The Rehabilitation Professional, 24(1), pp. 17–26

Evidence-Based Vocational Evaluation Recommendations for the California Workers' Compensation System

Steven L. Rockett and
Roderick C. Stoneburner

Senate Bill 899 substantially changed the method of determining permanent disability for California's industrially injured workers. The *AMA Guides to the Evaluation of Permanent Disability* (5th ed.), is now the basis of medical evaluation for permanent disability awards for the California workers' compensation system. A different approach and structure is needed to meet the criteria for substantial medical evidence determined by physicians and substantial vocational evidence as determined by vocational experts. Vocational experts must provide a reasonable factual basis for their work and conclusions. Vocational Experts are suppliers of facts to the triers of fact in the California workers' compensation system. VEs must be able to understand and apply Workers' Compensation Appeals Board rules and regulations, case law, and critical analyses such as causality and apportionment as defined by the California Labor Code Sections 4663 and 4664 or be at risk for having their forensic vocational evaluations rejected by the triers of fact. This paper addresses the structure and purpose of forensic vocational evaluations as pertains to the California workers' compensation process for evaluation of vocational disability. A comprehensive structure of the forensic vocational evaluation process, successfully utilized by the authors, is offered for consideration. Finally, the authors offer a review of case law regarding causation and apportionment, including a suggested process for the vocational evaluator to utilize.

Keywords: California workers' compensation, vocational evaluation, Senate Bill 899, causation, apportionment

On April 19, 2004, Senate Bill 899 (California Department of Industrial Relations, Division of Workers' Compensation, April 2005 & California Workers' Compensation Institute, 2004, April 20), signed into law by Governor Schwartzenegger, substantially changed the method of determining permanent disability for California's industrially injured workers. With regard to injured workers, physicians no longer determine work capacities or tolerance using medically determined work restrictions. The *AMA Guides to the Evaluation of Permanent Disability*, 5th Edition (*AMA Guides*, 2001), is the current basis of medical evaluation for permanent disability awards for the California workers' compensation system. As a result, the previous vocational evaluation process may no longer meet the requirement of substantial medical (vocational) evidence under the California workers' compensation system. It is apparent that a different methodology is needed to evaluate the criteria for substantial medical evidence determined by physicians. Vocational experts must provide a factual basis for their work and conclusions. They must be able to understand and apply Workers' Compensation Appeals Board rules and regulations, case law, and critical analysis such as causality and apportionment as defined by the California Labor Code Sections 4663 and 4664 or be at risk for having their work rejected, a consequence experienced by at least two vocational experts which is summarized later in this manuscript. This conceptual article offers recommendations for rehabilitation professionals who are engaged in offering vocational opinions in the California workers' com-

pensation system. Although this article is specific to California, implications and recommendations may apply to other states as well.

Summary of Requirements as of 2005

In California workers' compensation cases, physicians are required to apportion and address causation of permanent disabilities under Labor Code Sections 4663 & 4664.

4663. (a) Apportionment of permanent disability shall be based on causation.

(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.

(c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.

(e) Subdivisions (a), (b), and (c) shall not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

4664. (a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment. (b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

(c) (1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following:

(A) Hearing.

(B) Vision.

(C) Mental and behavioral disorders.

(D) The spine.

(E) The upper extremities, including the shoulders.

(F) The lower extremities, including the hip joints.

(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.

Forensic Vocational Evaluations Structure and Purpose

The Forensic Vocational Evaluation represents a process by which specific medical and vocational information may be used to quantify the injured worker's vocational disability by access to the labor market and diminished future earning capacity, a WCAB measurement of disability (Van de Bittner, 2006). Medical disability is defined by evaluating medical experts using the *AMA Guides* (2001). Assessment of medical disability is based upon activities of daily living, rather than ability to function in a competitive work environment (*AMA Guides*, 2001).

This method of vocational evaluation differs from the vocational evaluation process designed to develop a vocational rehabilitation plan in that it strictly measures current functional abilities in a clinical setting, rather than to identify and develop vocational skills and/or work skills that will lead to a specific occupation. Factual information in the form of medical evaluations, historical vocational data, vocational testing/work sampling, and situational assessment are the basis for this evidence-based vocational evaluation (Weed & Field, 2012). Vocational evaluations are used by the Social Security Administration to determine eligibility for Social Security disability benefits (Weed & Field, 2012). Vocational evaluations may be

used for litigation purposes including but not limited to personal injury, employment law, family law, and workers' compensation (Weed & Field, 2012).

