

Workers' Compensation: Forensic Evaluation and Assessment Considerations for Vocational Experts

Andrew Nay M.A., C.W.C.P.

Abstract

The practice of forensic rehabilitation in workers' compensation is ever-changing and unique across the multiple jurisdictions in which work disability is defined. The main role of the vocational expert in workers' compensation is to formulate an objective and unbiased opinion as to the employability, wage earning capacity, and barriers to employment an individual holds through an individualized assessment and evaluation process. The purpose of this paper is to present vocational evaluation and assessment considerations within the workers' compensation setting and promote further discussion into developing methods of improving forensic evaluations process within this adversarial system. Four overlapping themes of professional development are presented and serve as the basis for improving vocational expert testimony and outcome: Education, Familiarization, Facilitation, and Standardization. It begins by gaining an understanding of the multiple perspectives of stakeholders interests, becoming familiar with relevant legislation and case law, improving communication among parties of common interest, and working together as a profession of vocational experts to improve the overall empiricism and admissibility of vocational evidence presented in court.

Considerations for Vocational Experts

The practice of forensic rehabilitation within the workers' compensation arena is ever-changing and unique across the multiple jurisdictions in which work disability is defined. Shaped by judicial decisions, public policy, and political appointments, vocational rehabilitation counselors/consultants serving as expert witnesses remain a pivotal component of the vocational evaluation and assessment process, yet face numerous challenges affecting both the client and the consumers of expert forensic services. Within some states, namely Michigan, a fine line has been drawn between the vocational evaluation and rehabilitation service delivery system that has many rehabilitation professionals and state administrators questioning the ethical and legal implications. The purpose of this paper is to present some significant forensic evaluation and assessment considerations within the workers' compensation setting and promote further discussion into developing methods of improving the vocational evaluation and assessment process within adversarial systems.

Four overlapping themes of professional development are presented and serve as the basis for improving vocational expert testimony and outcome: Education, Familiarization, Facilitation, and Standardization.

This process begins by gaining an understanding of the multiple perspectives of employers, employees, attorneys, and insurers within adversarial settings where vocational assessments are to take place: Education. It involves becoming familiar with important legislation and case law that help to guide vocational evaluation and assessment practices within the workers' compensation system: Familiarization. It means working

Shaped by judicial decisions, public policy, and political appointments, vocational rehabilitation counselors/consultants serving as expert witnesses remain a pivotal component of the vocational evaluation and assessment process, yet face numerous challenges affecting both the client and the consumers of expert forensic services.

to improve communication between interested parties in discussing desired goals and how to get the important questions asked and answered in a timely and accurate manner: Facilitation. And it encourages working together as a profession of vocational

experts to improve the overall empiricism and admissibility of evidence presented in court: Standardization.

The main role of the vocational expert in workers' compensation is to formulate an objective and unbiased opinion as to the employability, wage earning capacity, and barriers to employment an individual holds through an individualized assessment and evaluation process. Most often in workers' compensation, vocational experts are called to address the issue of whether or not there has been a diminished earning capacity (Burke, 1995). While initially vocational experts were sought out by plaintiff counsels to empirically express the extent of their client's physical limitation and inability to work, defense attorneys have also begun to employ the services of vocational experts to refute plaintiff testimony and identify the capabilities of the claimant rather than their deficiencies. This determination of earnings capacity is heavily dependent upon each jurisdiction's definition of work disability and the reliability of vocational evidence presented before the court.

Education

Legal History

Workers' compensation in the United States began in 1911 as Wisconsin passed the first recognized statutory system. Soon

thereafter, other states followed suit. Statutory workers' compensation systems strike a compromise between the employee and their employer. It guarantees a worker's access to timely medical care and payment for lost time following a workplace injury or illness, and relieves the employers from the majority of liability under most circumstances. Prior to the enactment of workers' compensation laws, injured workers had to file suit against employers, and such legal actions had significant drawbacks for workers. At the same time, a successful suit could impose very large and unpredictable costs on an employer. As a compromise, the development of mandatory workers' compensation systems across states provided for prompt payment of medical, rehabilitation, and wage replacement benefits to injured workers, while placing limits on the cost of the system for employers. By 1950, each state had adopted or modified some form of workers' disability and compensation system that best fit the majority stakeholder's interests.

