

Evaluating Employability and Earning Capacity to Obtain the Most Accurate Permanent Disability Rating in California Workers' Compensation Cases After *Ogilvie III*

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The context for conducting vocational evaluations regarding employability and earning capacity changed in California workers' compensation cases with *Ogilvie v. WCAB* and *City and County of San Francisco v. WCAB* (2011), commonly referred to as *Ogilvie III*. Three ways to rebut a permanent disability rating were provided in *Ogilvie III*. At least 2 of the 3 rebuttal options require a vocational analysis of employability and earning capacity. This article provides methods for evaluating employability and earning capacity under *Ogilvie III*. Laws, regulations, and court decisions related to *Ogilvie III* are summarized. Standard methods for evaluating employability and earning capacity in California workers' compensation cases are described. Methodologies are then presented for various types of evaluations of employability and earning capacity in relation to *LeBoeuf* (1983) and *Ogilvie III* (2011). The evaluation methodologies are all presented in relation to California Labor Code section 5307.7 (Bae, 2012) regarding a new vocational expert fee schedule for vocational evaluations, expert testimony, and related services provided by vocational experts in California workers' compensation cases. Issues related to qualifications of vocational experts and ethics are discussed in relation to *Ogilvie III* and Labor Code section 5307.7. This is followed by a report format that vocational experts can follow regarding *Ogilvie III* and Labor Code section 5307.7.

Ogilvie v. WCAB and *City and County of San Francisco v. WCAB* (2011), commonly referred to as *Ogilvie III*, changed the context in which vocational experts conduct vocational evaluations to develop opinions regarding employability and earning capacity in California workers' compensation cases. *Ogilvie III* followed *Ogilvie v. City and County of San Francisco* (2009, February 3), commonly referred to as *Ogilvie I*, and *Ogilvie v. City and County of San Francisco* (2009, September 3), commonly referred to as *Ogilvie II*. This article begins with a historical overview of laws, regulations, and court decisions regarding the evaluation of employability and earning capacity in California workers' compensation cases. This is followed by a review of the literature regarding published, peer-reviewed and related methodologies for evaluating em-

ployability and earning capacity in California workers' compensation cases.

Types of vocational evaluations under *Ogilvie III* (2011), *LeBoeuf* (1983), and Labor Code sections 4660 and 4662 (Bae, 2012) are described along with vocational expert services related to depositions and trials. The types of evaluations are presented in relation to *Ogilvie III* and California Assembly Bill 1168, which was signed by Governor Brown on October 7, 2011, and added Section 5307.7 to the California Labor Code (Bae, 2012, p. 386). Issues related to minimum education and certification qualifications of vocational experts are discussed together with ethical issues related to conducting an evaluation and providing vocational expert testimony. This information is

presented in part in relation to Labor Code section 5307.7, which mandates the development of a vocational expert fee schedule for California workers' compensation cases by January 1, 2013. The final part of the article includes a recommended report format that vocational experts can follow in summarizing their findings and presenting their opinions. Implications for practice in workers' compensation and in the broader vocational expert arena are discussed.

This article builds on the recent work of the authors of a position paper for the California Chapter of the International Association Rehabilitation Professionals (CA-IARP) titled *Post-Ogilvie III Vocational Expert Methodology Recommendations* (Cottle et al., 2011, September 16). The efforts of these authors in addressing the implications of *Ogilvie III* for vocational experts and others in the California workers' compensation community are recognized and appreciated.

History of Laws, Regulations, and Court Decisions Regarding Employability and Earning Capacity in California Workers' Compensation

LeBoeuf (1983) concluded that a determination that an injured employee "cannot be retrained for any suitable employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating" (p. 594). The California Supreme Court ruled in *LeBoeuf* that, "The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability" (p. 597).

The 1997 *Schedule for Rating Permanent Disabilities (Schedule)* (California Division of Workers' Compensation, 1997), was based in part on Labor Code section 4660 (a) and (b) (Moffatt et al., 2003) and required that:

In determining the percentage of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.

The administrative director may prepare, adopt, and from time to time amend, a schedule for the determination of the percentage of permanent disabilities in accordance with this section. Such schedule shall be available for public inspection, and without formal introduction in evidence shall be prima facie evidence of the permanent disability to be attributed to each injury covered by the schedule. (p. 298)

It is clear from this review of the *LeBoeuf* decision and the 1997 *Schedule* that a permanent disability rating can be rebutted with vocational expert opinion. However, no specific method for rebutting a permanent disability rating with vocational evidence was provided in either *LeBoeuf* or the 1997 *Schedule*.

California Senate Bill 899 was signed into law by California Governor Schwarzenegger on April 19, 2004 (California Workers' Compensation Institute, 2004, April 20). Among other things, SB 899 changed the focus for determining permanent disability in California workers' compensation cases from an injured employee's diminished ability to compete in an open labor market to diminished future earning capacity (DFEC). The 2005 *Schedule for Rating Permanent Disabilities (Schedule)* (California Division of Workers' Compensation, 2005) was developed as required by SB 899. Among other things, the 2005 *Schedule* is based on the revised Labor Code section 4660 that states "an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees" (Grant et al., 2005, p. 319). Section 4660 continues to hold that the *Schedule* "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule" (Grant et al., 2005, p. 319). Among other things, this information confirms that the 2005 *Schedule* is rebuttable.

Labor Code section 4662 describes several situations that result in a conclusive presumption of permanent total disability, as follows:

Any of the following permanent disabilities shall be conclusively presumed to be total in character:

- (a) *Loss of both eyes or the sight thereof.*
- (b) *Loss of both hands or the use thereof.*
- (c) *An injury resulting in a practically total paralysis.*
- (d) *An injury to the brain resulting in incurable mental incapacity or insanity.*

In all other cases, permanent total disability shall be determined in accordance with the fact. (Bae, 2012, pp. 346-347)

All of the facts of a case involving permanent total disability may include a combination of vocational as well as medical facts. In this instance, the medical factors are used as a basis for the vocational expert's analysis of the effects of the industrial injury on the injured worker's employability and earning capacity. This suggests that Labor Code section 4662 provides another method for rebutting the 2005 *Schedule*.

Wanda Ogilvie v. City and County of San Francisco (2009, February 3), commonly referred to as *Ogilvie I*, prescribed a methodology for determining whether an

injured employee is able to rebut the future earning capacity (FEC) adjustment factor in the 2005 *Schedule*. Subsequently, *Wanda Ogilvie v. City and County of San Francisco* (2009, September 3), commonly referred to as *Ogilvie II*, upheld the *Ogilvie I* prescribed method for attempting to rebut the FEC adjustment factor in the 2005 *Schedule*. Thus, the 2005 *Schedule* continued to be rebuttable with vocational evidence.

Shini (2010) and *Noriega Garcia* (2010) further clarified vocational factors that should be included in an assessment of an injured employee's diminished future earning capacity. Among other things, *Shini* and *Noriega Garcia* held that *Montana* factors (*Argonaut Insurance Company v. Industrial Accident Commission (Montana)*, 1962) should be included in an assessment of an injured employee's attempt to rebut the FEC adjustment factor in the *Schedule*. The California Supreme Court ruled in *Montana* (1962) that in estimating an applicant's earning capacity, "the applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant" (p. 3).

Wanda Ogilvie v. WCAB and City and County of San Francisco v. WCAB (2011), commonly referred to as *Ogilvie III*, provided 3 methods for rebutting the *Schedule*, as follows:

Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. (p. 14)

The reference to an employee not being amenable to rehabilitation refers to an employee's ability to rebut the *Schedule* under *LeBoeuf*. This rebuttal method was described above.

Regarding the second rebuttal method involving "the omission of medical complications aggravating the employee's disability in preparation of the rating schedule" (p. 14), several reasons can be used as the basis for rebuttal. First, the 2003 RAND report (Reville, Seabury, & Neuhauser, 2003), noted that the researchers were "able to match most (over 69%) of the injured workers in this sample to both (1) similar workers and (2) to administrative data on wages from the Employment Development Department (EDD) to estimate the impact on earnings experienced by these workers" (p. 18). Therefore, approximately 30% of

workers were unaccounted for in the sample of injured workers studied by RAND.

In addition, the 2003 RAND report included only single-impairment cases (p. 21). Therefore, injured employees with injuries to multiple body parts were not addressed by the 2003 RAND report. Having injuries to more than one body part can result in an increased negative effect on an individual's employability and earning capacity.

The 2003 RAND report also addressed only 3-year proportional earnings losses (p. 23). The use of a 3-year timeframe for comparing pre-injury and post-injury earnings is unique to the RAND study. Using a 3-year timeframe for comparing pre-injury and post-injury earnings can result in an inaccurate conclusion regarding the percentage of DFEC. In litigation venues outside of workers' compensation, vocational experts and economists customarily use the timeframe encompassed by worklife expectancy in assessing loss of earning capacity since doing so is likely to result in a more accurate percentage of loss of earning capacity. Among other things, the worklife expectancy timeframe accounts for changes in earnings over an individual's lifetime, commonly referred to by Dillman, an economist, as the age-earnings cycle (1998).

Finally, there was no crosswalk between the 1997 *Schedule* and whole person impairment ratings under the *AMA Guides to the Evaluation of Permanent Impairment* (5th edition) (Cocchiarella & Andersson, 2001). Regarding this, the 2003 RAND report noted that, "the *AMA Guides* are limited in scope because they provide guidelines only for measuring impairment and say nothing about the extent that impairments limit work" (p. 13). Therefore, merely applying a .1 to .4 FEC adjustment factor to the standard whole person impairment rating may not result in an accurate permanent disability rating.

There have been a few court decisions at the Workers' Compensation Appeals Board since July 29, 2011. In *Bakerian v. WCAB et al.* (2011), a petition for writ of review was denied by the Court of Appeal. Previously, a panel (including 3 commissioners) decision denied reconsideration and incorporated the workers' compensation judge's decision that the applicant had failed to rebut the *Schedule* FEC adjustment factor since only 7-8 months had elapsed from the permanent and stationary date until the trial date, the applicant did not testify regarding other skills or education he possessed, the applicant did not address the reasons why he stopped working, there was no evidence provided regarding job opportunities available to the applicant, and the vocational expert's testimony that applicant was unemployable did not constitute substantial evidence to rebut the FEC factor. The court found the vocational expert's opinions to be conclusory, not based on underlying facts. The court

decision indicates that the vocational expert's evaluation consisted of reviewing records, interviewing the applicant for 2 hours at his home, and preparing a report. Among other things, this court decision underscores the need for a complete and thorough vocational evaluation and a solid basis for vocational opinions.