In order to accurately conduct a forensic vocational evaluation for Diminished Future Earning Capacity designed to rebut the schedule, changes in the process must be considered as follows:

Assessment of Medical Information

It is proposed that medical experts are now using the *AMA Guides* (2001). The Vocational Expert no longer can rely solely upon "work restrictions" documented by the physician (*AMA Guides,* 2001). For a more detailed description of medical work capacity and medical work restrictions, the authors recommend the *AMA Guides™ to the Evaluation of Work Ability and Return to Work* (Talmage, Melhorn, & Hyman, 2011). The physician is generally not considered an authority for vocational issues, and the Vocational Expert must assume the responsibility of converting medical disability to vocational disability. Vocational Experts with appropriate educational background have been trained in medical aspects of disability, psychosocial aspects of disability, and cultural aspects of disability (Commission on Rehabilitation Counselor Certification, 2016). All objective medical data that quantify limitations or impairments should be considered.

The AMA requires evaluating physicians to use the measurement criteria found in the *AMA Guides* (2001), and must meet the requirement for substantial medical evidence supported by empirical information that is considered objective, measureable criteria (Talmage et al., 2011). The substantial medical evidence criteria include a multitude of diagnostic tools dependent on the medical specialty and the impairment being assessed (*AMA Guides*, 2014; Talmage et al., 2011). In California, based on Labor Code 4660.1, evaluating physicians are required to use the *AMA Guides* (2001) to determine whole permanent impairment rating based upon activities of daily living for each medical condition and/or body parts. The physician identifies the medical condition by diagnosis, and then refers to the appropriate section in the *AMA Guides* for a comparison of the patient's measureable impairments and/or limitations to the impairment rating criteria documented within the specific section. The physician has the option to use his or her professional judgment when conducting the impairment evaluations (Guzman, 2010).

The *AMA Guides* (2001) address the issue of Disability and Impairment in Section 1.2: Impairment, Disability, and Handicap. The *Guides* define impairment "as loss, loss of use, or derangement of any body part, organ system, or organ function" (p. 2). The impairment criteria documented in the *AMA Guides* provide a standardized method for physicians to use to determine medical impairment (p. 4). Impairment percentages or ratings were developed by medical specialists and are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the medical condition decreases an individual's ability to engage in activities of daily living. The *AMA Guides* further document the requirement to determine the effect of a specific impairment (functional limitations) on an individual's ability to perform work, the final step to determining disability. The *AMA Guides* specify that "The impairment evaluation, however, is only one aspect of disability determination. A disability determination also includes information about the "individual's skills, education, job history, adaptability, age, and environmental requirements and modifications" (p. 8).

Disability is defined by the *AMA Guides* (2001) as ". . . an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment (p. 8). The *AMA Guides* discuss Employability Determinations in Section 1.9. If physicians have the appropriate skills, training and knowledge pertaining to the issues of disability and employability, he or she may ". . . address some of the implications of the medical impairment toward work disability and future employment" (p. 13). However, there are cases in which the evaluating physician is requested to make decisions regarding an individual's ability to return to his or her job in a given occupation. The *AMA Guides* specify the need for additional evaluation from medical and non-medical experts, such as vocational specialists. Relevant factors for consideration of disability include, but are not limited to, consideration of an individual's education, employment related skills, motivation, the state of the job market, and local economic considerations.

Analysis of Medical Impairments and Work Restrictions

With the implementation of the *AMA Guides*, there came a demand for an objective method of measuring disability and, more specifically, permanent impairment. The vocational evaluator must concentrate on accurate analysis of all appropriate medical information to establish vocational disability, convert medical impairments/work restrictions to vocational parameters, and establish vocational disability by diminished future earning capacity.

The evidence-based vocational evaluation cannot rely on prior methods of data collection (Van de Bittner, 2015). Prior to 2005, medical specialists used a disability rating system that identified functional disability using common vocational terms such as heavy work, heavy lifting, etc. Each term was defined by functional parameters and a percentage of impairment. The vocational specialist used those data to establish the vocational parameters for work.

