

## The Idiot's Guide to Expert Testimony

Michael McClanahan, Ph.D.,  
Auburn, Alabama

The purpose of this paper is to provide practical information that will assist the Vocational Expert with the handling of cases involving Workers Compensation and personal injury. The first section addresses logistics and communication in either type of case; the second section discusses the qualitative differences between the types of cases from the perspective of the VE.

### Tips on working with attorneys

It is almost cliché to identify *communication* as the key to functioning effectively as an expert, but it is important and can make a difference. It is not true, however, that more is better; it is the quality of communication that is vital. There are four stages of the case in which communication is important, including the (a) referral, (b) evaluation, (c) trial preparation, and (d) trial.

**Referral.** Several things that need to be discussed at the time of referral include the type of case it is (i.e., workers compensation, personal injury, Social Security, etc.), fee arrangements, "hard" deadlines (i.e., discovery, trial calendar), the logistics of getting the VE and the client together, and the nature of referral information that the VE needs to make an assessment. Some VEs prefer to have the entire medical file copied, while others are selective. Generally speaking, the documents that are needed include:

- All physicians' depositions that have been taken in relation to the case.
- Medical bills, lab and radiology reports, the accident report, legal correspondence, and claims-related documentation are usually unnecessary.
- Documents and reports that are viewed as "unfavorable" are as important as are those that are "favorable." Ask for reports of physicians as well as other vocational experts whose opinions are not helpful to the referral source's case.
- Medical summaries, provided the related documentation is included.
- In personal injury cases where calculation of diminution of wage-earning capacity is to be

performed, tax records for the few years prior to the accident, as well as subsequent to the accident should be included.

**Evaluation.** The calculation of Vocational Disability and/or diminution of wage-earning capacity should involve (except in death or incapacitation) a comprehensive vocational evaluation which requires a face-to-face meeting and a reasonable battery of vocational tests. Vocational Evaluation is a process designed to assess and predict work

---

**It is almost cliché to identify communication as the key to functioning effectively as an expert, but it is important and can make a difference. It is not true, however, that more is better; it is the quality of communication that is vital.**

---

behavior. It is most often a comprehensive process that systematically utilizes work, either real or simulated, as the focal point for evaluation and exploration to assist with vocational development.

The most widely accepted vocational evaluation method for assessing persons with disabilities is the worker-trait factor (WTF) approach. The theoretical basis for this approach is that one can assess the traits individually, then add them up, and the sum of the component parts will be equal to the whole. This procedure has a number of advantages, perhaps the most distinguishing of which is that it can be used as an inclusive model for use of other approaches to assessment. Other advan-

tages include the fact that it directly relates to the majority of databases that we access in vocational settings, have a common language and nomenclature, has at least a 60-year history, and can serve as the framework by which a number of employment-related services can be structured. The primary disadvantage to this approach is that the expert can become so enamored with measuring each of the individual traits (trees) that the client (forest) becomes forgotten. A valued characteristic of this approach is that it results in quantifiable information that ties directly into the U.S. Department of Labor massive databases. These databases contain the same type of information on the composition of jobs that should be collected about the evaluatee. This feature, having quantifiable information across similar dimensions for both individuals and jobs, spawned the development and use of computers in vocational evaluation. As virtually all of the computerized databases use the Department of Labor nomenclature, it makes sense to use the same data so as to facilitate the evaluatee to job(s) "match." To obtain the data specific to the evaluatee's worker traits (the data already exists for more than 12,000 jobs), we evaluate each factor by testing, analyzing past relevant work, analyzing educational and medical records, and various other means. The process then becomes one of selecting jobs by taking the evaluatee's profile and comparing it to the 12,000+ job databank. The domains addressed in the trait factor approach include (a) physical abilities/limitations, (b) environmental limitations, (c) general educational development, (d) specific vocational preparation, (e) aptitudes, (f) interests, and (g) temperaments.

An informal survey of reports addressing vocational disability in Alabama reveals that it is not uncommon for VEs to simply

conduct a file review, interview the client and then submit a report replete with a rating. Not only does this practice fail to adequately assess the required worker trait factors, it does not require the generation of new and independent data. In effect, this abbreviated process mirrors the Court's role, which is to consider existing evidence and pass judgment.

**Trial preparation.** These are a few suggestions when working with attorneys when the time for trial approaches. There are as many "unwritten rules" as there are attorneys and experts, so a few guide lines that both parties could agree on might facilitate matters at an otherwise hectic time.