In *Regents of the University of California v. WCAB (Siegel)* (2011), a petition for writ of review was denied by the Court of Appeal. Previously, a panel decision upheld the workers' compensation judge's 100% unapportioned award under Labor Code section 4662. The vocational expert's testimony was found credible that the applicant was unable to compete in the open labor market.

Cordova v. Garaventa Enterprises, SCIF (2011) was a panel decision that upheld a workers' compensation judge's 100% disability award in reference to Labor Code section 4662. The court ruled that the applicant's inability to speak or understand English did not contribute to 100% disability. The court also noted that Labor Code section 4662 applies to 100% cases and that Labor Code section 4660 applies to partial disability cases.

In *Perez v. Orange Plastics, SCIF* (2011), a finding of 100% permanent disability by a workers' compensation judge (WCJ) was amended to 90% in a WCAB panel decision. The panel concluded that the applicant had not proved that he was 100% disabled because of factors directly attributable to the industrial injury. Instead, non-industrial factors such as the applicant's limited education and limited ability to speak English were considered in the decision by the WCJ.

In *Hayes v. Pacific Bell Telephone Company* (2011), the WCJ awarded permanent disability of 100% for the applicant who was injured on 3/1/06. Panel qualified medical evaluators in physical medicine and rehabilitation and psychiatry, the treating pain management physician, and both vocational experts concluded that the applicant was unable to work in the open labor market.

In *Dahl v. Contra Costa County* (2011), the WCJ awarded permanent disability of 59% based on the medical evidence and that the applicant had failed to rebut the *Schedule*. Vocational evidence could not be followed since the numeric formula for doing so had been nullified by *Ogilvie III* and no replacement formula had been provided. The WCJ concluded that numeric formulas developed by vocational experts were not sufficient in attempting to rebut the *Schedule*. Vocational evidence can be relied on only in proving permanent and total disability (100%). Finally, the WCJ recommended that the commissioners revisit the issue of calculating permanent disability in cases that do not result in permanent and total disability.

In response to the above WCJ decision, *Dahl v. Contra Costa County* (2012), a panel decision involving an Opinion and Decision after Reconsideration, held "that a *LeBoeuf* type of analysis may be properly applied in a case involving less than 100% permanent disability when it is shown that the injury impairs the employee's rehabilitation, as in this case" (p. 3). The panel decision endorsed the earlier method for determining diminished future earning capacity recommended by Commissioner Caplane in *Ogilvie I* (2009, February 3). Commissioner Caplane recommended a comparison of estimated pre-injury and post-injury earning capacity from the permanent and stationary date through worklife expectancy. The panel decision stated that the Court of Appeal in *Ogilvie III* (2011):

... recognized that there is no meaningful distinction between the terms "diminished future earning capacity" and "ability to compete in an open labor market," and held that an employee rebuts the PDRS rating by showing that he or she will have a greater loss of future earnings than reflected in the PDRS rating. (pp. 3-4)

The panel decision concluded by stating:

Application of a *LeBoeuf* type of analysis in cases of partial permanent disability requires expert opinion on the effect of the injury's impairment on the worker's amenability to rehabilitation and the effect of that on DFEC. Such an analysis can be done even where there is less than total permanent disability, as in this case where the employee has rebutted the PDRS by showing that she will have a greater DFEC than reflected in the PDRS rating. (p. 5).

In *Gonzalez v. William McCulloch, SCIF* (2011), the workers' compensation judge increased a prior award of 8% to 73% based on medical and vocational evidence. The applicant was a laborer with relatively high wages who could work only at unskilled low wage post-injury jobs. The judge found one year of post-permanent and stationary wages to be sufficient for a wage comparison. Finally, the judge found the applicant's vocational expert's evaluation charges of \$4,881.00 and the expert's trial rate of \$225.00 per hour to be reasonable.

In *Apodaca v. Coastal Iron, SCIF* (2012), the WCJ rejected the applicant's claim for permanent and total disability and awarded 90% permanent disability. Both parties retained vocational experts. The WCJ concluded that the applicant could find employment within his work restrictions in the areas suggested by the defense vocational expert.

In *Wright v. BCI Builders, Inc., SCIF* (2012), the workers' compensation judge awarded permanent disability of 68% based on the findings of the applicant's vocational expert that the applicant had a DFEC of 68%. The judge agreed with the vocational expert's

conclusion that the applicant's pre-injury earning capacity was \$34.25 per hour for full-time work. The applicant testified that full-time work was available although he chose to work part-time. The judge also ruled that it was not necessary to adjust the 68% rating since the vocational expert had considered age and other factors. The judge also determined that the hourly rate and amounts of time billed by the vocational expert were reasonable.

In *Wen v. Gagmar's Inc.* (2012), the WCJ increased a 37% combined orthopedic and psychiatric rating to 71% based on the applicant's ability to work 60 hours per week prior to the work injury and only 22 hours per week following the work injury. Both vocational experts used the same numeric formula to calculate DFEC. The WCJ found the medical complications rebuttal method in *Ogilvie* (2011) to be appropriate in this case.

Dewey v. The Limited / Lerner (2012) was a panel decision that amended the decision of the WCJ and found the applicant to be 100% disabled based on a combination of medical and vocational evidence. The commissioners considered the report and trial testimony of the applicant's vocational expert to be the most substantial and persuasive analysis of the degree of the applicant's permanent disability caused by the industrial injury.

In *Gerton v. City of Pleasanton* (2012), the WCJ followed *Dahl v. Contra Costa County* in concluding that the DFEC percentage established by the vocational expert was equal to the permanent disability rating, less 5% for apportionment. The WCJ also found the vocational expert's hourly rate of \$250.00 to be quite reasonable. In terms of methodology, the vocational expert used the WCEC Formula (Van de Bittner, 2006) to compare pre-injury and post-injury earning capacity starting at the date of maximum medical improvement through worklife expectancy.

Literature Review of Methodologies for Evaluating Employability and Earning Capacity in California Workers' Compensation Cases

Van de Bittner (2003) described a 9-step *LeBoeuf* Evaluation Process that can be used to develop vocational evidence to combine with medical evidence in establishing an accurate permanent disability rating in California workers' compensation cases. The 9-step process includes the following:

- a. Medical records review
- b. Review of school, work, and vocational rehabilitation records
- c. Interview and test the injured worker

- d. Review deposition transcripts and sub rosa video-tapes
- e. Evaluate self-initiated return to work efforts
- f. Complete a transferable skills analysis
- g. Determine vocational feasibility
- h. Analyze employability
 - 1) Labor market access
 - a) Medical labor market access
 - b) Vocational labor market access and placeability
 - 2) Labor market survey
- i. Reporting

The *LeBoeuf* Evaluation Process is similar to vocational evaluation methodologies described by Berg (2003) for use in Washington, by Johnston and Growick (2003) for use in Ohio, and by Spitznagel and Cody (2003) for use in evaluating workers' compensation cases in Florida. The *LeBoeuf* Evaluation Process continues to have relevance in evaluating injured workers in California in relation to the 1997 *Schedule*. It also applies to an evaluation of all of the facts of a case in a claim for permanent and total disability under Labor Code section 4662. In addition, it applies to a consideration of all of the factors in relation to *Argonaut Insurance Company v. Industrial Accident Commission (Montana)* (1962).

Van de Bittner (2006) described 3 formulas for evaluating DFEC in relation to the 2005 *Schedule*. These included the Workers' Compensation Earning Capacity Formula (WCEC Formula), the RAPEL Formula, and the Stepwise Estimate of Diminished Earning Capacity (SEDEC) Formula.

Under the WCEC Formula (Van de Bittner, 2006), the calculation of DFEC is expressed in the following equation:

$$DFEC = f(WLE) \times \left[\frac{PRE - POST}{PRE} \right]$$

Where:

- DFEC = diminished future earning capacity
- WLE = worklife expectancy
- PRE = pre-injury earning capacity
- POST = post-injury earning capacity
- f = function of

The WCEC Formula provides the vocational expert an empirically based methodology for calculating post-injury employability and the injured worker's residual earning capacity. The post-injury earning capacity figure can then be applied to the formula to determine DFEC expressed as a percentage. The steps in applying the WCEC Formula are described in Table 1.

Table 1*Workers' Compensation Earning Capacity Formula (WCEC Formula)*

The Workers' Compensation Earning Capacity Formula (WCEC Formula) (Van de Bittner, 2006) can be applied in determining diminished future earning capacity relative to Labor Code section 4660.

- I. Clarify Worklife Expectancy
 - A. Clarify date of birth, date of injury and P&S (MMI) date
 - B. Determine pre-injury worklife expectancy
 - C. Determine post-injury worklife expectancy
- II. Establish Pre-injury Earning Capacity
 - A. Clarify wages at time of injury
 - B. Clarify benefits at time of injury, particularly if they are likely to be substantially different post-injury
 - C. Combine wages and benefits to establish pre-injury earning capacity
 - D. Consider wages alone, if you expect benefits to represent a comparable portion of earnings post-injury
 - E. If necessary, convert partial workyear earnings to full workyear earnings
- III. Calculate Post-injury Earning Capacity
 - A. Use the total labor market access approach or the most suitable job(s) approach
 - B. For the total labor market access approach, use the *McCroskey Transferable Skills Program* (MTSP), *OASYS*, *SkillTRAN*, or a comparable program to determine the entry-level wage for the highest paying job or jobs for which the injured employee has some or all of the skills required for employment
 - C. For the most suitable job(s) approach, use the *RAPEL Method* or a related method to identify the most suitable jobs to use as the basis for post-injury earning capacity, using MTSP, OES, or another source of wage data
 - D. Add a separate calculation for benefits if they are likely to be substantially different as a percentage of wages post-injury
 - E. Calculate earnings after 3 to 5 years through the MTSP, OES, or another source of wage data
 - F. Add benefits, if substantially different as a percentage of wages post-injury
 - G. Determine earnings, if any, while in training
 - H. Calculate the average hourly earnings for the first 3 to 5 years post-injury
 - I. Calculate earnings for the remainder of the worklife post-injury
- IV. Calculate future earning capacity
 - A. Earnings for the first 3 to 5 years plus training and job search time
 - B. Plus earnings for the remainder of worklife
 - C. Equals total post-injury EC
 - D. Pre-injury EC less post-injury EC
 - E. Equals DFEC
 - F. Divided by pre-injury EC
 - G. Equals the percentage of DFEC
 - H. Add any training related costs
 - I. Determine DFEC including training related costs
- V. Calculate the impact of any additional disability factors on DFEC
 - A. Medically necessary use of a mobility aid such as a cane, crutches, walker, or wheelchair
 - B. Artificial member or brace
 - C. Limited to part-time work, e.g., 4 hours per day only or 3 days per week only
 - D. Need for extra or extended rest breaks, lie-down breaks, or unscheduled absences due to flare-ups
 - E. Absences from work for anticipated surgeries and other treatment
 - F. Need for ready access to a bathroom
 - G. Special environmental limitations

The resulting percentage of DFEC can be used as a substitute for the permanent disability rating in the 2005 *Schedule for Rating Permanent Disabilities* since the percentage of DFEC considers physical impairment, age, occupation, and earning capacity, unless the DFEC percentage is less than the rating under the *Schedule* after adjusting for age, occupation, and future earning capacity (FEC). Should this occur, the DFEC percentage can be used as a substitute for the FEC adjustment factor in the *Schedule*. Or, the percentage of DFEC can be applied to the formula at page 1-6 in the 2005 *Schedule for Rating Permanent Disabilities* when combined with the unadjusted permanent disability rating.

