

USE OF A VOCATIONAL EXPERT TO MAXIMIZE THE FUTURE LOST EARNINGS CALCULATION OF THE INJURED WORKER

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INTRODUCTION

With SB899 came two significant changes to the Workers Comp system as we know it starting on 1/1/04.

1.) First was that the old permanent disability schedules were revised with Labor Code section 4660 in which the determination of the percentage of PD shall take into account three factors:

- a) The physical injury, which incorporates the descriptions and measurements of physical impairments of the AMA Guidelines
- b) The occupation and age at date of injury
- c) The employee's diminished future earning capacity based on a numeric formula of empirical data and findings that aggregate the average percentage of long term loss of income resulting from each type of injury for similarly situated employees.

The schedule, which was posted to the Department of Industrial Relations website effective January 2005, "shall be mandatorily amended at least once every five years," thus leaving plenty of time to establish case law. Without formal introduction into evidence of anything to the contrary, the schedule constitutes prima facie evidence of the percentage of PD to be attributed to each injury covered by the schedule. Public hearings on 4/4/05 to address the issue of the negative impact caused to the injured employee due to the dramatic reduction in PD benefits, seemed to have fallen on deaf ears, and no change to the schedule is anticipated by Sacramento watch dogs.

2.) The second significant change was, that in place of the \$16,000.00 Voc Rehab program there is now a voucher system allowing for \$4,000.00 to \$10,000.00 to be awarded based on the percentage of permanent disability, to be used for schooling and related costs and counseling. There is no maintenance benefit provided. Given the delay in the provision of the funds and lack of support, it appears to be an empty promise.

USING A VOCATIONAL EXPERT

When looking at the definitions, we could say that:

- **Loss of earnings** refers to the loss of wages from the date of injury until the date an employee returns to work.
- **Lost earning capacity** refers to the reduction, if any, in one's capacity to work and earn money. This is based on a variety of factors to include social, physical, emotional and psych, education,

past employment, past wage history, skills, and the future expense to that employee of restoring a set of work skills to that level which is compatible with their physical ability following injury.

- **Future lost earnings**, refers to the amount of dollars lost in the future as a result of one's loss of earning capacity.

The new PD rating system will generate a 'future earning capacity adjustment' to the 'impairment standard' of between 10 and 40% for each 'injury category.' As expected, one must be sizably disabled to achieve the 40% range. The problem with this type of approach is that no single one method toward calculating lost earning capacity will fit all workers equally or fairly. The method proposed assumes there is no variance in the impact of disability on the capacity to perform work, and that all persons of a certain type of disability will experience the same degree of lost earning capacity (LEC). Not taken into consideration is gender, race / ethnicity, transferable knowledge/ skills/abilities, local market conditions, current and future economic trends, pre-injury wage /work history, education, emotional status, social factors, native language, resiliency, and employee fringe benefits paid at date of injury. The AMA Guideline approach does not take into consideration a thorough review and evaluation of pre-imposed date of injury functional capacities, and the application of the percentage loss after injury to a specific geographical market.

To obtain relevant information, the VE would first obtain do and intake interview and a transferrable skills analysis of the worker's capacity both pre and post date of injury. Though it can be done manually, more and more, reliable software is available to aid the evaluator with this research. It is important that the VE understands the inner workings of the software program used and the methodology it employs to provide results, so as to avoid opposing counsel from raising the question of admissibility. Sometimes the slightest changes in these software programs can result in wild extremes of data output. As compared to regional labor market information, the pre and post changes will result in a percentage loss of earning capacity or employability.

Coupled with that is the future loss of earning capacity. It must first be established as to what the employee's base wage rate was at the date of injury. This may be well represented by their Average Weekly Wage. However, in the case of a worker in a transitional position, incarceration, temporary employment, or someone who has simply decided to take it easy for awhile, the DOI wage may not be a fair representation of what that person's true base earning capacity was at injury. It could have been the best job or worst job of their career. The Social Security Retirement Benefit Wage Statement sent annually to employees provides a very clear understanding of prior years' wages. This information is compared with the future potential jobs that result from the transferrable skills analysis and provides the future base rate. Information can be obtained from the local labor market via trade journals, newspapers, and online sources, labor market information sources of state agencies, census reports, software programs that can be updated, and/or simply using the minimum wage as the standard in the case of a low income worker. The pre and post base wage figures are compared to result in the future loss of wage earning capacity.

future lost earning capacity, it may also be prudent to employ the services of an economist to run the final loss figures.

Consideration of hiring an expert is bolstered by the fact that the PD adjustment calculator in the schedule for lost earnings is based on the ‘average percentage loss for a similarly situated worker,’ which means there are roughly 50% of employees above or below the average. Defense litigators should be looking at this situation from the inverse perspective in cases of higher disability or underemployment. Things for applicant’s counsel to consider include:

- A. Circumstances surrounding the wage at date of injury - If the wage at injury is significantly lower than past wages earned with the employer of record, their base rate for consideration of wage loss is arguably higher, thus resulting in a potentially higher future LEC. Countering this is if the worker's wage is based on sizeable levels of overtime that they can no longer perform.
- B. Probability of RTW / loss of employability - Taking into consideration all of the employee’s factors, the lower the perceived probability of RTW and / or the higher anticipated loss of employability, makes this a strong reason for review of a VE. This is especially true if the possibility exists of moving toward a LeBoeuf argument.
- C. Anticipated future earnings - If the worker was working in a highly skilled or specialized field or trade resulting in few transferrable skills, paid a union wage for their craft, is lesser educated, must drop down to the sedentary / light range, or has other unique factors, the loss of future earnings is likely greater.

The significant details a VE can bring to the table for discussion and negotiation can be sizable. Use of the VE has been around and employed in other areas of litigation including personal injury, 3rd party, divorce, wrongful termination, discrimination, and wrongful death, among others. Though used to a lesser degree in Worker’s Comp in the past, in the future, I suspect it will be a consideration on every case that meets the criteria, as long as California uses the AMA guidelines for disability determination. It appears that post Jan 04 DOI’s are starting to reach the settlement phase, and all parties in the system will have to retool and begin dealing with the use of the new system. Many vocational rehabilitation consultants will be using their own transferrable skills to aid in the fair evaluation of lost earning capacity for disability rating. A seasoned vocational rehabilitation counselor will understand the intricacies of injury and resulting disability, as well as their effect on a person’s employability and wage earning capacity, with or without skill upgrade. As is always the case, there will be a learning curve for doctors, lawyers and vocational experts alike. This is the new system for better or worse, and it becomes of a question of how to maximize the benefit for your client, be it injured worker or insurer.

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