Virtually nonexistent prior to 1970, the United States experienced a dramatic increase in the amount of private-for-profit rehabilitation companies as insurance providers began new campaigns to more closely monitor and oversee the rehabilitation of their workers' compensation claimants (Burke, 1995). Initially termed insurance rehabilitation, it is today more commonly referred to as the private rehabilitation industry. And although the role of the private sector rehabilitation counselor remains similar to their public sector counterparts, their increased exposure to mediation and litigation began to require that they possess additional skills that included forensic assessment and evaluation expertise. While plaintiff attorneys representing injured workers typically hired their own vocational experts in order to obtain maximum awards for their clients, employers and defense attorneys began employing rehabilitation experts to help them achieve cost containment and claims settlement strategies. As a result, vocational consultation and expert testimony became an essential tool to laying the foundation for other aspects of litigation (Anchor, 1994) and is especially prevalent within workers' compensation systems.

Current Trends in Practice

Vocational experts must pay particular attention to how their evaluation and assessment practices are conducted within adversarial settings. A common method of defending workers' compensation claims is the use of the vocational rehabilitation counselor as a vocational expert. This is frequently the same counselor who has or is currently providing vocational rehabilitation services to the injured worker (claimant) involved in litigation. Defense strategies have also consisted of providing portions of forensic evaluations (e.g. labor market results, prospective jobs, employment statistics) to the injured party prior to trial to encourage their participation in exploring work opportunities. Similar techniques have vocational experts following up on job leads that were provided to claimants following the forensic evaluation and assessment process. These are only a few of the developing trends that are transforming the way vocational assessment and evaluation in workers' compensation is being practiced in Michigan, and have been the direct result of changes in bureaucratic perspective and political influences within the private rehabilitation industry.

Political Influences and Bureaucratic Perspectives

In the vast majority of states, the original jurisdiction over workers' compensation disputes has been transferred by statute from the trial courts to special administrative agencies or bureaus that specialize in the mediation and hearing of disputed workers' compensation claims. Disputes are usually handled informally by administrative law judges or magistrates. Within Michigan, litigated claims are formally heard before politically appointed magistrates who are evaluated by the director of the bureau every two years. Appeals may then be taken to an appeals board or appellate commission and from there into the state court system. It is relatively uncommon, however, for such appeals to reach the state courts due to the underpinnings of workers' compensation system to reduce the amount litigation within the courts. The few claims that reach these legislative levels tend to define how disability is defined or interpreted and how workers' compensation litigation is practiced throughout the jurisdiction.

Identifying the Stakeholders Interests

Each stakeholder (political officials, insurance companies, employers, injured workers, defense and plaintiff firms, medical professionals, and vocational rehabilitation experts) brings their own perspectives, values, and goals into the workers' compensation setting. Generally, employers wish to minimize their monetary damages, while injured employee's attempt to establish maximum monetary gain. Insurance providers seek to contain indemnity growth of claims in order to maximize revenue and expand business. Politically appointed magistrates and judges attempt to expedite the hearing of contested cases while remaining consistent with the jurisdictions political culture. The underlying interests embedded within each workers' compensation system will influence how forensic evaluations and assessments are conducted and accepted within a given jurisdiction.

A useful method for attempting to identify these principal interests in workers' compensation can be identified by analyzing the language used within a given states legislation or administrative rules. In Michigan, employee's who sustain an injury arising out of our in the course of employment "shall be paid compensation as provided [by] the act" (§ 418.301) while the burden of proof remains with the injured worker (§ 418.851). By carefully analyzing the legislative intent, there appears to be a literary emphasis being placed on an injured workers exclusive right to wage replacement benefits prior to the determination of eligibility or entitlement. This is common within industrialized, pro-labor jurisdictions and can make defending workers' compensation claims meticulous and challenging.