With the implementation and use of the *AMA Guides* physicians no longer evaluate their patients for work limitations, but rather medical impairment based upon specific medical criteria. Assessment of medical impairment by the physician is based upon criteria found in the *AMA Guides* as pertains to activities of daily living, rather than the potential for work. As physicians have transitioned to the *AMA Guides* to determine impairment, documenting work restrictions no longer has a significant effect on determining an individual's ability to engage in employment. As a result, fewer physicians are documenting specific work restrictions or work capacities. And, when "work restrictions" are documented, they are often general in nature and are based solely on the physician's judgment regarding his/her patient's ability to engage in work related activities from a medical perspective with consideration given to activities of daily living. However, the *AMA Guides* (Talmage et al., 2011), when used by the evaluating physician, offer objective, measureable data that can be used in the analysis of functional abilities that extend beyond activities of daily living, thus supplementing and completing the analysis for vocational disability.

Objective medical information collected from treating and evaluating physicians is then converted to vocationally relevant information. Exertional and non-exertional demands as identified in medical reports are "matched" to the characteristics of exertional and non-exertional demands as defined by the *Dictionary of Occupational Titles*, 1991 Edition. Physical demands for lifting, carrying, pushing, pulling, whole body range of motion, extremity range of motion, *etc.* are clearly defined by a structured rating system for each function, also considered a "worker trait" (McCroskey et al., 2002). Medical information as applied to the worker trait structure results in a conversion from medical analysis using the *AMA Guides* to a vocational profile. The vocational profile is used to compare the evaluee's functional abilities to the exertional and non-exertional demands of competitive occupations, and thus allows for analysis of transferable skills and access to the labor market using objective data. (Authors' note: In forensic settings, the person undergoing the evaluation is considered the evaluee since there is no client-counselor relationship. For a discussion on this issue, see Barros-Bailey et al. (2008).

Vocational analysis of medical information considers all appropriate medical data. Weight is given to medical evaluations from Agreed Medical Evaluators or Panel Qualified Medical Evaluators. The medical report must be considered as substantial medical evidence per *California Labor Code* 139.2, *et seq.*

Components of the Vocational Evaluation

The Vocational Interview is designed to collect specific information/facts from the evaluee regarding work history, educational/training achievements, and additional activities involving skill application (Weed & Field, 2012). Work history and educational achievements are used as a basis for identification of acquired skills and subsequently potential transferable skills. The vocational evaluator uses source documents to characterize and analyze past employment by employer, job title, dates of employment, and tenure in the occupation (Weed & Field, 2012).

Vocational testing is used to measure an individual's work related functional capacities for general and specific cognitive abilities, academic achievement, and manual dexterity (Power, 2013; Robinson, 2014). Standardized vocational testing is primarily normative-based in results and is supported by reliability and validity studies that substantiate objective results. Vocational tests are selected to address the needs of each evaluee, as well as to meet specific goals for measuring academic skills, cognitive abilities, and physical functioning, including manual dexterity. Selection of vocational testing is critical to ensure accurate evaluation of abilities and skills.

Cognitive testing involved with the vocational evaluation process can be general in nature and designed to assess current academic levels and general problem solving abilities (Powers, 2013; Robinson, 2014). Cognitive testing can also be selected to measure specific work-related aptitudes such as mechanical reasoning, clerical aptitude, verbal-educational aptitude, etc. Skill testing is the measurement of an individual's academic achievement, generally involving the basic reading comprehension and mathematical skills by grade level or by comparison to selected normative groups such as specific occupations. Dexterity tests accurately measure functional abilities for upper extremities and are standardized for validity and reliability. Dexterity tests measure fine finger coordination, finger rate, hand speed, and bimanual dexterity. Measured results are compared to normative groups from various industrial and vocational settings.

Vocational evaluations can also include work sampling and situational assessments (Weed & Field, 2012; Powers, 2013; Van de Bittner, 2003). The evaluee is asked to perform work-related tasks that have been formalized for specific measurement criteria, such as a work sample. Work samples are constructed to measure work related functions or general work performance. Many work samples are standardized with measureable objectives, normative data for comparison, and include reliability and validity measurements. Situational assessments are used to measure behavior in a work environment. Situational as-

sessments are generally criterion based evaluations involving behavioral observations of the evaluee engaged in work-like activities and measured by completion of the task. The behavioral observation process used during the course of the vocational evaluation is designed to assess the evaluee's potential to function in a competitive work environment. Clinical observations of an individual are based upon measuring gross physical performance as well as the interactive responses of the evaluee during the vocational evaluation. Behavioral observations must be clearly defined by the specific behavior or action and results should be documented on a criterion-referenced basis (*AMA Guides*, 2001). Examples of such behavioral observations may address an individual's ability to engage in sitting and/or standing during the course of work. The evaluator may record the number of times in a given period that the evaluee changes position and how the position changes occur. The evaluator may measure the number of pain breaks taken by an individual during a specific period by documenting frequency, duration and, perhaps, comments from the individual. Finally, the vocational evaluator may document whether the observations compare with the medical practitioner's.