Vega, Van de Bittner, Toyofuku, Van de Bittner, and Mohebbi (2008) summarized the results of the use of the WCEC Formula in 31 evaluations of DFEC in relation to the 2005 *Schedule*. The WCEC Formula was effective in determining the actual DFEC of an applicant. The article expanded on the application of the WCEC Formula to individual cases.

Hall (2006) described the application of the SEDEC Method in the following steps:

- a. Determine average past earnings & convert to hourly rate;
- b. Determine single job and/or pool of jobs that most reasonably offer greatest employment potential to worker;
- c. Calculate median entry-level hourly wage for job or pool of jobs;
- d. Calculate median experienced wage (with 3-5 years experience) for a single job or a pool of jobs;
- e. Determine pre-injury worklife or pre-injury work period to be considered;
- f. Consider potential loss due to reduced worklife;
- g. Calculate loss scenarios using SEDEC formula;
- h. Develop alternative scenarios to consider the impact of receiving Vocational Rehabilitation, job accommodations, training, etc. (p. 6)

A consensus methodology developed by the CA-IARP DFEC Work Group for evaluating employability and earning capacity was presented in White Paper: IARP – DFEC Work Group (White Paper) (Austin et al., 2009). The following recommendations were provided in the White Paper regarding an evaluation of employability:

- a. An interview that includes review of work, medical and educational background and psychosocial data
- b. Assessment of existing employment related skills and abilities

- c. Consideration of the current physical and/or mental limitations as established in medical and psychiatric records and as presented by the evaluatee
- d. Transferable skills analysis
- e. Vocational testing, if necessary to determine the evaluatee's employability
- f. Occupational and labor market research
- g. Identification of factors that may delay, prevent, or enhance employability
- h. Consideration of additional services that may enhance employability when appropriate
- i. Other factors as determined by the expert

An earning capacity evaluation was described as follows:

- a. Develop opinions on past and future earning capacity, based on the outcome of the employability evaluation
- b. Complete wage and benefit research
- c. Sources of wage and benefit research are:
 - 1) W-2 forms, Social Security Administration records, and other authenticated records
 - 2) California Employment Development Department
 - 3) U.S. Department of Labor and Bureau of Labor Statistics
 - 4) Other publicly available and statistically reliable published wage and benefit data
 - 5) As required, labor market sampling, research, and relevant contacts with employers, unions, schools and/or organizations to verify wage and benefit data
- d. Apply the most appropriate DFEC or loss of earning capacity method for comparing pre-injury and post-injury earning capacity
- e. Report findings

This consensus methodology developed by the CA-IARP DFEC Work Group was later compared with published, peer-reviewed methodologies (Van de Bittner, Wallace, Cottle, & Simon, in press). As a result, it was learned that the consensus methodology developed by the CA-IARP DFEC Work Group was generally consistent with published, peer-reviewed methodologies.

Van de Bittner and Toyofuku (2010) presented a methodology for combining medical and vocational evidence to achieve accurate permanent disability ratings under *Ogilvie I* and *II*. Types of evaluations and reporting formats were also provided.

The Post-*Ogilvie III* methodology recommendations developed by a group of vocational experts (Cottle et al., 2011) were then presented as a position paper by the California Chapter of the International Association-

tion of Rehabilitation Professionals on September 16, 2011 to provide guidance for conducting a vocational evaluation in relation to *Ogilvie III*. The recommended evaluation process focused on the *LeBoeuf* Evaluation Process by Van de Bittner (2003) and the consensus methodology developed by the CA-IARP DFEC Work Group (Austin et al., 2009). The position paper emphasized the numeric formula for comparing pre-injury with post-injury earning capacity as represented by the WCEC Formula (Van de Bittner, 2006), although allowing for a modification in the period of time for comparing pre-injury with post-injury earnings. The SEDEC Formula (Hall, 2006) was presented as an alternative numeric formula for comparing pre-injury with post-injury earnings.

Indicators for a Vocational Expert Evaluation

Van de Bittner (2006) described a Screening Checklist for Diminished Future Earning Capacity (DFEC) Referrals (p. 28). The list of factors to consider in deciding whether an evaluation is needed by a vocational expert has been updated and is outlined in Table 2.

The unique education, skills, experience, and clinical judgment of a vocational expert may be required to determine the most accurate permanent disability rating in a particular case. For example, the education, skills, and experience of a vocational expert are often needed to determine which of the 12,974 occupational titles in the U.S. Department of Labor's *Dictionary of Occupational Titles* or which of the 1,110 occupations in the U.S. Department of Labor's *Occupational Information Network*, most accurately represents the job performed by the injured worker at the time of injury and other jobs in the injured worker's work history.

Similarly, a vocational expert is often needed to determine which of the 822 occupational titles in the *Standard Occupational Classification* system most accurately represents the control group of similarly situated employees. Selecting the most appropriate occupational title for the jobs held by the injured worker is important since training and skill requirements vary from one occupational title to another and choosing the wrong occupational title can lead to a faulty outcome for a transferable skills analysis. A vocational expert is often needed on a particular case for assistance in determining an injured worker's or control group's pre-injury earning capacity. In the 2003 RAND report (Reville, Seabury, & Neuhauser), the control group was described as "workers at the same firm with similar pre-injury earnings (p. 19). Pre-injury earning capacity is usually equal to an injured worker's wage at the time of injury. But in some cases, pre-injury earning capacity is different than the wage at the time of injury. An example is the pre-injury earning capacity for a worker who had just started his or her employment at the time of injury. Other examples include part-time workers, seasonal workers, or workers who appear to be employed below their skill level at the time of injury.

An evaluation by a vocational expert is often needed to determine the most suitable post-injury occupation or occupations for an injured worker, particularly in cases where the injured worker has not returned to work by the time decisions are being made regarding permanent disability. Regarding this issue, a vocational expert is needed to determine whether an injured worker is vocationally feasible or amenable to rehabilitation.

Table 2

Indicators for a Vocational Expert Evaluation under LeBoeuf, LC 4660, Ogilvie III, or LC 4662

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|----|---|
| A. | For the Applicant |
| | 1. Medically unable to return to the pre-injury job |
| | 2. Injuries to multiple body parts |
| | 3. High pre-injury wage and a low expected post-injury wage |
| | 4. Not vocationally feasible or amenable to rehabilitation |
| | 5. Limited to part-time work |
| | 6. Need for mobility aids |
| | 7. Appears to be permanently and totally disabled |
| B. | For the Defendant |
| | 1. Evaluated by an applicant's vocational expert |
| | 2. Able to return to the pre-injury job |
| | 3. Expected post-injury wages appear comparable to pre-injury wages |
| | 4. Applicant appears employable but has not returned to work |
| | 5. A claim for permanent and total disability is likely |
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The education, skills, experience, and clinical judgment of a vocational expert are needed to identify the most reasonable starting wage that an injured worker will be paid for the occupation or occupations determined to be most suitable based on the injured worker's medical restrictions, school history, work history, transferable skills, wage history, the requirements of prospective occupations, labor market considerations, and other relevant factors. The skills and experience of a vocational expert are then needed for an opinion regarding the likelihood of future wage increases in the new occupation or occupations throughout the injured worker's worklife expectancy, and if wage increases are likely, the frequency, amount, and duration of future wage increases. Finally, for cases involving a claim for permanent and total (100%) disability, an evaluation by a vocational expert is needed to develop and provide an ultimate opinion regarding whether the injured worker is employable when considering all medical and vocational factors.

The ultimate opinion of a vocational expert depends on the accuracy and completeness of the underlying data relied upon by the vocational expert. This is particularly true for a records only evaluation used for settlement purposes. Table 3 outlines the information typically needed by a vocational expert to complete an evaluation.

Types of Vocational Expert Evaluations and Testimony

A description of various types of vocational expert evaluations is presented in order to assist referring parties in deciding the specific type of vocational evaluation services needed in a particular case. The types of evaluations presented below address not only Labor Code section 4660 and *Ogilvie III* but also *LeBoeuf*

and Labor Code section 4662. The specific activities listed are based on the actual experience of the authors and other California vocational experts who practice in the workers' compensation arena. Specific activities may change in the future based on any changes in the underlying law, court decisions, or regulations.

The types of evaluations and related vocational expert testimony are also presented in relation to a consideration of reasonable, actual, and necessary vocational evaluation, expert testimony, and related services provided by vocational experts under California Assembly Bill 1168 and Labor Code section 5307.7 (Bae, 2012).

Table 4 provides a synopsis of typical activities included in relation to a Comprehensive *LeBoeuf* Vocational Expert Evaluation. Activities in Table 2 regarding a Comprehensive *LeBoeuf* Vocational Expert Evaluation apply to a vocational evaluation completed in relation to the 1997 *Schedule*. This type of evaluation applies to injuries that occurred on or before January 1, 2005 where there was a formal medical opinion or other indication of permanent disability prior to December 31, 2004.

Table 5 provides a summary of activities included in a Preliminary Records Only *LeBoeuf* or DFEC Vocational Expert Evaluation that is used for settlement purposes only.

A Preliminary Records Only *LeBoeuf* or DFEC Vocational Expert Evaluation does not include an interview or vocational testing of the applicant. It is based on medical, employment, and wage records. Opinions are preliminary and based upon a limited evaluation. Therefore, the results are primarily recommended for use in case settlement.

