly understood in the Arizona courts and elsewhere. When job applicants are equal on all dimensions directly relevant to hiring decisions, employers may consciously or unconsciously assign greater significance to minor characteristics simply to weed out and manage the number of qualified applicants. There is recent anecdotal evidence of this in newspaper and magazine articles about employers being overwhelmed by the number of resumes and applications. Job applicants need not be perfectly observed by employers. At the same time it can be assumed that they have insight into characteristics unobserved by the economist or the vocational expert. Differences in hiring rates can be attributed to differential dispersion in unobserved components (Heckman, 1998). These are sometimes idiosyncratic. Thus, there is categorical exclusion of disabled or injured workers when the applicant pool is large. The injured worker may be disqualified more readily when the applicant pool is greater than 10.

What vocational expert would not consider an injured worker applicant to be a qualified applicant if he or she was called back to be one of the last two applicants for a position? At that stage of the interview process, unless there were only two applicants in the first place, the employer or interviewer most likely has already moved past the categorical exclusion of impairment and is weighing other characteristics such as the best fit for the job, not just qualifications. Dillman's analogy may play well before a jury in a personal injury case but it doesn't capture the essence of the competitive labor market as it is understood in the Arizona workers' compensation arena. There is an elegant logic to the Roach/Zimmerman "qualified applicant" process that serves injured workers and vocational experts well.

Questions for further study include:

- What are the determinants of the number and quality of job applicants?
- What are the determinants of the number of call-backs and interviews?

- What is the ideal job pool size (number of qualified applicants)?
- What is the selection rate by employer/industry?
- What is the vacancy duration common to the employer/industry?
- What vignettes or hypothetical's work best?

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Forensic Rehabilitation and Economics A Journal of Debate and Discussion

A relatively new journal presenting and discussing important topics germane to the practicing forensic rehabilitation consultant. The editors (Tim Field, Tony Choppa, and Kent Jayne) are experienced rehabilitation professionals who have been in the field for over 25-30 years. The journal is currently in the third year of publication and has included such topics/articles and authors as:

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