

Anatomy of a Forensic Labor Market Survey

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Learning Objectives:

- ❑ **In Defense Base Act claims, the vocational rehabilitation evaluation and labor market survey may be a factor in determining wage loss or earning capacity.**
- ❑ **Although vocational specialists have similar education and credentials, there may be disparate and conflicting expert opinions as to wage loss or loss of earning capacity.**
- ❑ **The process of the vocational evaluation and concluding report should follow methodology described in peer reviewed journals, facts or data. This standardization of methodology is empirically documented in all recognized forensic theories of vocational rehabilitation.**
- ❑ **Relative case law should be understood by the specialist to properly assist the referral source.**

In litigated matters, the vocational rehabilitation evaluation is a tool in determination of present earning capacity.

- The vocational specialist should provide an evaluation and labor market survey, obtained by acceptable methodology, that he or she is able to defend in testimony.
- This evaluation and labor market survey allow the referral source to make informed decisions on the financial aspects of the claim.



Possible explanations as to why there is a difference in conclusions as to earning capacity among consultants on the same claim:

- ❑ Different factors and variables were documented and relied upon by the opposing vocational specialists.
- ❑ Varied earning capacity models used by vocational specialists.
- ❑ Records reviewed may vary between specialists.
- ❑ Core or cultural belief system of the specialist should not influence evaluation or conclusions.

Relevant Factors and Variables often relied upon by vocational specialists to formulate opinions as to loss of earning capacity:

- **Employment**
- **Personal/Social**
- **Education**
- **Medical Factors**
- **Reason for Referral**
- **Literature Resources**
- **Avocational Factors**
- **Psychometric Testing**
- **Observations**
- **Military Service**
- **Activities of Daily Living**
- **Medication Factors**
- **Transferable Skills Analysis**
- **Economic factors**

Robinson, R., Young, M. E., & Pomeranz, J. (2009). Content Analysis of Factors Identified in Vocational Evaluation Analysis Reports. *The Rehabilitation Professional*, 17(4), 163-172

Table 3 *Major Category Groupings for Factors and Rate of Report Incidence* - >37% to 100% addressed in reports

Core Domains in Forensic Vocational Evaluations

- **Labor Market Survey** – jobs available in the present local (and overseas if appropriate) labor market.
- **Psychometric testing** – reliable measurement of various worker traits, including intellect, educational aptitude, interests and personality.
- **Past, present and future medical care** – apart from development of life care plan, may impact formation of plan.
- **Wage earning capacity** – earning capability not influenced by claimant's vocational choice but actual earning capabilities.
- **Work life participation** – emerging area in vocational evaluations, identifying total time claimant planned to be employed.
- **Transferable Skills Analysis** – identifies alternative jobs.
- **Employability** – identifies the individual has ability to obtain employment.
- **Placeability** – identifies the individual is a viable candidate for a specific job, and maintain that job.

Vocational Rehabilitation Specialists as an Expert Witness:

- ❑ Rule 702 of the Federal Rules of Evidence requires that any expert methods be reliable according to the standards of practice in the expert's field. Standards of practice has been addressed in peer reviewed research.
- ❑ Reliable principles, applications and methods are emphasized.
- ❑ The expert has specific training and knowledge in an area of interest that is relevant to the case. That information is to assist the trier/jury to understand evidence as a result of the expert's specific knowledge, skill, education and training.

Identifying Suitable Alternative Employment in Labor Market Surveys

New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1931, 1038 (5th Cir. 1981); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992).

Once the claimant has established a prima facie case of disability, the burden shifts to the employer to show available suitable alternative employment. To properly show this, the employer must prove existence of available jobs.

The vocational counselor should note: **claimant's age, education, employment history and physical capabilities have been considered. The employer must demonstrate the claimant could obtain employment with diligent effort. Jobs should be included for which the claimant is qualified, and capable of performing, in his/her geographical area. The jobs should outline terms, nature, availability, distance from claimant's residence and physical requirements of the position. Salary and location should be specific.**

Additional Information to Affirm Vocational Evaluation and Labor Market Survey:

- Vocational specialists prepare for testimony by review of employment trends in specific geographical areas of focus.**
- Vocational specialists review updated evidence based research to identify common industry practices to ensure appropriate reliability and reasoning behind opinion.**
- Vocational specialists review continuum of availability of employment following labor market survey.**
- Vocational specialists attend various continuing education seminars relative to their credentials. Typically, any trends in the field are identified and discussed.**
- Vocational specialists benefit from feedback of reports and testimony by peers and other professionals.**

Thank You!

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