Table 3

Information Needed by a Vocational Expert for a LeBoeuf, LC 4660, Ogilvie III, or LC 4662 Evaluation

1. Medical records, including medical restrictions, functional limitations, psychiatric impairments or other limitations
2. Job description for the DOI occupation
3. Employment and school records, if available, including any post-injury employment or training records
4. Stipulated occupation at DOI, if available
5. Stipulated average weekly wage (AWW) at DOI, if available
6. Employer's Earnings Statement for the year before the injury
7. W-2 Wage and Tax Statements for 3-5 years before the DOI
8. Social Security Administration Earnings Statement
9. Records of any return to work efforts
10. Employment and wage records for any concurrent employment at DOI
11. Deposition transcripts of the applicant, physicians, and other relevant parties

Table 4*Comprehensive LeBoeuf Vocational Expert Evaluation*

A Comprehensive *LeBoeuf* Vocational Expert Evaluation includes all of the vocational evaluation activities necessary to develop defensible vocational expert opinions for deposition or trial testimony related to *LeBoeuf* and the 1997 *Schedule for Rating Permanent Disabilities*. It can also assist the parties in reaching a settlement by clearly describing all of the relevant factors involved in the case. This type of evaluation typically includes an interview with the applicant and vocational testing, unless it is not possible for the vocational expert to meet with the applicant.

Activity

A. The following are common activities for this type of evaluation:

1. Review of medical, employment, school, wage, deposition transcripts, surveillance videos and related records
2. Comprehensive interview of the applicant
3. Vocational testing
4. Evaluation of self-initiated return to work efforts
5. Transferable skills analysis (TSA), if completed
6. Assessment of vocational feasibility
7. Employability analysis to determine labor market access (LMA) and to identify post-injury suitable occupations, if any
8. Labor market survey, if completed
9. Report preparation, if completed
10. Correspondence with attorneys, applicant, claims administrator, and other parties by letter, e-mail, facsimile, etc.
11. Teleconference preparation
12. Teleconferences, telephone calls, etc.

Estimated average time to complete: 20-40 hours, plus additional time for voluminous records, multiple dates of injury, multiple impairments, complex employment and wage issues, significant non-industrial factors, and related complex issues.

B. The following are additional activities that may be needed for this type of evaluation:

1. Review of additional medical and vocational records, deposition transcripts, surveillance videos opposing expert's report(s), etc.
2. Supplemental reports and evaluation activities related to them
3. Updated labor market research needed because of revised medical restrictions, elapsed time since the initial labor market survey, etc.
4. Job analysis and report
5. Re-evaluations and reports
6. Functional capacity evaluation
7. Travel time for evaluations outside the vocational expert's office
8. Transportation expenses: Mileage, parking, air fare, public transit charges, etc.
9. Hotel room and board
10. Day office or meeting room rental for interview and testing of the applicant
11. Charge for late cancellation fee of evaluations within 5 workdays
12. Unanticipated additional services requested that are related to the vocational evaluation

Table 5*Preliminary Records Only LeBoeuf or DFEC Vocational Expert Evaluation for Settlement Only*

A Preliminary Records Only *LeBoeuf* or DFEC Vocational Expert Evaluation includes no interview or vocational testing of the applicant. It is based on summary medical, employment, and wage data provided by the referral source. It includes a limited evaluation and is not a complete and thorough vocational expert evaluation. Therefore, the results should be used for settlement purposes only. A Comprehensive DFEC Vocational Expert Evaluation for less than a 100% claim, a Combination DFEC, *LeBoeuf*, and LC 4662 Vocational Expert Evaluation for a 100% claim, or Comprehensive *LeBoeuf* Vocational Expert Evaluation as outlined would be necessary for a vocational expert (VE) to develop substantial vocational opinions for deposition or trial testimony.

Activity

A. The following are common activities for this type of evaluation:

1. Review of medical, employment, school, wage, deposition transcripts, surveillance videos and related records
2. Transferable skills analysis (TSA), if completed
3. Employability analysis to identify post-injury suitable occupations
4. Clarify earning capacity
 - a. Establish pre-injury earning capacity of the applicant and the control group of similarly situated employees
 - b. Establish post-injury earning capacity of the applicant or a similarly situated employee
5. Clarify worklife expectancy or establish another time frame for comparison of post-MMI control group earning capacity with post-MMI earning capacity of the applicant
6. Calculate DFEC with a numeric formula
7. Report preparation, if completed
8. Correspondence with attorneys, applicant, claims administrator, and other parties by letter, e-mail, facsimile, etc.
9. Teleconferences, telephone calls, etc.

Estimated average time to complete: 5-15 hours, plus additional time for voluminous records, multiple dates of injury, multiple impairments, complex employment and wage issues, significant non-industrial factors, and related complex issues.

B. The following are additional activities that may be needed for this type of evaluation:

1. Additional review of medical and vocational records, deposition transcripts of physicians and the applicant, surveillance videos, etc.
2. Labor market research
3. Supplemental reports and evaluation activities associated with them
4. Unanticipated additional services requested that are related to the vocational evaluation

Table 6 includes the typical activities required for a Comprehensive DFEC Vocational Expert Evaluation for a claim of less than 100% disability. This comprehensive evaluation includes all of the vocational evaluation activities necessary to develop defensible vocational expert opinions for deposition and trial testimony related to the 2005 *Schedule for Rating Permanent Disabilities*, or the most recent *Schedule*, if revised. The results of this comprehensive evaluation can also lead to settlement by the parties. This comprehensive evaluation typically includes an interview with the applicant and vocational testing, if necessary, unless it is not possible for the vocational expert to meet with the applicant. The focus of this type of

evaluation is on claims that are less than 100%, where the applicant is expected to be able to return to work.

Table 7 provides the typical activities required for a Combination DFEC, *LeBoeuf*, and Labor Code section 4662 Vocational Expert Evaluation for a case involving a claim for permanent and total (100%) disability. Services include all of the vocational evaluation activities necessary to develop defensible vocational expert opinions for deposition and trial testimony regarding vocational feasibility, employability, and earning capacity. The results of the evaluation can also be used by the parties to negotiate settlement. This type of evaluation typically includes an interview with the applicant as well as vocational testing, unless it is not

Table 6*Comprehensive DFEC Evaluation for a Claim of Less than 100% disability*

A Comprehensive DFEC Evaluation for a claim of less than 100% disability includes all of the vocational evaluation activities necessary to develop defensible vocational expert opinions for deposition and trial testimony regarding employability and earning capacity. It can also assist the parties in reaching a settlement. This type of evaluation typically includes an interview with the applicant and may include vocational testing, unless it is not possible for the vocational expert to meet with the applicant. This type of evaluation focuses on claims of less than 100% disability regarding an attempt to rebut the FEC adjustment factor in Labor Code section 4660.

Activity**A. The following are common activities for this type of evaluation:**

1. Review of medical, employment, school, wage, deposition transcripts, surveillance videos and related records
2. Comprehensive interview of the applicant
3. Vocational testing, as necessary to develop opinions
4. Transferable skills analysis (TSA), if completed
5. Evaluation of amenability to rehabilitation
6. Employability analysis to determine labor market access (LMA) and identify post-injury suitable occupations, if any
7. Labor market survey, if completed
8. Analysis of *Montana* factors
9. Clarify earning capacity
 - a. Establish pre-injury earning capacity of the applicant and the control group of similarly situated employees
 - b. Establish post-injury earning capacity of the applicant or a similarly situated employee
10. Clarify worklife expectancy or establish another time frame for comparison of post-MMI control group earning capacity
11. Calculate DFEC with a numeric formula
12. Report preparation, if completed
13. Correspondence with attorneys, applicant, claims administrator, and other parties by letter, e-mail, facsimile, etc.
14. Teleconference preparation
15. Teleconferences, telephone calls, etc.

Estimated average time to complete: 15-40 hours, plus additional time for voluminous records, multiple dates of injury, multiple impairments, complex employment and wage issues, significant non-industrial factors, and related complex issues.

B. The following are additional activities that may be needed for this type of evaluation:

1. Review of additional medical and vocational records, deposition transcripts, surveillance videos, opposing expert's report(s), etc.
2. Supplemental reports and evaluation activities related to them
3. Updated labor market research needed because of revised medical restrictions, elapsed time since the initial labor market survey, etc.
4. Job analysis and report
5. Re-evaluations and reports
6. Functional capacity evaluation
7. Travel time for evaluations outside the vocational expert's office
8. Transportation expenses: Mileage, parking, air fare, public transit charges, etc.
9. Hotel room and board
10. Day office or meeting room rental for interview and testing of the applicant
11. Charge for late cancellation fee of evaluations within 5 workdays
12. Unanticipated additional services requested that are related to the vocational evaluation

possible for the vocational expert to meet with the applicant. The focus of this evaluation is on claims for 100% permanent disability, where there is a question regarding whether the applicant can return to any occupation in the open labor market.

The services included in Table 7 are used for the rebuttal method in *Ogilvie III* that addresses whether or not an applicant is amenable to rehabilitation. Table 7 also includes the services needed for an evaluation of all of the facts of a case in relation to Labor Code section 4662. Finally, the evaluation services included in Table 7 apply to an evaluation where a vocational expert is asked to develop vocational opinions under the 1997 *Schedule* and the 2005 *Schedule* when there is a question as to which schedule applies in a particular case.

Table 8 describes typical services related to vocational expert deposition and trial testimony.

Table 9 depicts the various types of vocational evaluation and testimony services in a timeline format. Vocational expert services can begin with any type of evaluation. However, deposition or trial testimony would typically only occur after a complete evaluation. In addition, any type of evaluation can be followed by an updated opinion and supplemental report or a re-evaluation and report. There can be multiple supplemental reports and re-evaluation in a given case.

Definition and Qualifications of a Vocational Expert

A vocational expert is a person who relies on graduate training in vocational rehabilitation or a related field, combined with additional training related to forensics, and skills and experience, to review medical, vocational, wage, and other records, interview and test evaluatees, analyze transferable skills, vocational feasibility, employability, and earning capacity, assess return to work efforts, develop opinions regarding pre- and post-incident employability and earning capacity, prepare comprehensive reports, and provide expert testimony at depositions and trials.

According to the fourth edition of the *Rehabilitation Consultant's Handbook* (Weed & Field, 2012):

The vocational expert is a professional who should possess the following specific areas of expertise related to assessment, rehabilitation planning, and employment/wage analysis of vocational issues of the injured worker.

1. *Be familiar with the general field of vocational rehabilitation, including federal and state laws and regulations of pertinent programs, e.g., Workers' Comp., Jones Act, etc.*
2. *Be knowledgeable of vocational, educational, and psychological assessment procedures, in-*

cluding tests, work samples, and measures often used in the assessment of vocational potential.