- *Request from the attorney that as soon as the case is set for trial, to contact you ASAP and let you know.* Emphasize that even if the trial is set six months into the future, and/or there is an expectation that the case will either be continued or settled, you want to be notified. Remember that litigation rarely proceeds according to plan. As the trial date approaches, the need for immediate notification - by phone, email, or fax, as opposed to "snail mail" - is greater than the need for a paper trail.
- As the trial date draws near, make sure to inquire as to the specifics of the clerk docket (e.g., how many cases are in front, whether they are jury or bench trials, the expected duration of the cases in front, etc.).
- If, after time has passed since seeing the claimant and/or new information is made available, and you realize that *it would be helpful for extra work to be done, let the attorney know as soon as possible.* Keep in mind discovery deadlines, the length of time and logistics involved in writing reports, and whether the work can be satisfactorily completed prior to testifying. It is not uncommon for work to be performed while the trial is going on, particularly the gathering of data for rebuttal to the other side's witness.
- In Alabama, most Workers' Compensation cases are heard along with a garden variety of other types of cases. It seems to be more uncommon that the attorney would know the specific time that a case would be heard. One exception is when a case has been specially set. Otherwise, the attorneys are expected to show up for the docket call first thing in the morning to find out when their case might be heard. This is a troublesome issue in many cases, because when subpoenas are issued to witnesses (including experts), the order requires the presence at or during this docket call. A great deal of unnecessary expense is generated when the expert is required to go to the court house and sit around all day before testifying late in the afternoon. *In most instances, the attorney can go for the docket call, put the expert "on call" and save the unnecessary expense.*
- In the case of jury trials, *a conference sometime during the week prior to trial (either in person or by telephone) followed by a brief phone call at the end of the first day of testimony is very helpful.* Usually by the end of the first day, the order of witnesses is known to both sides, and the expert can know about when he/she is going to be called. Also, this provides for any last minute issues to be raised and dealt with before testimony.
- *Communication regarding the nature of testimony is best accomplished between the witness and the one who is going to be asking the questions.* Assisting attorneys and paralegals, regardless of degree of competence, are no substitutes for direct communication. When the attorney's office protocol is for communication to end with either a paralegal or assisting attorney, the results are often disappointing.

**Trial.** It is helpful to have a boilerplate list of questions for direct examination that can be customized to the needs of the specific case. The following are the broad domains that typically need to be addressed (left column) and specific questions (right column).

<b>NAME &amp; ADDRESS</b>	1. Please state your name and address
<b>EMPLOYMENT</b>	2. Tell the Judge/jury where you presently are employed.
<b>PROFESSION</b>	3. What is your profession?
<b>EDUCATIONAL BACKGROUND</b>	4. Tell us about your education, beginning with your undergraduate degree. 5. Are any of your works published? Tell the Judge/jury about your professional writing.
<b>EMPLOYMENT EXPERIENCE</b>	6. Please tell the Judge/jury about your professional experience in the field of rehabilitation beginning with graduation from college. 7. Do you have any certifications? Are you a member of any professional organizations? 8. Exactly what do you do currently? 9. Have you ever qualified as an expert in your field in a court of law? How many times?
<b>PROCESS DEFINED</b>	10. Have you had an opportunity to conduct a Vocational Evaluation on [Client]? 11. Before we get into that, would you tell the Judge/jury just what is a Vocational Evaluation? 12. These instruments and procedures that you use: Are they the most valid and reliable instruments available today? 13. When interpreting the data and establishing the vocational prognosis, do you rely upon and deal with a variety of health related professionals including physicians, psychiatrists, psychologists, physical therapists, occupational therapists, and other specialty areas? 14. As a part of your daily professional activities, do you receive and review the reports and use them in formulation of rehabilitation and vocational conclusions and recommendations? 15. Do you have any specialized training and/or experience in using these reports and interpreting them from a vocational standpoint? 16. One final question before we get into your specific evaluation of [CLIENT]. Just how many people over the past 25 years have you been directly involved in conducting vocational assessments and/or vocational rehabilitation activities?
<b>EVALUATION OF CLIENT</b>	17. Are you prepared today to discuss with the Judge/jury your findings of your Vocational Evaluation of [Client]? 18. Tell us, when did you conduct such an evaluation? Who requested your services? 19. What are your fees related to the conducting of the Vocational Evaluation, and for your being here today? 20. Tell the Judge/jury exactly what it is that you did with [Client], and the results of your Vocational Evaluation?
<b>FINDINGS/ OPINIONS</b>	21. As a result of the tests and interviews and other vocational procedures and the review of the information, have you reached some conclusions regarding the vocational prognosis and diagnosis of [Client]? 22. [Jury only] Do you have for the Jury a visual display/Power point presentation that you believe will help them understand your conclusions? 23. [Jury only] Would you please step down here in front of the Jury with your visual aid before I continue with my questions? 24. [Jury only] Please describe to the Jury exactly what these slides mean, and give us some help in understanding the meaning of these numbers? 25. In your professional opinion, is [Client] presently capable of competitive employment? 26. To what extent?