This requires that vocational experts be able to present forensic evidence that can sustain rigorous scrutiny and empirical examination. It may even demand that vocational experts supplement statistical labor market analyses with qualitative research findings. Common techniques included having direct verbal feedback from employers within a given labor market area to verify average wage estimates, job availability, and reaffirm cataloged job descriptions. In other jurisdictions such as Florida, the legislative intent of their workers' compensation laws are literally neutral, declaring "that disputes concerning the facts in

workers' compensation cases are not to be given a broad liberal construction in favor of the employee on the one hand or of the employer on the other hand, and the laws pertaining to workers' compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either employee or employer..." (§440.015). This disparity in legislative intent comes as a result of each state's right to interpret and implement their own disability and workers' compensation laws.

Familiarization

Determining the extent to which an individual is disabled is at center of the workers' compensation system (Welch, 2004). Due to the extreme diversity among each state's legal system, making this determination can range from a relatively standard set of well accepted procedures to a complex web of legal proceedings. Within these more complex systems, an important role of a vocational expert is that of a consultant. It is important that the legal representative requesting the forensic services and vocational expert fully understand each respective case and its desired outcome. It serves no purpose if the vocational experts analysis does not answer or address the question(s) being brought forth at trial regardless how objective or unbiased the evaluation. Consultation between parties of common interest is necessary to properly prepare and execute useful vocational evaluations. This process can be further facilitated if vocational experts are current in their understanding of the jurisdictions case law decisions that affect vocational evaluation and assessment (e.g. rules of evidence, disability, hearsay, and discovery)

Why is it important the vocational experts understand recent and relevant case laws? Case law defines work disability in the workers' compensation industry and guides forensic vocational evaluation and assessment practices within the workers' compensation system. In order for vocational experts to be credible and persuasive they must first understand how disability is defined within each particular jurisdiction in order to conduct valid and reliable labor market research. This knowledge also assists the vocational expert in determining which methods of assessment would be most objective and reliable within a given jurisdic-

tion (e.g. rehabilitation focused assessment, vocational potential assessments, wage loss determination, non-exertional impairment evaluations, etc.).

The benefit for vocational experts practicing in workers' compensation is that it is assumed the claimant has a work history that can be scrutinized which is an important characteristic in formulating an expert vocational opinion regarding an individual's future employability. The disadvantage for experts is that the methods in which an individual's employability is established may be subjected to numerous objections of hearsay and discovery depending on the jurisdiction in which the case is presented.

Hearsay

Hearsay is a legal term that describes a class of evidence that is generally disallowed by most courts. The theory of the rule against hearsay is that assertions made by human beings are naturally unreliable and cannot be empirically proven. Although there is no all-encompassing definition of hearsay, vocational experts must be up-to-date on current interpretations on hearsay within the jurisdictions they practice. The lack of empirical evidence regarding the mere nature of employment, workplace settings, job descriptions, transferability of skills, and one's lifetime expected earnings capacity all lends itself to evidentiary scrutiny. It therefore becomes necessary for the expert to perform vocational assessments and evaluations that are not only unbiased and objective, but are also admissible at trial. Vocational experts may find it difficult to provide supplemental or supportive information, such as information gathered by direct contact with employers or identified through transferable skills analyses.

Recent Michigan case law has basically required that all jobs identified by vocational experts in making the determination of wage loss be "real jobs in the real world" and "readily available". This ruling has discouraged the practice of formulating expert vocational opinion based solely on published labor statistics. In order to meet this definition, vocational experts are basically forced to contact prospective employers and verbally verify the nature, extent, and appropriateness of each job verbatim. This requires that vocational experts conduct labor market analyses by contacting employers by telephone or through corre-

spondence to verify the availability of work, specific job duties, and respective wages. These findings, however, are inadmissible in many courts under the hearsay ruling.

The hearsay rule requires judges and magistrates to conduct an "analysis calculated to discover and expose in detail its possible weaknesses, and thus to enable the [judge or magistrate] to estimate it at no more than its actual value" (Wigmore, 1985). Plaintiff attorneys representing injured employees have been successful in arguing for the hearsay ruling since the vocational expert is making unverifiable statements in the absence of the employer. It is not feasible to ask that those employers who have been identified by the vocational expert be required to testify at trial. As a result, the judge or magistrate is forced to apply the hearsay rule to portions of the vocational evaluation which may impact its overall validity.