3. *Be familiar with and able to utilize standard references covering issues of occupations, employment, labor market, and wage resources, e.g., Dictionary of Occupational Titles (1991), the Transitional Classification of Jobs (6th edition, 2004), the O*NET database and related documents (see references).*
4. *Be familiar with the concept of "transferability of skills" and able to utilize this analysis process in determining loss of vocational functioning due to injury.*
5. *Be knowledgeable of competencies involved in "job analysis" of the worker's previous jobs, as well as jobs in general as they exist in a local economy.*
6. *Be able to determine the potential for future employment of the injured worker based upon the worker's transferable skills and capacity for work, especially as the worker's potential relates to the worker's own labor market. The VE should also be able to estimate a loss of access to particular jobs that exist in the economy as a result of the injury to the worker.*
7. *Be knowledgeable of wage and earnings data for jobs that exist in the economy and be able to estimate a wage loss based upon the worker's loss of access to employment to the economy. The VE should be able to assist the attorney in estimating the loss of power to earn money as a result of the injury and be able to provide sufficient employment and job data to an economist for the purposes of calculating the loss of future earnings.*
8. *Be familiar with procedures, processes, and resources for rehabilitation planning and/or training relative to the physical and/or psychological needs of the injured worker. This area of work would include utilizing client interviewing skills; referring clients to appropriate consultants for functional assessment (e.g., physicians, psychologists, physical therapists, etc.); planning for services such as medical treatment, education, etc.; coordinating services during the rehabilitation process; providing necessary job analyses, training and orientation, and job placement; and most importantly, writing comprehensive and relevant reports and summaries on all aspects of the worker's situation. This may include skills related to the development of a life care plan.*
9. *Be able to serve as a consultant to a variety of other professionals involved in the total rehabilitation/litigation process of the injured*

Table 7

Combination DFEC, LeBoeuf, and LC 4662 Vocational Expert Evaluation for a 100% claim

A Combination DFEC, *LeBoeuf*, and LC 4662 Vocational Expert Evaluation for a 100% claim includes all of the vocational evaluation activities necessary to develop defensible vocational expert opinions for deposition and trial testimony regarding vocational feasibility, employability, and earning capacity. It can also assist the parties in reaching a settlement by clearly describing all relevant factors involved in the case. This type of evaluation typically includes an interview with the applicant as well as vocational testing, unless it is not possible for the vocational expert to meet with the applicant. This type of evaluation focuses on claims for 100% permanent disability, where there is a question regarding whether the applicant can return to any occupation in the open labor market. This type of evaluation also applies where there is a question regarding which *Schedule* applies in a particular case.

Activity

A. The following are common activities for this type of evaluation:

1. Review of medical, employment, school, wage, deposition transcripts, surveillance videos and related records
2. Comprehensive interview of the applicant
3. Vocational testing, as necessary to develop opinions
4. Transferable skills analysis (TSA), if completed
5. Evaluation of amenability to rehabilitation
6. Employability analysis to determine labor market access (LMA) and identify post-injury suitable occupations, if any
7. Labor market survey, if completed
8. Analysis of *Montana* factors
9. Clarify earning capacity
 - a. Establish pre-injury earning capacity of the applicant and the control group of similarly situated employees
 - b. Establish post-injury earning capacity of the applicant or a similarly situated employee
10. Clarify worklife expectancy or establish another time frame for comparison of post-MMI control group earning capacity
11. Calculate DFEC with a numeric formula
12. Report preparation, if completed
13. Correspondence with attorneys, applicant, claims administrator, and other parties by letter, e-mail, facsimile, etc.
14. Teleconference preparation
15. Teleconferences, telephone calls, etc.

Estimated average time to complete: 20-50 hours, plus additional time for voluminous records, multiple dates of injury, multiple impairments, complex employment and wage issues, significant non-industrial factors, and related complex issues.

B. The following are additional activities that may be needed for this type of evaluation:

1. Review of additional medical and vocational records, deposition transcripts, surveillance videos, opposing expert's report(s), etc.
2. Supplemental reports and evaluation activities related to them
3. Updated labor market research needed because of revised medical restrictions, elapsed time since the initial labor market survey, etc.
4. Job analysis and report
5. Re-evaluations and reports
6. Functional capacity evaluation
7. Travel time for evaluations outside the vocational expert's office
8. Transportation expenses: Mileage, parking, air fare, public transit charges, etc.
9. Hotel room and board
10. Day office or meeting room rental for interview and testing of the applicant
11. Charge for late cancellation fee of evaluations within 5 workdays
12. Unanticipated additional services requested that are related to the vocational evaluation

Table 8
Vocational Expert Deposition and Trial Testimony Services

Activity

1. Correspondence with attorneys, the court, claims administrator, and other parties related to the scheduling and confirming of depositions and trials
2. Preparation for pre-deposition and trial conference or teleconference (Additional time is required when a deposition is used in lieu of trial testimony.)
3. Pre-deposition and pre-trial conferences or teleconferences with attorney(s) (Additional time is required when a deposition is used in lieu of trial testimony.)
4. Deposition preparation (Additional time is required when a deposition is used in lieu of trial testimony.)
5. Deposition appearance
6. Trial preparation
7. Trial appearance
8. Additional teleconferences, telephone calls, etc.
9. Late cancellation of depositions or trials within 5 workdays
10. Deposition or trial travel time
11. Transportation expenses: Mileage, parking, air fare, public transit charges, etc.
12. Hotel room and board
13. Items 1-12 above will be repeated if the deposition or trial is continued or rescheduled shortly before the deposition or trial.
14. Unanticipated additional services requested that are related to the deposition or trial

worker by offering clear, concise, and pertinent information to the relevant issues involved.

10. *Be skilled in the area of vocational presentation in depositions and judicial hearings relative to all areas of the vocational rehabilitation process of the injured worker.*
11. *Under the rules of the Daubert and Kumho rulings, the VE (or any expert) is required to offer testimony that can meet the test(s) of relevant and reliable information as the basis for testimony. While it appears that the Kumho ruling is more relevant to the work of the vocational consultant, the specific criteria for testimony under Daubert cannot be ignored (see Field, 2006, 2011).*
12. *Consistent with the point above, the VE must be cognizant of the requirements for being clear and consistent about methodologies used in the preparation of expert testimony. Reliable and relevant sources of data and information must be utilized in the formulation of opinion. (p. 34-35)*

The occupational title of Vocational Expert is included in the title of Vocationologist in the McCroskey Vocational Quotient System (2012). The occupational title of Vocationologist is defined in The Job Definitions Report from the McCroskey Vocational Quotient System as follows:

Plans, develops, conducts, analyzes, synthesizes and applies studies of components, structures, mental and physical capacities, job demands, worker requirements, and relationships between workers and occupations, jobs, positions, labor markets and earning patterns to determine underlying relationships, pre and post worker trait factor profiles of employability and earning capacity within the context of one or more specific relevant labor market of interest: Studies specific details of past relevant work history (typically considered to be successful personal work history having occurred over the past 15 years) to establish the highest typical levels of trait factor vocational functioning demonstrated across past relevant work history. Develops, or utilizes existing techniques, measurement devices, tests and rating scales, to analyze job requirements and individual profiles of vocational functioning in terms of the same standard set of vocationally significant job demand/worker trait requirement trait factors in order to draw conclusions and inferences in oral or written form regarding an individual's employability, return to work potential, and earning capacity relative to specific labor markets of interest, to a reasonable degree of vocational, rehabilitation economic and statistical certainty. Uses vocational testing, job analysis, rehabilitation economic, and statistical analysis techniques to determine relationships between work capacity, job demands, residual transferable skills, training potential and compen-

Table 9
Vocational Evaluation and Testimony Timeline

Step 1

- a. Preliminary Records Only *LeBoeuf* Evaluation for Settlement (1997 *Schedule*), possibly followed by a complete evaluation, Table 5
- b. *LeBoeuf* Vocational Evaluation (1997 *Schedule*), for a claim at or near 100%, Table 4
- c. Preliminary Records Only DFEC Evaluation for Settlement (2005 *Schedule*, LC 4660), possibly followed by a complete evaluation, Table 5
- d. Comprehensive DFEC Evaluation (2005 *Schedule*, LC 4660), for a claim less than 100%, Table 6
- e. Comprehensive DFEC and LC 4662 Evaluation (2005 *Schedule*, LC 4660 and LC 4662), for a claim at or near 100%, Table 7
- f. Combination *LeBoeuf*, DFEC, and LC 4662 Evaluation (Use of the 1997 or 2005 *Schedule* is in dispute), for a claim at or near 100%, Table 7

Step 2	Step 3	Step 4	Step 5 and continuing
a. Possible complete evaluation	Possible review of additional records and supplemental report preparation (May repeat 5-10 times or more)	Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible repetition of step 3 and Step 4
b. Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible re-evaluation and report (May repeat several times)	Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible repetition of step 3 and Step 4
c. Possible complete evaluation	Possible re-evaluation and report (May repeat several times)	Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible repetition of step 3 and Step 4
d. Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible re-evaluation and report (May repeat several times)	Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible repetition of step 3 and Step 4
e. Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible re-evaluation and report (May repeat several times)	Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible repetition of step 3 and Step 4
f. Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible re-evaluation and report (May repeat several times)	Possible deposition or trial testimony, Table 8 (Either may continue for several days)	Possible repetition of step 3 and Step 4

sation for work performed. Performs job analyses in accordance with the US DOL Handbook for Analyzing Jobs (HAJ) or related reliable job analysis methods for analyzing jobs. Works with attorneys, doctors, court systems, workers, disabled individuals, employers, counselors, evaluators, psychologists, school personnel, nurses, chiropractors, physical and occupational therapists or related rehabilitation professionals. May specialize as a Vocational Expert (VE), Forensic Vocational Consultant, Vocational Analyst, Certified Rehabilitation Economist (CRE), Certified Earnings Analyst (CEA), Certified Rehabilitation Vocationologist (CRV), American Board of Vocational Experts (ABVE) Forensic Consultant, or Educator, and be designated accordingly. Source-Original Job Analysis data and written job description first published in *The Vocationologist* Volume 1, Issue 1, 4/13/92, pp. 1-2, authored by Dr. Scott Streater, D.V.S., the first person to describe Occupational Group 042 "Occupations in Vocationology." This group includes occupations primarily concerned with the scientific collection, testing, rating, analysis, synthesis, integration, interpretation and application of relevant trait factor data pertaining to the correspondence between human capacities, skills, abilities, tolerances, needs and behaviors relative to general adult norms and typical worker trait requirements of jobs and reinforcers available to individuals in specific labor markets of interest. Primary emphasis is placed upon studying, understanding and quantifying aspects of an individual's employability & job requirements in relevant labor markets of interest (RLMI), and their earning capacity at selected points over time (past, present & future), considering past, current and future vocational functioning, given the individual's age, education, relevant work and earnings history, career development, vocational and educational potential, and pre/post earning capacity quantified through vocational and rehabilitation economic analysis of human capacities, past and current behaviors, activities of daily living, socialization skills, mental and physical disabilities and restrictions, level of independence, available labor market opportunities and associated pay rates in the RLMI, relevant labor market access, availability, utilization, specific vocational preparation, past skills, residual transferable skills, general and specific educational development, aptitudes, achievements, abilities, physical capacities, environmental tolerances, interests, temperaments, needs, educational potential and related matters relative to typical job demands, mental & physical requirements of work, environmental working condition, work activities, work situations, and reinforcers in specific relevant labor markets of interest. Dr. Streater's Vocationologist Profile and Job Description were first entered into the McCroskey Dictionary of Occu-

pational Titles (McDOT Vers. 8.0) on 5/26/97. (pp. 1, 2)