Vocational evaluators typically use the *Dictionary of Occupational Titles*, 1991 edition (USDOL, 1991) and/or the *O*NET OnLine* (O*Net, 2016) program to assist in the analysis and characterization of past work history. The *Dictionary of Occupational Titles* also provides definitions for work (Sedentary, Light, Medium, Heavy & Very Heavy) and has analyzed approximately 12,970 jobs for skill application and measurement of worker traits. However, the *Dictionary of Occupational Titles*, 1991 edition has not been updated with new jobs occupational titles and job classifications, thus rendering this source document lacking in current information about newer occupations. The *O*NET OnLine* program has been highly effective as a tool for individualized career exploration as it provides useful information regarding occupations in general for knowledge, skills, abilities, and interests. In these authors' experience, the *O*NET OnLine* program is excellent for its use of the Standard Occupational Codes, which references groups of occupations for similarly situated employees. The Standard Occupational Code allows the Vocational Evaluator to access national, state, and regional labor market information for analysis of diminished future earning capacity (USDOL, 2014). Vocational evaluators may use published computerized software programs to assist in the transferable skills analysis process.

In line with the newer protocols, for purposes of determining residual functional capacity of an injured worker, the vocational evaluator must review all appropriate medical documentation from treating and evaluating physicians. Medical documents that provide the most information are evaluative in nature and usually involve a determination of maximum medical improvement (MMI) or permanent and stationary (P&S) status. Evaluating physicians document results of the medical/clinical evaluation, diagnosis, and medical impairments (Whole Person Impairment). In cases involving multiple injuries and/or multiple body parts, the vocational evaluator must evaluate each injury/body part for work restrictions and/or medical impairments then combine the cumulative medical impairments for analysis of work disability, as well as causality and apportionment of the vocational disability.

Case Law & Vocational Apportionment: Purpose and Process

Case law in the California workers' compensation system is an ongoing process of settling permanent disability issues for industrially injured workers. Attorneys address issues such as compensability, causality, and apportionment. Permanent disability awards are to be based upon the industrial injury and consequences of medical treatment, without impact from non-industrial or pre-existing medical conditions. Physicians must determine the specific and sole impact of an industrial injury using medical expertise and the *AMA Guides*. Their conclusions and medical opinions must meet the criteria for substantial medical evidence, based upon empirical data and methods, medical testing, and measurement consistent with the specialty. Similarly, vocational experts must meet the criteria for substantial vocational evidence, based upon empirical data and methods and using vocational testing and related objective methods of measuring work functioning. Their conclusions and opinions must be based upon objective vocational data.

Authors' Comment: For an excellent article on vocational apportionment in California, see Eugene E. Van de Bittner's *Vocational Apportionment: An Analysis of Medical and Vocational Factors Affecting Apportionment of Employability and Earning Capacity* (2015).

Among the many legal decisions regarding apportionment that impacts vocational experts, *LexisNexis* has identified many of the most salient (Lexis-Nexis, 2015).

The first case is *Walter v. International Capital Group*. The applicant rebutted the Whole Person Impairment combined rating of 57% with the vocational expert's report that supported her position that she was 100% permanently disabled and unable to return to work. In this case, the Workers' Compensation Judge (WCJ) denied both the defendant's vocational expert and applicant's vocational expert. According to the opinion, the defendant's expert failed to consider the psychiatrist's analysis, and the applicant's expert failed to consider the apportionment determination to

non-industrial factors by the AME orthopedist (Walter, 2015).