Discovery

In practice, most civil cases in the United States are settled after discovery prior to the actual trial taking place. This process of discovery requires that opposing parties share all information, unless privileged or otherwise protected, and disclose their own supporting evidence without being requested to by the other party. Although discovery and the settlement of cases prior to trial taking place are common practice within worker's compensation, Michigan jurisdictions offer no formal process of discovery. Although subpoenas may be issued to third parties to compel the testimony of witnesses, they are basically unenforceable unless the case extends into the district courts. This becomes an interesting issue in developing valid vocational evaluations presented at trial.

In order for vocational experts to formulate objective and unbiased vocational opinions, they will need to review a variety of medical and employment records. Given the fact that no formal discovery process exists and subpoenas are unenforceable, the power to obtain important information from past employers and treating physicians can be extremely difficult and many times unsuccessful. Without the ability to specifically identify a worker's vocational characteristics, medical restrictions, previous job duties, and workplace behavior, it may not be possible to formulate an accu-

rate and objective vocational opinion.

Defining Disability

There is no single, universally accepted definition of disability. Mashaw and Reno (1996) document over 20 definitions of disability used for purposes of entitlement to public or private income support programs, government services, or statistical analysis (Houtenville, 2007). In 2002, the Michigan Supreme Court changed the way disability was defined within their jurisdiction. This dramatic shift in disability determination changed the way forensic evaluations were conducted. Prior to this change, the state had adopted an definition of disability that encompassed any work-related injury that renders an employee unable to do one or more particular jobs within the employee's qualifications and training (Haske v. Transport Leasing, 1997). Under this interpretation, vocational experts needed only to utilize U.S. Labor of Statistics information and other governmental publications in order to identify the prospective availability of positions, anticipated openings, and wages within a particular labor market area. Under the most recent interpretation, disability has been defined, "as a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training, where as the establishment of disability does not automatically create a presumption of wage loss" (Sington v. Chrysler Corporation, 2002). Given this interpretation, vocational experts would utilize transferable skills analyses and labor market surveys to determine the availability of employment positions consistent with the claimant's qualifications, training and provided work restrictions.

Depending on each jurisdictions current interpretation of work disability, vocational experts will need to apply their assessment methods accordingly. For example, state jurisdictions utilizing economic interpretations of disability (e.g. loss in earnings capacity) will require assessment methods that can be used to identify transferable skills to quantify lost earnings and project earnings potential. In states that apply medical interpretations of work disability (e.g. inability to physically perform work), vocational experts will need to pay particular attention to the physical requirements of the job(s) the individual performed and

how those skills could be applied to similar occupations within the claimant's current physical limitations. Medical interpretations of disability will typically require the vocational expert to explore possible accommodations with the individual's employer of injury to determine if the employee can continue perform his/her job. This is an important factor in determining an individual's ability to earn wages outside of their normal occupation.

Environmental Settings

Vocational assessment and evaluations in workers' compensation settings can be adversely affected by certain environmental dynamics of the meeting place. In forensic practice, the environment in which the vocational assessment is to take place may have an effect on the degree of client participation and impact the validity of the vocational evaluation. More specifically, it may actually affect the extent of the injured worker's willingness or ability to describe their medical and vocational history, family circumstances, economic barriers, and education and training.

Many forensic rehabilitation experts also practice as rehabilitation counselors and are licensed under the Commission on Rehabilitation Counselor Certification (CRCC). According to the Code of Professional Ethics published by the CRCC, rehabilitation counselors will alert their employers to conditions that may be potentially disruptive or damaging to the counselor's professional responsibilities or that may limit their effectiveness (E.1). In some states, vocational experts are unable to choose where they meet with the claimant. Often times, these evaluations are conducted in the presence of attorneys. It may not always be possible to conduct evaluations within the clinical settings. Vocational experts should make a note of non-conductive environmental factors (e.g. third party presence, foot traffic, ambient noise, etc.) that were present during the evaluation process. Many times post-evaluations can be recommended to measure the consistency of test results and may be useful in identifying discrepancies prior to trial.