Regarding qualifications of a vocational expert, Berg (2003) noted that vocational experts "must have a master's degree and a certified rehabilitation counselor or American Board of Vocational Experts credential to receive forensic referrals from the state fund" (p. 93) for vocational evaluations regarding workers' compensation arranged by the state fund in Washington.

Hultine (2003) reported that a professional is qualified to complete loss of earning capacity evaluations related to workers' compensation in Nebraska "if the American Board of Vocational Experts (ABVE) has certified an individual as a Vocational Expert (VE), or the Commission on Rehabilitation Counselor Certification has recognized an individual as a Certified Rehabilitation Counselor (CRC)" (p. 107).

Johnston and Growick (2003) reported that Employability Assessors that provide vocational evaluations for the Ohio Industrial Commission are required to:

Possess a minimum of a Master's degree in Rehabilitation, Education, Psychology, or related fields; Have 5 years of experience in vocational rehabilitation services; Be certified by the American Board of Vocational Experts (ABVE), or be a Certified Vocational Evaluator (CVE), Certified Rehabilitation Counselor (CRC), or Certified Insurance Rehabilitation Specialist (CIRS); Maintain up-to-date knowledge of industrial and occupational trends; Have the ability to evaluate employability in light of age, education, work experience and psychological/social factors; Have knowledge in standard vocational references and computerized vocational database systems; and Be experienced in developing information about job requirements and presenting and defending vocational expert opinions. (p. 115)

Van de Bittner (2006) explained that, "The training, skills, and experience of a vocational expert chosen to conduct a diminished future earning capacity evaluation will likely have an impact on the outcome" (p. 29).

Van de Bittner noted:

The parties may wish to consider the minimum requirements for certification as a vocational expert by the American Board of Vocational Experts (2003) in this regard. Among other things, certification at the diplomate level requires a master's degree or a doctorate in human services or a related field plus 7 years of vocational expert forensics experience. Fellow status has the same education requirement but with 3 years of vocational expert forensics experience. (p. 29)

White Paper: IARP-DFEC Work Group (Austin et al., 2009) provided the following list of recommended qualifications for a vocational rehabilitation expert:

- a. Graduate degree in vocational rehabilitation, the behavioral sciences, human services or a related field;
- b. Specialized training in the area of vocational rehabilitation as it relates to forensics;
- c. Certification as a Certified Rehabilitation Counselor (CRC), (and) no additional experience or Certified Disability Management Specialist (CDMS) and 3 years of experience. Both certifications require passage of a national certification examination, adherence to a code of ethics, continuing education requirements, and a peer review process (The certifications are awarded and monitored by the Commission on Rehabilitation Counselor Certifications and the Certification of Disability Management Specialists Commission respectively);
- d. Vocational Rehabilitation Experts have the knowledge, skill, experience, training and education to provide opinions and testimony regarding the effects of impairments and disabilities on employability and earning capacity;
- e. Membership in relevant professional organizations or associations. (pp. 147–148)

The California Family Code section 4331 (Retrieved on 1/9/12) requires that:

A vocational training counselor (vocational expert) shall have at least the following qualifications:

- a. A master's degree in the behavioral sciences
- b. Be qualified to administer and interpret inventories for assessing career potential.
- c. Demonstrated ability in interviewing clients and assessing marketable skills with understanding of age constraints, physical and mental health, previous education and experience, and time and geographic mobility constraints.
- d. Knowledge of current employment conditions, job market, and wages in the indicated geographic area.
- e. Knowledge of education and training programs in the area with costs and time plans for these programs.

Finally, regarding the qualifications of a vocational expert, Weed and Field explained in the fourth edition of the *Rehabilitation Consultant's Handbook* (2012):

One qualification that generally supersedes other qualifications for expert status is the attainment of a terminal degree or doctorate in a vocationally related area such as guidance and counseling, vocational counseling, and/or vocational rehabilitation counseling. Publication in professional journals will typically enhance the recognition of the vocational specialist as an expert, as will a vocationally related professorial appointment at a college or university

(i.e., adjunct status). Some of the more relevant journals to the profession of forensic rehabilitation consulting are:

The Rehabilitation Professional (International Association of Rehabilitation Professionals)

Journal of Life Care Planning (International Academy of Life Care Planners)

Journal of Forensic Rehabilitation Research (Academy of Forensic Rehabilitation Research)

Forensic Rehabilitation and Economics: A Journal of Debate and Discussion (E&F, Inc.)

Journal of Vocational Forensic Analysis (American Board of Vocational Experts) (p. 33–34)

There are many professional, business, and administrative reasons for establishing a minimum education requirement of a Master's degree in vocational rehabilitation or a closely related field to provide vocational evaluation, testimony, and related services under the vocational expert fee schedule. One important reason is the minimum level of education required by test publishers to purchase tests that are commonly administered during the course of a vocational evaluation to assess employability and earning capacity. For example, PEARSON/Psych Corp (2012) requires the following qualifications to purchase the *Beta II*, *Raven Progressive Matrices*, and *Career Assessment Inventory*:

Certification by or full active membership in a professional organization (APA, ASHA, AOTA, AERA, ACA, AMA, NASP, NAN, INS, CEC, AEA, AAA, EAA, NAEYC) that requires training and experience in a relevant area of assessment

OR

A master's degree in psychology, education, occupational therapy, speech-language pathology, social work, or in a field closely related to the intended use of the assessment, and formal training in the ethical administration, scoring, and interpretation of clinical assessments. (p. vi)

In addition, EdITS (2005) requires a graduate degree or countersignature of a sponsoring professor for graduate students when ordering the *Career Ability Placement Survey* and the *Career Occupational Preference System*. Moreover, Harcourt Educational Measurement (2001) requires a Master's degree to purchase the *Differential Aptitude Tests*. While some tests can be purchased by individuals with a B.A. degree in psychology, not having at least a Master's degree significantly limits the choices available to the test administrator. More importantly, the skills required to properly select, administer, and interpret the results of tests are typically learned through graduate courses and supervised internships in vocational rehabilitation, psychology, and related fields.

Labor Code section 139.2 addresses, among other things, the qualifications of agreed medical evaluators and qualified medical evaluators who complete medical-legal evaluations for California workers' compensation cases (Bae, 2012, p. 159). Similarly, minimum education and certification standards will likely be established by the California Division of Workers' Compensation in relation to the vocational expert fee schedule required by Labor Code section 5307.7 (Bae, 2012). There is a surprising consistency in the minimum education and certification requirements of vocational experts who conduct vocational evaluations and testify in state workers' compensation cases cited above by Berg (2003), Hultine (2003), Johnston and Growick (2003), Van de Bittner (2006), and the California Family Code (2005). The California Division of Workers' Compensation may want to consider similar minimum education and certification qualifications for vocational experts under California's vocational expert fee schedule regarding workers' compensation cases such as a Master's or Doctoral degree in vocational rehabilitation, the behavioral sciences, human services, or a closely related field, and certification as a Certified Rehabilitation Counselor (CRC) by the Commission on Rehabilitation Counselor Certification (CRCC) or certification as a vocational expert at the Fellow or Diplomate level by ABVE.

In the experience of the authors, there is a small number of former Qualified Rehabilitation Representatives that currently conduct vocational evaluations regarding DFEC and testify at the Workers' Compensation Appeals Board that do not meet the above minimum education and national certification requirements. A 5-year grandfathering provision could be established to allow such individuals to continue to provide vocational expert services under the vocational expert fee schedule while completing readily available on-line or after hours classroom training to earn a Master's degree in vocational rehabilitation or a related field and obtain ABVE Fellow or Diplomate certification or CRCC certification.

Vocational experts often arrange for other individuals to perform certain services during the course of a vocational evaluation, such as administering tests, conducting labor market and school research, and completing a preliminary record review. The vocational expert should insure that such individuals meet the minimum educational, skill, experience, and other requirements for the services they perform and that all services are properly monitored by the vocational expert.

Vocational Expert Fees

Labor Code section 5307.7 (Bae, 2012) requires the Administrative Director of the California Division of Workers' Compensation to develop a vocational expert fee schedule. Section 5307.7 states:

(a) *On or before January 1, 2013, the administrative director shall adopt, after public hearings, a fee schedule that shall establish reasonable hourly fees paid for services provided by vocational experts, including, but not limited to, vocational evaluations and expert testimony determined to be reasonable, actual, and necessary by the appeals board.*

(b) *A vocational expert shall not be paid, and the appeals board shall not allow, vocational expert fees in excess of those that are reasonable, actual, and necessary. Leg.H. 2011 ch. 555 (AB 1168) §1. (p. 386)*

In the experience of the authors, customary fees charged by vocational experts in California in civil arenas, such as third party, personal injury, medical malpractice, employment law, family law, and related cases range from \$250.00 to \$500.00 per hour. Many vocational experts in civil cases charge a higher fee for depositions and trials than for conducting evaluations. In California workers' compensation cases, fully qualified, knowledgeable, and experienced vocational experts charge fees ranging from \$200.00 to \$300.00 per hour. Many vocational experts in California workers' compensation cases charge a higher fee for depositions and trials than for conducting vocational evaluations.