<b>Case specific issues</b> [Sample questions]	27. What role does pain play in the employability of persons with disabilities? 28. How do you rate the intensity of pain? 29. If you consider the only the medical opinion of Dr. , what would be your vocational disability rating? Diminution of wage-earning capacity? 30. Is there disagreement among the physicians regarding this client's ability to work? 31. Which physician's opinion did you rely on the most? Why? Have you reviewed the report by the other vocational expert in this case? Do you agree or disagree with the opinions expressed in that report? Why?
---	---

### Workers Compensation and Personal Injury

The purpose of this section is to examine the similarities and differences between the processing of a workers' compensation and personal injury case. There are more similarities than differences, but the differences, though subtle, can be significant. Of the previously referenced four step process - referral, evaluation, trial preparation, and trial - the first two are identical in both workers compensation and personal injury cases. It is in the last two steps that the cases take on a different appearance.

The primary differences lie in the processing and presentation of data. In the former, definitions and what is being requested constitute the biggest difference. In the latter, the courtroom presentation in workers compensation cases is to a judge, whereas, in personal injury cases attention is typically directed to a jury. The difference of presentation can be seen in the Direct Examination questions previously addressed.

The most obvious difference in the processing of data is that a percentage is the number that asked for in worker compensation, whereas, in personal injury a dollar amount is at issue. Rarely, if ever, are these numbers equivalent. In other words, one cannot take the Vocational Disability Rating and translate it into a dollar figure that can then be used in a personal injury case. For example, a permanent partial impairment vocational disability rating is used as a variable in an equation that uses the compensation rate and a finite number of weeks. In personal injury cases, real wage rates and work life expectancy tables are the variables.

**Vocational Disability Rating.** Vocational disability, a rating that is intended to recognize that the same impairment can have

disparate impact on workers, is typically defined by a number of factors that affect a worker's vocational prognosis. The question that is to be answered by the professional assigning the rating is "how does this particular injury affect this worker's ability to work and earn wages?" Among the data used to make the calculation are work history, educational and training background, tested abilities (in the form of assessment of the worker trait factors), medical history, and the assessment of functional limitations associated with the injury in question. These data are then translated into terms that assess the impact of injury on (a) wage earning potential, (b) access to the labor market, and (c) work life expectancy (or employment rates).

**Total disability.** The standard for total disability can be different in workers compensation than in personal injury cases. The term "disability" under the Worker's Compensation Act means an infirmity which affects one's ability to work as a normal person at time of and prior to the accident. Total disability does not require the employee to be absolutely helpless or entirely physically disabled, but unable to perform his trade or unable to obtain gainful employment. *Morrow Drilling Co. v. Adkins*, 597 So. 2d 1365 (Ala. Civ. App. 1992); see *M.C. Dixon Lumber Co. v. Phillips*, 642 So. 2d 477 (Ala. Civ. App. 1994); see also *Yellow Freight Sys. v. Green*, 612 So. 2d 1209 (Ala. Civ. App. 1992). Gainful employment is employment similar in remuneration to that earned prior to the injury and it must be suitable [Code of Alabama (1975), § 25-5-77, V.15 p. 607-8]. Suitable employment is compatible with the employee's preinjury occupation, age, education and aptitude. It must be "reasonably attainable and nearly as possible to his average weekly earnings at time of injury" [p.407].

The definition of total disability promulgated by workers compensation law is different than that which is present in personal injury cases. The extent of disability in a personal injury case is determined by the collective wisdom of the jury, and quite frequently it can be more difficult to establish total disability in the absence of a regulatory definition. Issues regarding part time, seasonal and home based employment are not uncommon ones to put before a jury in order to mitigate damages.

**Case example.** A 49-year-old male who dropped out of school in the eighth grade with an employment history of Truck Driver for the past 20 years earning \$14.00 per hour, 50 hours per week was involved in an on the job motor vehicle accident. The injuries were to his back and lower extremities, and it was generally agreed that he would be relegated to sedentary and light work.