Facilitation

An important trait of vocational experts practicing in worker's compensation is their ability to develop communication between

parties. This includes discussing the desired goal of each case and how to get the important questions asked and answered in a timely and accurate manner. Vocational Rehabilitation Counselors and consultants serving as expert witnesses remain a pivotal component of the vocational evaluation and assessment process, yet face the numerous challenges affecting both the client and consumers of expert forensic services. Within some states, namely Michigan, a fine line has been drawn between the vocational evaluation and rehabilitation service delivery system that has many rehabilitation professionals and state administrators questioning the resulting legal and ethical implications. According to the code of professional ethics by the CRCC:

"When providing forensic evaluations, the primary obligation of rehabilitation counselors will be to produce objective findings that can be substantiated based on information and techniques appropriate to the evaluation, which may include examination of the individual with a disability and/or review of records. Rehabilitation counselors will define the limits of their reports or testimony, especially when an examination of the individual with a disability has not been conducted" (F.12).

Finding an acceptable medium between the requested forensic services while conforming to the ethical guidelines outlined by CRCC can be challenging within some jurisdictions. In defending alleged claims of disability, employer representatives may request that portions of forensic evaluations be provided to the claimant and/or the plaintiff prior to trial. In Michigan, where there remains the emphasis on identifying real jobs (versus hypothetical), labor market research portions have been pulled out of vocational evaluations and provided to the injured worker prior to trial. As previously discussed, this partly comes as a result of recent case law opinion where magistrates have ruled that it is not enough to merely identify jobs, wages and availability of positions with the use of governmental statistics. This has additionally been influenced by magistrates who have at times inquired as to whether or not a claimant has applied for any jobs since their injury. It seems plausible that if the forensic evalu-

ation is presented to the plaintiff prior to trial, it may allow the opportunity for the claimant to explore the employment opportunities identified within the evaluation.

The ethical dilemma arises when the defense strategy focuses on whether or not the claimant has actually applied to the jobs provided. Making this determination involves direct contact with the employers identified within the evaluation. In order to verify that the claimant had applied, the vocational expert would need to disclose the claimant's name, many times without having informed consent from the claimant. In Michigan, this practice has recently been prohibited by state administrators after numerous rehabilitation counselors refused to participate in this practice. It is difficult to determine whether the practice is indeed unethical, or merely fails to conform to the present majority of stakeholder's values. Despite the consequences, finding an acceptable medium between providing unbiased-objective vocational evaluations and meeting ethical requirements will be a continuing challenge for vocational experts who practice within adversarial workers' compensation settings.

Standardization

There remains a need for professional collaboration among vocational experts within workers' compensation in order to improve existing evaluation and assessment practices. This has recently been recognized by Williams et al. (2006) in a study conducted to identify the common factors considered by vocational rehabilitation professional in employability and earnings assessment. The overall purpose of the study was to provide the foundation for the establishment of a standardized methodology for developing expert opinions of an individual's wage earning capacity (Williams, et. al, 2006), as result of the application of *Daubert v. Merrell Dow Pharmaceuticals* (1993) ruling to vocational rehabilitation testimony.

The *Daubert* decision confirmed that the Federal rules of evidence are the standard for the admission of scientific evidence and expert opinion in Federal courts (Rast, 2006). The criteria, however, outlined in the *Daubert* decision are flexible and are within the discretion of each magistrate or judge. It has been applied to hundreds of decisions at all court levels since its incep-

tion. The court has held that the admissibility of expert testimony and scientific evidence be tested by applying several criteria, which include but are not limited to: whether the theory or technique has been tested; whether the theory or technique has been subject to peer review and published; whether the theory or technique has established standard error or variance; or, whether the technique is generally accepted within the relevant scientific community (Rast, 2006).