A recommended structure for the new vocational expert fee schedule is depicted in Tables 10 and 11 below. Basically, this is a 3-tier fee structure by education level combined with a premium for agreed vocational evaluations. The standard hourly fee would be set for fully qualified vocational experts with a Master's degree and Fellow or Diplomate certification by ABVE or CRC certification by the CRCC. Fully qualified vocational experts with a Doctorate (Ph.D., Ed.D., etc.) and Fellow or Diplomate certification by ABVE or CRC certification by CRCC would be paid at 1.25% of the standard hourly fee. During the grandfathering period, B.A.-level vocational specialists would be paid 75% of the standard hourly fee. This type of payment structure is consistent with the findings of the U.S. Department of Labor in *Education Pays in Higher Earnings and Lowered Unemployment Rates* (2007-2010) where persons with a Master's degree earned 18-25% more than those with a Bachelor's degree and persons with a Doctoral degree earned 22-28% more than those with a Master's degree.

In addition, a premium of 25% would be paid to an agreed vocational evaluator on a particular case. Under the Medical Legal Fee Schedule, Agreed Medical Evaluators are paid a higher hourly fee than Qualified Medical Evaluators (Bae, 2012, pp. 1073, 1074). In addition, a premium of at least 50% would be paid for depositions and trial appearances. Knowing there is a fee premium for depositions and trial appearances can offer a modicum of solace to a vocational expert being

Table 10
Vocational Expert Fee Level by Education Level

Education level	Vocational expert fee level
Master's degree	Standard fee
Doctoral degree	Standard fee plus 25%
Bachelor's degree (used during grandfathering)	Standard fee minus 25%

Table 11
Fee Premiums by Referral Type and for Depositions and Trials

Referral type	25% fee premium by referral type	50% fee premium for depositions and trials
Agreed vocational evaluation	Yes	Yes
Qualified vocational evaluation	No	Yes

subjected to rigorous cross-examination at a deposition or trial.

It is common knowledge among vocational experts, attorneys, and others that the process of determining the most accurate permanent disability rating with combined medical and vocational evidence has increased in complexity with each passing year, especially since SB 899 became law and the 2005 *Schedule for Rating Permanent Disabilities* became effective. In addition, the dollar value of permanent disability awards has increased in recent years to the level commonly seen in personal injury, employment law, and other civil cases, particularly for applicants with a work injury after January 1, 2003. A new cost of living allowance applies to permanent disability awards for injuries on or after January 1, 2003.

Under the 1997 *Schedule for Rating Permanent Disabilities* and *LeBoeuf* (1983), vocational experts provided an opinion regarding an applicant's employability. Under the 2005 *Schedule for Rating Permanent Disabilities*, a vocational expert continues to develop opinions regarding employability. In addition, the vocational expert must develop opinions regarding both pre-injury and post-injury earning capacity, identify an appropriate control group of similarly situated employees, and calculate DFEC with a numeric formula that will be accepted by the court. In many ways, the vocational expert is expected to provide a combination of vocational and economic opinions. Moreover, since *Ogilvie III*, a vocational expert needs to be even more familiar with the RAND studies related to an attempt to rebut the *Schedule*. All of these factors require a vocational expert to have a very high level of education, knowledge, skills, and experience to provide evaluation and testimony services that are productive, effective, and beneficial to the parties and the court.

For the above reasons, it is important to create a fee schedule structure that will encourage the most highly qualified vocational experts to offer their services in the California workers' compensation arena. While a fee lower than the standard fee is appropriate for B.A.-level vocational specialists, a fee higher than the standard fee is appropriate for Doctorate-level vocational experts. Vocational experts at the Doctorate level are commonly referred cases with the greatest level of complexity because of the advanced assessment, analytical, research, problem solving, and other skills learned through doctoral training that typically requires 3-5 years of advanced graduate education beyond the Master's level. Doctoral training also typically involves advanced graduate coursework in rehabilitation counseling and consulting, testing, rehabilitation engineering, disability management, rehabilitation economics, and statistics, plus a supervised internship and a dissertation. Vocational experts at the Doctorate level commonly migrate from the workers' compensation arena to personal injury, employment law, and other civil arenas where they are paid higher fees than in the workers' compensation arena. However, because of the increasing complexity of workers' compensation cases, vocational experts with education, knowledge, skills, and experience at the Doctorate level are often most needed for workers' compensation cases. In summary, it is important to structure the fee schedule to ensure a full complement of fully qualified vocational experts for cases at all levels of complexity in all geographic regions of California.

It is strongly recommended that the vocational expert fee schedule be structured to require fee advances for budgeted vocational evaluation, deposition, and trial testimony and related services. The California Code of

Civil Procedure section 2034.450 (Bae, 2008) mandates that physicians be paid prior to the commencement of a deposition and that any overage be paid within 5 days of the deposition. Fee advances are customary for medical, vocational, and other expert services in third party, personal injury, employment law, family law, and other civil cases. Many vocational experts are routinely paid in advance for vocational evaluation, deposition, and trial services in California workers' compensation cases. At the same time, in the event that vocational experts are not paid within 60 days of an invoice, a service charge or penalty should be paid to the vocational expert along with the late payment in the same manner that agreed medical evaluators and qualified medical evaluators are paid for payments after 60 days.

In the experience of the authors, a payment structure based on fee advances results in significant cost savings to both the claims administrator and the vocational expert. Arranging and monitoring a fee advance procedure requires far less time and expense than that associated with payment after services are provided, particularly when considering the personnel and expense costs to all parties associated with collections, interest, penalties, and in some cases ongoing litigation expenses. A fee advance structure would also significantly reduce the need for lien trials, which would result in significant cost savings to the parties related to litigation and to the Division of Workers' Compensation related to reduced trials. Finally, a fee advance structure would result in further cost savings because of decreased litigation over the activities of bill review companies.

Labor Code section 5307.7 refers to a reasonable hourly fee, not a maximum hourly fee or an average hourly fee. For any vocational expert fee schedule to be effective, it will need to include an hourly rate that will insure that fully qualified and competent vocational experts are attracted to and will want to continue to provide services under the fee schedule. As a result, the reasonable hourly fee included in the fee schedule may be higher than the recent average hourly fee that vocational experts have charged for evaluations and testimony in California workers' compensation cases.

In addition, it is important that the vocational expert fee schedule include a cost of living allowance. This can be arranged in the same or similar manner to the cost of living allowance for permanent disability benefits to injured workers.

Ethics for Vocational Experts

Labor Code section 139.2 (Bae, 2012, p. 163) addresses financial conflicts for agreed medical evaluators and qualified medical evaluators. Vocational experts certified by ABVE and CRCs who are certified by CRCC

are required to abide by codes of ethics. Johnston and Growick (2003) noted that, "Employability Assessors (vocational experts) are excluded from performing assessments on claimants they have evaluated in the past, and may not accept the examined claimant for treatment in the future (IC of Ohio Employability Assessment Manual, 1996)" (p. 115).

The *Code of Professional Ethics for Rehabilitation Counselors by the Commission on Rehabilitation Counselor Certification* (2010) provides the following guidance regarding forensic business practices:

a. Payments and Outcome. Rehabilitation counselors do not enter into financial commitments that may compromise the quality of their services or otherwise raise questions as to their credibility. Rehabilitation counselors neither give nor receive commissions, rebates, contingency, or referral fees, gifts, or any other form of remuneration when accepting cases or referring evaluatees for professional services. . . (p. 17)

The *Code of Ethics for the American Board of Vocational Experts* (2007) provides the following guidance regarding Public Statements/Fees:

Vocational Experts will neither give nor receive a commission or rebate or any other form of remuneration to any Referral Source for the retainment of their professional services. (p. 9)

ABVE and CRCC discourage dual relationships and other ethical conflicts such as performing ongoing vocational counseling, job placement, or other services for an injured worker that the vocational expert has, is, or will conduct a vocational evaluation for vocational expert purposes. Financial conflicts should also be prohibited. Examples of financial conflicts would include engaging in professional, business, and related conflicts such as referring an injured worker who has, is, or will be evaluated for vocational expert purposes to a facility, school, or agency in which the vocational expert or a family member has a financial interest to receive training, equipment, or services related to the supplemental job displacement benefit.

Report Format

Table 12 provides a sample report format that can be used by vocational experts in California workers' compensation cases to promote consistency in providing evaluation results and opinions. In order to facilitate a quick review of vocational expert opinions, vocational experts should consider beginning their reports with a brief summary (1-3 pages) of their overall opinions.

Summary and Implications for Practice

Laws, regulations, and court decisions were reviewed as they relate to the evaluation of employability and

Table 12*Sample Report Format Related to LeBoeuf, DFEC, or LC 4662*

Overview
Summary of Opinions
Scope of Evaluation
Methodology
Record Review (if completed)
Interview (if completed)
Financial
Medical
School and Training History
Military Service
Work History
Self-initiated Return to Work Activities
Vocational Testing (if completed)
Transferable Skills Analysis
Vocational Feasibility
Rehabilitation Plan Options
Access to the Labor Market
Labor Market Research (if completed)
Placeability (if considered)
Earning Capacity
Labor Force Participation (Worklife Expectancy) (if considered)
<i>Montana Factors</i>
Ability to work
Age
Health
Willingness and opportunities to work
Skills and education
General conditions of the labor market
Employment opportunities for person similarly situated
Diminished Future Earning Capacity Analysis
Summary and Conclusions

earning capacity in workers' compensation cases in California. Various types of DFEC, *LeBoeuf*, and Labor Code section 4662 evaluations were outlined to both meet the requirements for conducting a vocational evaluation under *LeBoeuf*, Labor Code section 4660, *Ogilvie III*, and Labor Code section 4662 as well as in anticipation of the impending vocational expert fee schedule for workers' compensation cases in California. Issues related to qualifications and ethics of vocational experts were also discussed. A 3-tier payment structure was recommended together with a premium for cases involving an agreed vocational evaluation and a premium for depositions and trials. A sample report format was also presented.

The information contained in this article can be used by vocational experts evaluating applicants with claims for permanent partial disability and perma-

nent total disability in the workers' compensation system in California. At the same time, the concepts presented regarding the evaluation of employability and earning capacity can also be applied to other venues such as third party, personal injury, medical malpractice, employment law, family law, and others. The recommendations regarding the evaluation of employability and earning capacity as well as the comments regarding qualifications and ethics of vocational experts can provide a framework for discussion in relation to a new vocational expert fee schedule related to workers' compensation cases in California.

