

VOCATIONAL BARRIERS UNDER THE DEFENSE BASE ACT

Alan G. Brackett and Cassie E. Preston



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VOCATIONAL BARRIERS UNDER THE DEFENSE BASE ACT

- What to include in the vocational report and labor market survey?
- What is suitable alternative employment?
- What is the relevant labor market?
- How to account for higher wages and short term employment of civilian contractors?
- Technology considerations
- Case developments

WHAT IS SUITABLE ALTERNATIVE EMPLOYMENT?

- Suitable alternative employment is the availability of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of his or her age, work experience, and physical restrictions, is capable of performing

BURDEN SHIFTING FRAMEWORK

- Maximum Medical Improvement
- Burden shifts to employer and carrier to identify suitable alternative employment
- Employee presumed permanently and totally disabled until suitable alternative employment is identified.
- Timing issues
 - *Lake v. L-3 Communications* (BRB)
 - *Papanier v. New York Container Terminal* (BRB)

BURDEN SHIFTING FRAMEWORK

- Claimant's physician's approval of the jobs identified in labor market survey is not required by law
- Once suitable alternative employment established, burden shifts to claimant to show he can not work or get the jobs identified in the labor market survey

GEOGRAPHIC BOUNDARIES AND THE RELEVANT LABOR MARKET

- Typically, the relevant labor market is the claimant's "local community"
 - The community in which the injury occurred, or
 - The community where Claimant resided when injury occurred
- BRB has held that jobs 65 miles and 200 miles away are not within the geographic area, even if employee took such jobs before his injury

GLOBAL LABOR MARKET SURVEYS

- “On the facts” approach
 - Claimant’s work history
 - Whether Claimant is accustomed to working in locales away from his or her home
- *Patterson v. Omniplex World Servs.*, 36 BRBS 149 (2003)
 - Global Labor Market Survey relevant and proper in case where claimant had seven years of overseas employment when accident occurred

FOREIGN NATIONALS

Barriers to Vocational Rehabilitation:

- Undefined labor market
- Poor economic outlook in foreign national's home country
- Language difficulties
- Cultural difficulties
- Paternalism by the Department of Labor

FOREIGN NATIONALS

Vocational Rehabilitation Considerations:

- Expert knowledge about claimant's home country
- Education
- Geographical boundaries
- Transportation
- Work history

LABOR MARKET SURVEYS IN AFGHANISTAN



DEPARTMENT OF LABOR VOCATIONAL REHABILITATION



HIGH WAGES AND SHORT-TERM EMPLOYMENT

- Civilian contracts working overseas typically pay higher wages than stateside employment
- Civilian contracts overseas are typically short-term
- The Longshore and Harbor Workers' Compensation Act is set up to imagine a lifelong wage earning capacity
- But, civilian contractors' wages overseas can not necessarily be earned for the remainder of the injured workers' life

TECHNOLOGY CONSIDERATIONS

- Online employment applications
 - Claimant should provide confirmation application was received
- Vocational rehabilitation counselor should provide instructions for claimant applying to job leads on the internet
- Labor market survey should include information regarding online application if available

CASE LAW DEVELOPMENTS

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WORK RESTRICTIONS

Marine Repair Servs., Inc. v. Fifer (4th Circuit)

- Employer may rely on **known work restrictions** to prepare labor market survey
- Employer should update labor market survey if work restrictions are revised

CLAIMANT MISCONDUCT

Cox v. Dir., OWCP (5th Circuit)

- Employer offered suitable alternative employment at claimant's original place of employment
- Claimant was terminated thereafter for misconduct
- Employer no longer required to show other suitable alternative employment or that claimant could earn wages in the open market

TYPES OF JOBS IDENTIFIED

Marathon Ashland Petroleum v. Williams (6th Circuit)

- Vocational experts must identify jobs that are compatible with the claimant's work restrictions.
- Job based on a discredited medical opinion is a "mirage"
- Holding: Claimant remained totally disabled despite Employer's labor market survey

SENIORITY RAISES

Petitt v. Sause Bros. (9th Circuit)

- Seniority raises do not reflect increased earning capacity
- Employer should be cautious using a labor market survey with jobs that offer **wage ranges** unless the basis for the range is defined