Dependent upon each state's general interpretation of *Daubert*, vocational expert testimony in the determination of one's wage earning capacity has been relatively inconsistent based on the volatility of political influence in workers compensation case law. Due to this variability, it is now becoming even more important for vocational experts to collectively seek standardized methods of evaluation and assessment in order to meet the rules of evidence. Once common factors of assessment can be identified, the standardized evaluation methods can be applied that will eventually yield standard errors of measurement necessary for presenting scientific evidence. The challenge will be how to develop testing instruments and evaluation practices that can empirically measure an injured worker's individual characteristics within unpredictable and diverse labor market settings. One thing that all vocational experts should keep in mind is that the *Daubert* decision does not preclude vocational expert opinion or conclusions as it applies to a particular case. The weight given to an expert's testimony is solely the determination of the judge or magistrate presiding over the case (Rast, 2006). Hence, the collaboration among vocational experts to seek common assessment techniques will also serve as a foundation towards improving the admissibility of expert vocational testimony.

In order to achieve standardization in practice, record keeping and data collection become an important role of the vocational expert in worker's compensation. Vocational experts must begin by collecting data that can be used to further study the variable relationships regarding employment, disability, employability and earnings assessment. The data may also be useful in developing new instruments in determining one's earning capacity. The challenge will be controlling for the various methodolo-

gies currently available in determining an individual's wage earning capacity across the fifty-one jurisdictions in which worker's compensation is practiced.

Conclusion

The main role of the vocational expert in worker's compensation is to formulate objective and unbiased opinions as to the employability, wage earning capacity, and barriers to employment an individual holds through an individualized assessment and evaluation process. Depending upon the jurisdiction in which vocational experts choose to practice, they will need to remain current on disability case law and the methods in which vocational evaluations are being measured by the courts to ensure the admissibility of their findings. While it remains the overwhelming interest of vocational experts to provide valid forensic assessments, they will be challenged by both the majority stakeholders' interest, and the ethical considerations as outlined under various counseling disciplines.

One of the biggest challenges vocational experts will continue to face is developing methods of improving the vocational evaluation and assessment process within adversarial systems. It begins by gaining an understanding of the multiple perspectives of stakeholders. It involves becoming familiar with important case laws that help to guide vocational evaluation and assessment practices within the workers' compensation system. It means working to improve communication between interested parties in discussing desired goals and how to get the important questions asked and answered in a timely and accurate manner. Lastly, it encourages working together as a profession of vocational experts to improve the overall empiricism and admissibility of evidence presented in court.

References

- Anchor, K. N. (1994). *Assessment of vocational disability*. In W. H. Burke, *The handbook of forensic rehabilitation*. Houston, TX: HDI Publishers.
- Burke, W. H. (1995). *The handbook of forensic rehabilitation*. Houston, TX: HDI Publishers. Commission on Rehabilitation Counselor Certification. (2001). *Code of Professional Ethics for Rehabilitation Counselors*. [Online]. Available: <http://www.crc certification.com>
- Daubert v. Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579 (1993).
- Haske v Transport Leasing, Inc, Indiana, 455 Mich. 628, 566 N.W.2d 896 (1997).
- Houtenville, Andrew J. (2007). *Disability Statistics in the United States*. Ithaca, NY: Cornell University Rehabilitation Research and Training Center on Disability Demographics and Statistics (StatsRRTC).
- Mashaw, J., & Reno, V.P. (Eds.) (1996). *Balancing security and opportunity: The challenge of disability income policy*. Washington, DC: National Academy of Social Insurance.
- Rast, P. H. (2006, Winter). The daubert decision: Accident reconstruction considerations. *The Forensic Examiner*, 15(4), 37-41.
- Sington v. Chrysler Corporation Corp., 245 Mich. App. 535, 630 N.W.2d 337 (2001).
- Welch, E. (2004, September). *Principles of disability law for the certified workers' compensation professional*. Workers' Compensation Center, Michigan State University, East Lansing, MI.
- Wigmore, J. H., (1985). *Evidence in trials at common law: tables of authors cited* (Rev. ed.). Boston, MA: Little Brown & Co.
- Williams, J. M., Dunn, P. L., Bast, S., & Giesen, J. (2006). Factors considered by vocational rehabilitation professionals in employability and earning capacity assessment. *Rehabilitation Counseling Bulletin*, 50(1), 24-34.
- Worker's Disability Compensation Act of 1969, Mich. § 418.301, § 418.851, (Supp. 2004).
- Workers' Compensation Act 2006, Fl. Stat. Ann §§ 440.015 (CGL 1936 Supp. 5966).