The Workers' Compensation Appeals Board considered the case under a Petition for Reconsideration. In agreement with the WCJ, they stated:

> *The WCJ was correct to find [the applicant's vocational expert] report was not substantial evidence since he failed to properly consider [the orthopedist's] apportionment in reaching his conclusion that applicant has sustained a total loss of earning capacity. In Ogilvie, the court held that the standard rating may be rebutted by evidence that the employee is not amenable to rehabilitation and, for that reason, the employee's diminished future earning capacity is greater than reflected in the scheduled rating. However, the 'employee's diminished future earnings must be directly attributable to the employee's work-related injury and not due to non-industrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education.' (Ogilvie, 76 Cal. Comp. Cases at 633.) Apportionment to non-industrial factors also removes that portion of the disability from consideration under Ogilvie.*

Authors' Comment: The defendant's expert failed to consider all medical work restrictions. The applicant's expert failed to consider apportionment.

The next case is *Brodie v. WCAB* (2007) in which the Superior Court stated:

> *"...the new approach to apportionment is to look at the current disability and parcel out its causative sources, nonindustrial, prior industrial, current industrial, and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries, not disregard of them." (Brodie, 2007)*

Authors' Comment: A Diminished Future Earning Capacity (DFEC) under *Ogilvie* can be successfully rebutted by use of vocational experts; however, vocational experts must present substantial evidence that the whole person impairment and/or the apportionment is incorrect based on reasonable vocational probability.

In *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal. Comp. Cases 138 [67 CCC 138] (*McDuffie*, 2002) when the medical record lacks substantial evidence, it is alright for the WCAB or WCJ to order that the parties request supplemental reports or to take the deposition of the original medical evaluator. If the record is still not sufficient, then the parties may select an agreed medical evaluator (AME). If the parties cannot agree, then the judge may consider appointment of a physician. In the *Walter* case, cited above, the WCAB applied the *McDuffie* process to a vocational expert analysis.

Authors' Comment: In this case, the WCAB or WCJ may request supplemental reports from the vocational experts that address apportionment. Applicant attorneys are requiring vocational experts to address vocational apportionment in the analysis, or on reports already submitted, requesting a supplemental report that addresses apportionment.

In *Brewer v. California Department of Corrections* (Brewer, 2014) the WCAB explained:

> *"Therefore, where an employee's scheduled disability rates less than 100% after apportionment, the employee can seek to rebut the scheduled rating by showing, through expert vocational evidence, that he or she is not amenable to vocational rehabilitation and, as a result, his or her DFEC is greater than that reflected in the scheduled rating. (Ogilvie III, supra, 197 Cal.App.4th at p. 1262; see also LeBoeuf v. Workers' Comp. Appeals Bd. (1983).*

Authors' Comment: The vocational expert must include a discussion of apportionment in the rebuttal, if it has not been previously addressed.

Under *Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman,* 2013) sections 4663 and 4664(a) still mandate apportionment to causation where the injured employee's non-amenability to vocational rehabilitation is due to a combination of industrial and non-industrial factors. Moreover, the burden is on the injured employee to affirmatively demonstrate that "the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors" (*Ogilvie III, supra,* 197 Cal. App. 4th at p. 1275). Therefore, when attempting to rebut a scheduled permanent disability rating, the burden is on the injured employee to establish what portion of his or her diminished future earning capacity is due to the injury and what portion is due to non-industrial factors. This is an exception to the general rule regarding the burden of proof on apportionment discussed previously.

Authors' Comment: Normally, the burden of proof for determination of apportionment is with the defendant; however, the WCAB is indicating that in the cases of rebuttals, the burden shifts to the applicant/employee.

In *Duplessis v. Network Appliance*, the applicant argued that charging "vocational experts with determining apportionment is inconsistent with the law." However, in this case, the WCJ determined that if the vocational expert cannot apportion non-industrial versus industrial, the applicant fails in their burden of proof (*Duplessis*, 2014).

In *Pound v. WCAB* (2014) the WCJ found that apportionment of any non-industrially caused permanent disability applies even if determined by vocational expert evidence *(Pound,* 2014).

Authors' Comment: No legal authority was found or is evident for vocational experts similar to Labor Code Section 4663. This case seems to elevate the vocational expert to the level of medical experts in determining apportionment.

In *Diaz v. State of California* (2014), the Appeals Board found that "The WCAB may not disregard evidence showing a basis for apportionment even if other evidence supports a finding of total permanent disability before apportionment" (*Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman,* 2013).

In *Mercer v. State of California* (2014), the Appeals Board stated "Under *Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman*) (2013) 218 Cal. App.4th 1137 [78 Cal. Comp. Cases 751], where an injured employee successfully rebuts the scheduled permanent disability rating through the presentation of vocational expert evidence under *Ogilvie,* the permanent disability must be apportioned in accordance with the medical evidence" (*Mercer*, 2014).