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Comments on "Evaluating Employability and Earning Capacity to Obtain the Most Accurate Permanent Disability Rating in California Workers' Compensation Cases After *Ogilvie III*"

William A. Herreras

The article presents a thorough analysis of the history of the laws, regulation and court decisions prior to the *Ogilvie* decision.

Also the article appropriately points out that Labor Code § 4662 provides another method of rebutting the schedule but this analysis deals with the traditional total disability cases. As §4662 provides "total disability shall be determined in accordance with the fact." (Emphasis added)

The remainder of the article deals with what most applicant attorneys and the parties face in evaluating disability of those individuals who suffer disabilities that range between 1% and 100%. The majority of cases that are litigated before the WCAB involve cases that are below 100% disability. The difficulty is therefore where you place the worker within the range of 1% to 100%.

The article appropriately points out that the RAND study only dealt with single injuries. Whereas many disabilities involve multiple parts of the body. Often persons who suffer multiple body part injuries suffer greater disability than those who suffer a single injury. The AMA Guides provide for some increase in disability when there are multiple parts of the body. But far too often the AMA rating, because the AMA guides do not deal with the effect of the injury in the workplace, fail to accurately reflect the full extent of the disability, when compared to the reduction diminished earning capacity.

Again, the vocational expert must evaluate the earning along with the so-called non-industrial factors such as language and education. If language and education were not a requirement in performing work of a similarly situated worker these factors should be considered in calculating the post-injury earnings. The language in *Ogilvie*, dealing with so-called nonindustrial factors, must ultimately be interpreted by the courts regarding non-industrial factors in light of this analysis. In other words, if the non-industrial factors such as language and education did not interfere with the injured worker's ability to earn a living then those factors should be considered in calculating the post-injury earning capacity as well.

The Van de Bittner formula, as contained in the article, is the most useful and shorthand tool in evaluating the diminished future earning capacity.

The most useful methodology is of course the methodology that is more comprehensive.

The "indicators" for obtaining a vocational evaluation are extremely important to applicant's attorney because applicant's attorney must make the economic judgment regarding whether to retain an expert and secure the necessary funding to pay for the vocational expert. The so-called Rosetta stone in selecting a vocational expert involves whether the worker can return to his previous occupation. The next step in the analysis is to determine whether the injured worker has received special accommodation from his employer in performing a modified job.

Even if the injured worker does not suffer immediate wage loss that worker must compete in the open labor market against other workers who do not suffer the same loss of ability to compete in the open labor market. As the court in *Ogilvie* pointed out, there is no meaningful difference between the loss of an opportunity to find work, the inability to compete in the open labor market and diminished future earning capacity. The both workers, one who is not able to return to their prior work (QIW status), and a worker who performs a modified job both may require the use of a vocational expert under the *Ogilvie* decision.

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Comments on "Comparison of a Consensus Methodology for Evaluating Employability and Earning Capacity by the CA-IARP DFEC Work Group with Published, Peer-Reviewed Methodologies" and "Evaluating Employability and Earning Capacity to Obtain the Most Accurate Permanent Disability Rating in California Workers' Compensation Cases After *Ogilvie III*"

Ted E. Richards

Expert opinion is appropriate and necessary where determination of an issue requires knowledge and expertise beyond that possessed by a layperson. As much as any area in California workers' compensation law, the extraordinarily complex and convoluted issues addressed by the *Ogilvie* decisions relating to rebuttal of the California Permanent Disability Rating Schedule (PDRS) and assessment of diminished future earning capacity (DFEC) require expert opinion. As the articles collected in this special issue of *The Rehabilitation Professional* highlight, the process under Labor Code sections 4660 and 4662, as informed by the court decisions in *Ogilvie III*, *LeBoeuf*, and *Montana*, requires a synthesis of legal, medical, economic, and vocational information and principles. Without a standardized and workable methodology with which to organize this process, the California Workers' Compensation system faces a quagmire of uncertainty and inconsistency sure to delay resolution of claims and encumber the system.

The methodologies described in this publication for evaluating DFEC in the context of California workers' compensation provide just such a standardized approach. They are consistent with published and peer-reviewed methods from other jurisdictions. They provide a framework with which to arrive at a result that is substantial evidence. They provide a mechanism to produce a consistent outcome upon which to evaluate claims and make settlement decisions.

Key to dealing with the issues surrounding DFEC is an analysis which addresses the requirements of *Ogilvie III* in a comprehensive manner that produces substantial evidence. I have found materials created by California WCJ Colleen Casey posted on Lexis and the DWC website to be particularly informative with regard to these issues and would recommend that any

person dealing with these issues review those materials closely. To the extent that my commentary coincides with the information found in those materials, this author acknowledges Judge Casey's analysis as a significant source of information.

As the decision in *Ogilvie III* makes clear, and the articles in this special issue of *The Rehabilitation Professional* address, the initial threshold with regard to the rebuttal of the PDRS on the issue of DFEC requires the use of one or more of three approaches: 1) a demonstration of factual error in the application of a formula or the preparation of the PDRS; 2) a demonstration of impairment of rehabilitation such that the DFEC is greater than reflected in the scheduled rating (*LeBoeuf*), or; 3) a demonstration that the injury involves complications not considered in the sampling used to compute the DFEC adjustment factor.

The burden of proving rebuttal by the above methods rests with the party seeking to rebut the PDRS. Thus, an applicant attempting to increase his or her rating through rebuttal of the PDRS must prove that one of the above three methods of rebuttal has been satisfied as a precursor to using a DFEC analysis to increase PD over the straight PDRS rating. The WCJ should, therefore, require that expert opinion offered by the applicant identify the method[s] of rebuttal relied upon and provide an adequate explanation of the basis for each method utilized.

The same scrutiny should apply to the calculation of an increase in PD based upon DFEC, assuming a DFEC exists. As noted in the articles in this publication, and as stated in the *Ogilvie* decisions, increases based upon a DFEC argument are limited to cases where the increased diminished future earning capacity is directly attributable to the employee's work-re-

lated injury and is not due to nonindustrial factors. The *Ogilvie III* court provided examples of factors for which the employer is not responsible such as general economic conditions, illiteracy, lack of proficiency in English, or lack of education. Other factors listed in the *Montana* decision are likewise not the responsibility of the employer such as lack of motivation and/or unwillingness to work, as well as non-industrial health issues.

An interesting question exists with regard to apportionment under Labor Code sections 4663 and 4664. With a standard rating string, once a PD level is calculated, that rating is then reduced by the percentage of the disability which overlaps with a prior Award or is caused by nonindustrial medical factors. If this apportionment has been accounted for in the methodology used to determine DFEC, then an argument exists that application of sections 4663 and 4664 has been satisfied. However, if the expert opinion has not accounted for all non-industrially caused disability when arriving at the DFEC, such disability should be apportioned under sections 4663 and/or 4664. For example, an expert may be able to account for a leg amputation that occurred prior to the work injury when eliminating jobs the applicant was unable to perform prior to the work injury. However, if a work injury to a shoulder then occurs which is caused by nonindustrial, previously asymptomatic, degenerative disease combined with a specific work injury, the expert may not be able to separate out the level of DFEC attributable to the degenerative disease versus the specific work injury, as compared to total effect of the shoulder problem on DFEC. In such a case, the defense should urge that the WCJ take the additional step of reducing the PD by applying apportionment consistent with *Escobedo*.

In summary, this discussion assumes a DFEC analysis by an expert whose opinion constitutes substantial evidence. Such an opinion should be based upon a reliable and credible methodology such as the ones described in this publication. The expert must identify the method[s] of rebuttal used and provide an adequate explanation of the basis for the opinion regarding rebuttal of the PDRS and the level of DFEC, if any. To be substantial evidence, the methodology and explanation should address age, occupation, and the nature of the injury, as well as the DFEC. When this is done, defendants should assert that the DFEC percentage represents the final PD level without adjustment using a rating string. Where appropriate, the defense should assert the application of Labor Code section 4663 and 4664 apportionment to the DFEC percentage.

As noted above, the expert's analysis should eliminate all nonindustrial factors contributing to the DFEC percentage. For example, when addressing the percentage of jobs the applicant cannot perform as a re-

sult of the industrial injury, the methodology should start by considering only the jobs the applicant was qualified to perform prior to the injury rather than all jobs in the labor market. Further, if vocational rehabilitation would reduce the DFEC rating, a methodology such as described in this publication should be used which accounts for the benefits of rehabilitation offset by the costs of rehabilitation. Finally, when a final PD percentage is obtained using a DFEC analysis, apportionment under Labor Code sections 4663 and/or 4664 should be applied to that rating where appropriate.

The keys to a consistent, reasonable result, even when the correct methodology is being used, are the quality of the facts addressed by the methodology and the competent and ethical application of the methodology. For this reason, it is essential that defendants' experts have access to the applicant for interviewing and testing. Further, it is essential that defendants conduct appropriate discovery to flesh out the nonindustrial factors described in the *Montana*, *Escobedo*, and the *Ogilvie* decisions. As well, the experts' training and expertise should be commensurate to the task of deciphering the DFEC issue.

The parties in a case would do well to consider the recommendations found in the articles in this publication related to the level of expertise required to address the DFEC issue. Cross examination relating to the opposing expert's qualifications should be thorough to expose any weaknesses that could affect the validity of that expert's opinions. Direct examination of the party's own expert should be thorough as well to demonstrate the expert's expertise and command of the material.

Finally, a review of case law suggests that a party should obtain a written report from the expert which should be served on the opposing party prior to the mandatory settlement conference (MSC). There are several benefits to this approach compared to simply naming an expert on the pre-trial conference statement at the MSC without providing a report. First, given the complexity of the issues involved, providing only oral expert testimony on these issues risks a WCJ missing or misinterpreting key portions of the expert's opinion. Providing a report that the WCJ can review while later weighing the evidence provides a much more powerful use of the expert testimony. A party that fails to serve an expert report by the MSC date risks having any report issued by its expert excluded. Further, the failure to provide reports at the MSC likely will result in depositions of the experts between the MSC and trial dates, which often create unnecessary litigation cost. Finally, failure to provide a report by the MSC could result in exclusion of the witness's testimony because the delayed disclosure may have eliminated the opportunity for fruitful settlement discussions.

The articles in this publication are important in many respects. They provide process and methodology legitimized by peer-review and by comparison to methodologies used in multiple jurisdictions. The methodologies provided are comprehensive in the factors and facts they consider and in addressing the necessary issues required for an opinion to be persuasive and substantial. If universally adopted, the methodologies should provide consistency and credibility that will allow parties the confidence to seek resolution when the opinion is provided by a competent expert ethically applying the methodologies.

Author Notes

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