Vocational Apportionment: Factors Affecting Employability and Earning Capacity

American Board of Vocational Experts

Annual Conference

Vancouver, British Columbia

April 9, 2016

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Goal:

To assist vocational experts in understanding the importance of developing an opinion regarding vocational apportionment. To describe a methodology that can be followed in developing an opinion. To provide physicians, attorneys, judges and other interested parties information about vocational apportionment.

Learning Objectives:

1. Develop an understanding of the concept of vocational apportionment
2. Learn medical factors affecting vocational apportionment
3. Learn vocational factors affecting vocational apportionment
4. Understand that developing an opinion regarding vocational apportionment is necessary based on recent court decisions.

Vocational Apportionment: An Analysis of Medical and Vocational Factors Affecting Apportionment of Employability and Earning Capacity (Van de Bittner, 2015)

Abstract: Vocational apportionment can impact an applicant's or plaintiff's employability and earning capacity. Medical factors and vocational factors affecting apportionment are discussed. Numerous recent court decisions regarding vocational apportionment are summarized. A new vocational apportionment analysis process is presented.

Vocational Apportionment Defined

Vocational apportionment refers to a pre-existing or non-industrial medical factor or a non-industrial vocational factor that impacts an applicant's or plaintiff's employability or earning capacity. Vocational apportionment can apply to applicants or plaintiffs in multiple judicial venues, such as workers' compensation, third party, personal injury, medical malpractice, longshore, and others. The primary focus of the discussion of vocational apportionment is the California workers' compensation system. However, the issues discussed can apply to other judicial venues.

Medical Apportionment

Medical apportionment is governed by Labor Code sections 4663 and 4664 in the California workers' compensation system. Labor Code section 4663 (Melchoir, 2015) states:

> (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.

Labor Code section 4664 (Melchoir, 2015) states:

(a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

The California Supreme Court affirmed Labor Code sections 4663 and 4664 by stating:

Employers must compensate injured workers only for that portion of their permanent disability attributable to current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors. *(Brodie v. WCAB and Contra Costa Fire Protection District, et al.*, 2007, p. 7)

Burden of Proof

Labor Code section 4664(b) (Melchoir, 2015) indicates that the employer has the burden to prove medical apportionment. However, as will be seen in the summary of recent court decisions below regarding vocational apportionment, applicant's vocational experts may be expected to prove that vocational apportionment does not exist, if that is their conclusion following a vocational evaluation.

Non-industrial Vocational Factors

Ogilvie v. WCAB and *City and County of San Francisco v. WCAB* (2011), commonly referred to as *Ogilvie III,* an en banc decision including all seven commissioners, stated:

> The application of the rating schedule is not rebutted by evidence that an employee's loss of future earnings is greater than the earning capacity adjustment that would apply to his or her scheduled rating due to non-industrial factors. (p. 15)

Examples of non-industrial factors are described in *Ogilvie III* as including "general economic conditions, illiteracy, proficiency to speak English, or an employee's lack of education" (p. 11).

Recent California Workers' Compensation Court Decisions Regarding Vocational Apportionment

***Schroeder v. WCAB, State of California/Department of Corrections and Rehabilitation* (2013), a Court of Appeal petition for writ of review denied decision**

The scheduled rating was not rebutted since the applicant's vocational expert considered impermissible factors.

Impermissible vocational factors: limitations on employment based on geographic area and general economic conditions.

The injured worker relocated and the vocational expert limited her analysis to the new county, where the job market was much weaker than in the prior county.

Vista Ford v. WCAB (Nilsen) (2013), another writ denied decision

The primary consideration was that the applicant was found to be 100% disabled based on the separate medical condition of chronic pain, and a related narcotic dependency and side effects of medication, despite pre-existing apportionment for other body parts. Additionally, an orthopedic panel qualified medical evaluator found that pre-existing medical conditions did not cause permanent work limitations. Any consideration of vocational factors affecting apportionment was moot, since the applicant was 100% disabled based on medical evidence alone related to the chronic pain condition and related medical issues. The medication side effects were substantial and included, among other things, hallucinations, loss of concentration, depression, falling asleep, and tremors and shaking. The WCJ did not believe there was any vocational apportionment due to earnings since the applicant had previously earned $100,000.00 to $120,000.00 per year.

Williams v. WCAB, Berkeley Unified School District (2013), a writ denied decision

Neither vocational expert considered the opinion of the agreed medical evaluator regarding 20% apportionment in determining the applicant's diminished future earning capacity. The WCJ stated the ideal circumstance would be to start the DFEC analysis from the medically apportioned permanent disability and to apply the DFEC analysis based on the applicant's medical restrictions, after apportionment. Instead, to conserve time and expense, the WCJ applied the medical apportionment to the overall disability. The WCJ reduced the overall permanent disability award of 35%, based on the opinion of the vocational experts, by 20% to 28% final permanent disability.