Authors' Comment: This decision does not mean that apportionment must be the same; rather it appears to mean that consideration must be given to the medical evidence. This appears to be another shift from the acceptance of work restrictions, as written, to an interpretation of medical evidence as considered by the vocational expert.

In *Joberg v Illuminations* (2014), "Moreover, the Appeals Board has held that finding 100% permanent disability pursuant to *LeBoeuf does* not preclude apportionment under sections 4663 and 4664. (*Nooner v. Workers' Comp. Appeals Bd.* (2009) 74 Cal. Comp. Cases 300 [*Nooner*].) [The vocational expert's] "...testimony also does not address the apportionment by Drs. Harris and Nathan. Therefore, the WCJ's explanation for not applying the apportionment reported by Drs. Harris and Nathan is inadequate under sections 4663 and 4664 and *Borman*" (*Joberg*, 2014).

Authors' Comment: It appears that the vocational expert must first address the apportionment by the medical experts, and then differentiate between medical apportionment and vocational apportionment, if appropriate.

Apart from the LexisNexis summary, the California Supreme Court decision in *Benson v. WCAB* upholds the new Labor Code Sections "'the new regime of apportionment based on causation' under new sections 4663 and 4664." "Section 4663 requires that for every claim of permanent disability, a reporting physician must make an apportionment determination on 'the issue of causation of the permanent disability.'" "The medical evidence must sort out the causes of the permanent disability, and apportion to the current industrial injury, a prior or subsequent industrial injury or a prior or subsequent non-industrial injury or condition." The Court further indicated that "a medical report that fails to offer an opinion on apportionment of each separate injury cannot be considered substantial medical evidence to justify an award of permanent disability (*Escobedo v. Marshalls, supra,* 70 Ca. Comp. Cases at pp. 620-612.) (*Escobedo*, 2007).

Authors' Comment: Vocational experts following the medical evidence must similarly apportion each permanent disability based on causation.

Conclusions and Recommendations

Vocational experts have been charged with the need to address apportionment in forensic vocational evaluations as they pertain to California workers' compensation cases. The authors conclude that documentation of apportionment should be as close to the requirements made of physicians under Labor Codes 4663 & 4664.

Labor Code Section 4663 could be rewritten for vocational experts as follows:

> *A vocational expert shall make an apportionment determination by estimating what approximate percentage of the vocational disability was caused by the industrial injury and consequences of medical treatment. The vocational expert must make an appropriate determination for each body part individually and cumulatively. The vocational expert must explain why and how the determination was made based on reasonable vocational probability supported by vocational evidence.*

In the authors' opinion, these are the relevant factors for vocational experts to follow in addressing apportionment:

- Physicians determine whole person impairment due to permanent disabilities based on the impact on activities of daily living, and vocational experts determine vocational impairments based on work restrictions caused by permanent industrial injuries.
- "Other factors" for the vocational expert must include reports from all physicians, psychologists, and ancillary medical professionals, such as Chiropractors, Functional Capacity Evaluators, Physical Therapists, Occupational Therapists, and Primary Treating Physicians, unless their reports are subsumed and addressed in AME, PQME, and/or QME reports.
- "Other factors" may include the impact of pain and stress on pre-existing disabilities and illnesses such as: diabetes, chronic pain syndrome, seizure disorders, urological disorders, and fibromyalgia, as defined by physicians.
- "Other factors" may include pre-existing psychiatric diagnoses aggravated by the industrial injury, as defined by psychiatrists or psychologists.