Three Vocational Evaluations were performed - one each at the request of the employer and the claimant, and by the Alabama Department of Vocational Rehabilitation - with similar test scores and somewhat similar opinions. The claimant demonstrated functional academics between the sixth and ninth grades, ninth grade in reading, and sixth grade in arithmetic. He scored in the average range on the IQ tests with a full scale I.Q. of 93 (Verbal 95, Performance 92). Dexterity testing was impressive as he scored above the 90<sup>th</sup> percentile when compared to competitively employed workers.

The claimant attempted to obtain work, but was unsuccessful. The Alabama Department of Vocational Rehabilitation determined him to be "not feasible for rehabilitation services," but he was given a subtle cue that should he present himself for services when he was not involved in a lawsuit he might be served. He also presented

himself to the Employment Service, but received no assistance or even encouragement from the state agency. In both trials, the plaintiff's attorneys argued that gainful employment was not "reasonably attainable" and that the plaintiff should therefore be considered totally disabled. At the workers' compensation and personal injury trials, both plaintiff and defendant experts agreed that the claimant could not return to truck driving, but that he could engage in light assembly jobs, such as electronics assembly. The wage rates that he was expected to earn

ranged from \$6.00 to \$8.00 per hour. The difference in the witness's testimony was that the plaintiff witness in the personal injury trial, referencing Department of Labor work life expectancy charts and various other authoritative resources, opined that the claimant would suffer a 25% reduction of work life expectancy for reasons attributable to the injury. The following represents what might be verdicts in the respective cases. In WC1, the Court found the claimant to be 100% disabled, as the claimant was obviously incapable of returning to his

pre-injury occupation and expected future wage rates did not compare to that which he enjoyed pre-injury. In WC2, the Court determined a rating of 99% to be proper as the claimant maintained some ability to work and the potential for retraining might enhance earning potential. In the personal injury case, the jury concurred that \$7.00 per hour was a reasonable estimate of his worth in the labor market, and that a 25% reduction in work life expectancy was realistic.

	<b>WC1</b>	<b>WC2</b>	<b>Personal Injury</b>
<b>Vocational Disability Rating</b>	100%	99%	N/A
<b>Diminution of wage earning capacity</b>	n/a	n/a	\$411,974
<b>Fringes</b>	n/a	n/a	\$ 41,191
<b>Household chores</b>	n/a	n/a	\$ 82,218
<b>Future medical expenses (knee replacement)</b>	Medical left open	Medical left open	\$ 23,000
<b>Assumptions used in calculations</b>	6% disc. rate, lifetime \$493.00 comp. rate	300 weeks @ \$220/wk	Act. earn. g.r.- 1% Fringe benefits - 10%, Retirement at 70 Household chores 50%. Discount rate - 3%
<b>Award</b>	<b>\$ 355,693.58</b>	<b>\$ 66,000.00</b>	<b>\$ 558,383.00<sup>1</sup></b>

<sup>1</sup> In the PI scenario, no other element of pain and suffering or punitive damage is considered.

**Conclusion**

The intention of the author is to provide some practical information that will assist Vocational Experts with the handling of cases involving both Workers Compensation and personal injury. Some tips on how to make effective use of the VE in either type of case were provided followed by a case example. No expert has ever won or lost a case. The facts of the case make it or break it, and the experts are there to provide information to the deciders so that a fair decision can be made. Strong facts and a good lawyer who knows how to use the services of experts usually wins.

**References**

Code of Alabama (1975), § 25-5-77, V.15 p. 607-8, 409

*M.C. Dixon Lumber Co. v. Phillips*, 642 So. 2d 477 (Ala. Civ. App. 1994)

*Morrow Drilling Co. v. Adkins*, 597 So. 2d 1365 (Ala. Civ. App. 1992)

*Yellow Freight Sys. v. Green*, 612 So. 2d 1209 (Ala. Civ. App. 1992)

Michael McClanahan, Ph.D., CRC, is the owner of *Vocational & Rehabilitation Consultants*, a company that specializes in the provision of services in forensic cases. He has regularly testified as an expert witness over the past 25 years in personal injury, workers' compensation, Social Security and civil cases. His specialties include vocational evaluation, calculation of diminution of wage earning capacity, job development and placement, and life care planning. He received a Ph.D. from Auburn University and a Master's from the University of Georgia. Dr. McClanahan is a Senior Disability Analyst and Diplomate with the American Board of Disability Analysts.