



The *Carnivale* of Risk

What's Work got to Do With It?: Emerging Law and Litigation over "Vocational Apportionment"

Presented By:

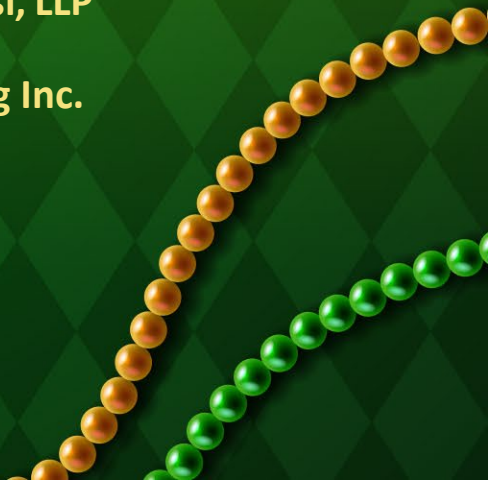
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What is permanent disability?

A permanent disability is the irreversible residual of a work-related injury that causes impairment in earning capacity, impairment in the normal use of a member or a handicap in the open labor market. *Brodie v. WCAB (2007) 40 Cal. 4th 1313, 72 Cal. Comp. Cases 565*

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How do we determine permanent disability?

Until April 2004, Labor Code §4660(a), permanent disability included “consideration being given to the diminished ability of such injured employee to compete in an open labor market.”

After April 2004 and SB 899, Labor Code §4660(a) permanent disability included “consideration being given to an employee’s diminished future earning capacity.”

After passage of SB 863, for injuries on or after 01/01/13, Labor Code §4660 does not reference the open labor market or diminished future earning capacity.

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Impairment vs. Disability

Permanent impairment as provided through the AMA Guides is not the same as permanent disability.

What is the difference?

In order to determine permanent disability, we must also consider an injured worker's diminished ability to compete in the open labor market and their amenability to rehabilitation.

This is where vocational rehabilitation evidence comes in. The AMA Guides account for activities of daily living but not necessarily for the effect of the injury on the ability to work. Applicant attorneys and Defense attorneys argue about the ability to rebut the Permanent Disability Rating Schedule.

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Vocational Evaluator/Expert

A vocational expert is tasked with assessing both medical and vocational evidence to determine whether an injured worker is amenable to rehabilitation and whether they have a diminished future earnings capacity.

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Case Law on Use of Vocational Evidence

LeBoeuf v. WCAB (1983) 48 CCC 587

A final decision of the Rehabilitation Bureau that an employee was incapable of being rehabilitated after he had received a partial permanent disability award may constitute good cause to reopen his workers' compensation case because the fact that he is precluded from vocational retraining is a factor to be taken into account in evaluating the employee's potential employability.

Ogilvie v. WCAB (2011) 197 Cal. App. 4th 1262, 76 CCC 624

The court of appeal held that an employee could challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee was not amenable to rehabilitation and therefore had suffered a greater loss of future earning capacity than reflected in the scheduled rating.

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Case Law on Use of Vocational Evidence cont.

Contra Costa County v. WCAB (Dahl) (2015) 240 Cal. App. 4th 746, 80 CCC 1119

Workers' compensation claimants may not rebut their disability rating merely by offering an alternative calculation of their diminished future earning capacity. Because a claimant failed to rebut her scheduled permanent disability rating under Labor Code §4660 by showing her injury precluded vocational rehabilitation, her attempted rebuttal did not comport with any of the approved methods for rebutting the rating provided using the rating schedule and was therefore foreclosed. There was also no evidence that the injury limited the claimant's rehabilitation prospects because both her and her employer's rehabilitation experts agreed that she was a good rehabilitation candidate, and the evidence suggested that she could increase her earning potential through retraining.

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Apportionment

Guiding Labor Code Sections:

§4664

§4663

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Medical Apportionment vs. Vocational Apportionment: Does the distinction even exist?

Let's assume an injured worker uses vocational evidence successfully to rebut the schedule and their disability is 100%, how do we then apply apportionment?

Let's Ask The Vocational Expert.....

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Overview of How Vocational Evaluations Have Been Performed

- Old Schedule
- 2005 Permanent Disability Rating Schedule
- current state of evaluations

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How Does an Evaluator Determine Disability?

- What an expert looks for during the evaluation?
- Critical factors relied upon
- Factors that may result in 100%
- Factors that will not result in 100%

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Vocational Evaluator's Changing Concept of “Vocational Apportionment”

- How has this changed over time?
- Montana factors?
- Recent trends

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Vocational Apportionment

Definition: Non-industrial contributing causal factors of an injured worker's alleged vocational disability.

Originating Case: *Target Corp. v WCAB (Estrada)* (2016) 81 CCC 1192 (writ denied)

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Competing Arguments:

Applicant Attorney:

- 1) The applicant was working full duty and participating in the labor market (even with prior medical injuries or conditions) and it was not until the instant injury that he or she is now no longer able to work.
- 2) Medical apportionment should not apply to total loss of labor market access if a) no significant work disability prior to current industrial injury, b) no prior vocational factors that prevented the worker from performing their job prior to the current industrial injury and c) was working their full job duties in their profession prior to the current industrial injury



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Competing Arguments cont.

Defense Attorney:

- 1) The concept of ignoring medical apportionment in 100% case is inconsistent with the dictates of the Labor Code and §4663.
- 2) The **Borman** case: Court of Appeal authority that discusses the interaction of vocational evidence and medical evidence of apportionment. *Acme Steel v. WCAB (Borman)* 218 Cal. App. 4th 1137. Based on this case, the defense argues that the law remains settled. Medical apportionment may only be disallowed when and if the medical apportionment is not supported by substantial medical evidence.

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Case Outlook/Strategy

Applicant Attorney: What cases is Vocational Evidence pursued?

- only those with no medical apportionment?
- any where the injured worker might never work again?

Defense Attorney: Preparation and Recommendations

- take the extra steps to bolster medical apportionment – depositions, supplemental report requests
- ask more questions at claim onset about history of work restrictions even for non-relevant body parts, educational history, language and reading skills
- thorough discovery of prior awards, claims, permanent work restrictions, and disability accommodations

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Thank you!

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