- "Other factors" may include behavioral observations by vocational experts trained in behavioral observation of such factors as evidence of pain, *sub rosa* video recordings, usage of prosthetics, and usage of orthotics. In order for the vocational evaluator to adequately observe a simulated Sedentary Work day, the authors recommend spending 6-8 hours with the evaluee or as long as the evaluee can tolerate in a clinical setting.
- "Other factors" may include test results and test performance specifically designed to measure relevant work-related skills, knowledge, academic functioning, and ability. Tests must be administered by vocational experts so qualified.
- "Other factors" may include observations in the vocational evaluation about work performance impacted by medications, especially those that might impair performance such as opioids and benzodiazepines (Talmage et al., 2011). Vocational experts must be aware of and document medications taken before and during the vocational evaluation as stated by the evaluee. For occupations that require commercial driving certain medications may be illegal and will automatically prevent employment (Talmage et al., 2011).
- "Other factors" may include future medical care that would reasonably prevent employment or restrict the evaluee to part-time employment, such as: hemodialysis, frequent physical therapy during normal working hours, blood transfusions, frequent injections, or other frequent medical treatment or therapy.
- The vocational evaluator should identify behavior consistent with observations made by medical examiners and psychologists or identify and address inconsistencies.
- Calculation and documentation of apportionment must comport with logic and reasonable vocational probability.
- If the evaluee was able to perform the duties of the job without accommodation or modification prior to the industrial injury under consideration then vocational apportionment is not in question. The vocational expert should so document.
- If the evaluee performed the duties of the job with modifications or accommodations, then the vocational expert must identify those modifications or accommodations and determine the approximate percentage of the job that was impacted. This shall be included in calculation of apportionment.
- If accommodations were unique to the employer-employee relationship, such as with employment of relatives or friends, then that should be considered in determination of access to the labor market and apportioned accordingly.
- If the evaluee suffered an injury from other than industrial sources prior to or subsequent to the industrial injury, then the vocational expert must determine the impact on work restrictions in percentages.
- The vocational expert shall use the definitions of Sedentary, Light, Medium, Heavy, and Very Heavy Work used in the *Dictionary of Occupational Titles* (1991) and *O*Net OnLine* when calculating apportionment.
- On occasion, the vocational expert may defer apportionment to the medical evaluators based on the reasoned determination that the permanent impairment does not represent a vocational impairment with associated work restrictions. These may include impairments controlled by medication, with no apparent medication side-effects.
- In consideration of percentages of more than one industrial injury, the total percentage may not exceed 100%.
- The vocational expert may not consider non-industrial factors, such as: general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education.

Authors' Note: When considering amenability to vocational rehabilitation under LeBoeuf (1983), non-industrial factors may be considered permissible. This assessment considers the whole-person concept in that pre-existing and non-industrial factors may be applied when addressing the individual's potential to benefit from a vocational rehabilitation plan.

References

Acme Steel v. WCAB (Borman): 218 Cal. App. 4th 1137; 78 Cal. Comp. Cases 751; 2013 Cal. App. LEXIS 638

Barros-Bailey, M., Carlisle, J., Graham, M., Neulicht, A., Taylor, R., & Wallace, A. (2009). Who is the client in forensics? *Journal of Forensic Vocational Analysis, 12*(1), 31–34.

Benson vs. WCAB (2009) 170 Cal. App.4th 1535, 74 Cal. Comp. Cases 113; *Benson vs. The Permanente Medical Group (2007).* 72 Cal. Comp Cases 1620 (WCAB en banc decision), *(Benson).*

Brewer v California Department of Corrections, 2014 Cal. Wrk. Comp. P.D. LEXIS 218 [2014 Cal. Wrk. Comp. P.D. LEXIS 218

Brodie v. Workers' Comp. Appeals Bd. (2007) 40 Cal.4th 1313, 72 Cal. Comp. Cases 565 *(Brodie)*

California Division of Workers' Compensation, (April 2005). Retrieved from *https://www.dir.ca.gov/dwcsb899/SB899Review2005.pdf*

California Division of Workers' Compensation. (2005). *Schedule for rating permanent disabilities.* Sacramento, CA: Publications & Informa-

tion Unit. California Workers' Compensation Institute. (2004, April 20). *Bulletin, 04-09,* 1.

California Labor Code Sections 4663-4664. (1/30/2016). Retrieved from http://www.leginfo. ca.gov/cgi-bin/displaycode?section=lab&group=04001-05000 &file=4650-4664

California WCAB Noteworthy Panel Decisions Reporter, (LexisNexis) "The Exception to Defendant's Burden of Proof on Apportionment, 3-18-2015. Retrieved from http://www.lexisnexis.com/legal newsroom/workers-compensation/b/recent-cases-news -trends-developments/archive/2015/03/18/california-vocational-experts-and-apportionment.aspx

Cocchiarella, L., & Andersson, G. B. J. (Eds.). (2001). *Guides to Evaluation of Permanent Impairment* (5th ed.) . Atlanta, GA: American Medical Association.

Commission on Rehabilitation Counselor Certification (2016) Scope of Practice. Available at https://www.crccertification.com/search-results?search_term=scope+of+practice

Diaz v. State of California, 2014 Cal. Wrk. Comp. P.D. LEXIS 560 [2014 Cal. Wrk. Comp. P.D. LEXIS 560]

Duplessis v. Network Appliance, 2014 Cal. Wrk. Comp. P.D. LEXIS 316 [2014 Cal. Wrk. Comp. P.D. LEXIS 316

Escobedo v. Marshalls, (2007) CCC 336

Guzman (Milpitas Unified School District v. WCAB (Guzman) (2010) 187 Cal. App. 4th 808.

Joberg v. Illuminations, 2014 Cal. Wrk. Comp. P.D. LEXIS 717 [2014 Cal. Wrk. Comp. P.D. LEXIS 717

LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587]. Retrieved from LexisNexis (2015), http://www.lexisnexis.com/en-us/gateway.page

Markham, J. M., Talmadge, J. B., Ackerman, W. E., III, & Hyman, M. H. (Eds.). (2014). *Guides® to the Evaluation of Disease and Injury Causation* (2nd ed.). Chicago, IL: American Medical Association.

McCroskey, B., Grimley, C., Williams, J., Hahn, S., Lowe, J., Wattenbarger, W., . . . Dennis, K. (2002). The McCroskey Vocational Quotient System (MVQS) Theory of Transferable Skills: Revised, extended and updated for the 21st Century. *Journal of Forensic Vocationology, 7*(1), 30–52.

McDuffie v. Los Angeles County Metropolitan Transit Authority (2002) 67 Cal. Comp. Cases 138, 67 CCC 138.

Mercer v. State of California, 2014 Cal. Wrk. Comp. P.D. LEXIS 690 [2014 Cal. Wrk. Comp. P.D. LEXIS 690

Ogilvie III, supra, 197 Cal.App.4th at p. 1262.

Pound v. WCAB (2014) 80 Cal. Comp. Cases 50 [80 CCC 50] (writ denied)

Power, P. (2013). *A guide to vocational assessment* (5th ed.). Austin, TX: Pro-Ed.

Robinson, Rick. H. (Ed.). (2014). *Foundations of Forensic Vocational Rehabilitation.* New York, NY: Springer.

Standard Occupational Classification guide (2010). Available at http://www.bls.gov/soc

Summary of Regulations Passed Since SB 899 Workcompcentral®. (2005). Available at https://www.workcompcentral.com/columns/show/id/i197c05h907099xy34v25c July 16, 2005.

Talmage, J. B., Melhorn, J. M., & Hyman, M. H. (2011). *AMA Guides to the Evaluation of Work Ability and Return to Work* (2nd ed.). Chicago, IL: American Medical Association.

USDOL. (1991). *Dictionary of occupational titles* (4th ed., rev.). Washington, DC: U.S. Government Printing Office. (available online at http://www.occupationalinfo.org)

USDOL. (2016). *Occupational outlook handbook.* Washington, DC: U.S. Government Printing Office (Available online at http://www.bls.gov/oco/)

USDOL. (2014). Bureau of Labor Statistics Standard Occupational Classification, May 2014. Available at http://www.bls.gov/oes/current/oes_stru.htm

USDOL. (1991). *The revised handbook for analyzing jobs.* Washington, DC: U.S. Government Printing Office

Van de Bittner, E. E. (2006). Determining diminished future earning capacity in state workers' compensation: The California Model. *Journal of Forensic Vocational Analysis, 9*, 19-31.

Van de Bittner, E. E. (2003). Evaluating workers' compensation claims for permanent and total disability in California: A vocational rehabilitation methodology. *Journal of Forensic Vocational Analysis*, 6, 77-88.

Van de Bittner, E. E. (2015). Vocational apportionment: An analysis of medical and vocational factors affecting apportionment of employability and earning capacity. *Journal of Forensic Vocational Analysis*, 16, 7–19.

Walter v. International Capital Group, [2015 Cal. Wrk. Comp. P.D. LEXIS 32].

Weed, R., & Field, T. (2012). *The rehabilitation consultant's handbook* (4th ed.). Athens, GA: Elliott & Fitzpatrick.

Author Notes

The authors wish to express appreciation to Roger O. Weed, Ph.D. and Timothy F. Field, Ph.D. for their guidance, support, and editorial recommendations. We also wish to express our appreciation to the following attorneys for their review and recommendations: Francisco T. Silva, J. D., Scott M. Rubel, J. D., Donald F. Cash, J. D., and Don Featherstone, J. D.