Acme Steel et al. v. WCAB and Michael Borman (2013)

The Court of Appeal annulled the WCAB order, which upheld the WCJ decision of 100% permanent disability for 100% hearing loss and other injuries. The agreed medical evaluator for hearing reported that the applicant's 100% hearing loss was 60% due to noise-induced occupational hearing loss and 40% due to non-occupational factors, particularly cochlear degeneration. The agreed medical evaluator also reported that the applicant informed him he had been awarded a 22% disability award due to hearing loss for a 1994 factory explosion. The court stated it was proper for the WCJ to use vocational expert evidence to find the applicant 100% disabled based on a combination of factors. However, the Court of Appeal cited *Brodie v. WCAB* (2007) in stating that the WCJ must address apportionment and compensate the applicant for only that portion of permanent disability attributable to the current industrial injury. The court rejected the WCJ's decision that there was no apportionment under Labor Code section 4664 since the applicant had continued to work with no related loss of earnings after the prior award.

Lentz v. WCAB, Henry Mechanical (2013)

The court concluded that the opinion of the applicant's vocational expert that the applicant had a diminished future earning capacity of 100% was not substantial evidence since the vocational expert did not consider the applicant's pre-existing non-industrial disability and did not perform vocational testing.

Brewer v. California Department of Corrections High Desert State Prison (2013)

The applicant's and defendant's vocational experts concluded that the applicant was permanently and totally disabled and that his diminished future earning capacity was 100%. Neither vocational expert considered apportionment, including primarily pre-existing medical apportionment. The WCJ relied on the applicant's vocational expert's opinion. The panel found the applicant's vocational expert's report and trial testimony were not substantial evidence. This was because the applicant's vocational expert's opinion that the applicant was unemployable was based on the applicant's overall medical disability. However, the WCJ found the medical disability in large extent to be apportionable, and the panel was in agreement. Moreover, the panel stated that a vocational expert cannot simply state that apportionment is not considered in a vocational evaluation. Ignoring or disregarding relevant factors does not constitute substantial evidence.

Warner Brothers Studios, Inc., v. WCAB (Crocker) (2013)

The WCAB commissioners upheld the WCJ's decision that the applicant was 100% disabled and had no future earning capacity. The WCJ found there was no apportionment since two prior injuries did not arise out of employment or in the course of employment and a third prior injury resulted in 0% permanent disability. The WCJ also found that the applicant's trial testimony was credible regarding the applicant's inability to compete in the open labor market and having diminished future earning capacity of 100%.

Edge v. Ralph's Grocery Store (2013)

The WCAB panel reversed the decision of the WCJ that the applicant was 100% disabled because the applicant's vocational expert had relied on non-industrial factors such as general economic conditions, illiteracy, proficiency to speak English, and an employee's lack of education. In addition, the panel concluded that the agreed medical evaluator and defense vocational expert did not find that the applicant could not be rehabilitated or was unable to compete in the open labor market. The panel also noted that the applicant's lack of post-injury employment did not prove the applicant was not amenable to rehabilitation.

Van Allen v. City of Los Angeles/Registrar-Recorder (2013)

The applicant had a 1998 industrial injury to multiple body parts. She had a prior industrial injury in 1990 that resulted in an award of 15.5% permanent disability based on work restrictions of no heavy lifting, repetitive bending, or stooping. The orthopedic agreed medical evaluator found 25% apportionment to the prior industrial injury. The internal medicine agreed medical evaluator found pre-existing apportionment to multiple internal conditions. The treating psychologist found no apportionment. The defense psychiatry qualified medical evaluator found 17.5% apportionment.

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The WCAB panel determined that the defendant met its burden of proof regarding the prior industrial injury and award. There was no dispute regarding the applicant's inability to compete in the open labor market. However, the WCAB determined that the applicant's vocational expert's opinion did not constitute substantial evidence because the vocational expert did not sufficiently analyze non-industrial factors that contributed to the applicant's inability to compete in the open labor market. The applicant's vocational expert concluded that the applicant was unable to compete in the open labor market based on a combination of industrial and non-industrial factors. There was no defense vocational expert.

***New Axia Holdings, dba Ames Taping Tools v. WCAB (Martinez)* (2014)**

The WCAB panel found that the WCJ erred in finding medical apportionment to a prior award that was introduced into evidence with no supporting medical file or medical reports. The defendant has the burden to prove medical apportionment. The WCJ rejected the applicant's vocational expert's opinion that the applicant was 100% disabled and accepted the opinion of the defense vocational expert that the applicant was employable based on the applicant's testimony that he could return to the open labor market and the orthopedic agreed medical evaluator's opinion that the applicant was precluded from substantial work. A preclusion from substantial work means the individual has lost approximately 75% of pre-injury capacity for lifting, pushing pulling, bending, stooping, climbing, and similar activities (California Division of Workers' Compensation, 1977).

Hines v. 3T 3C Transportation (2014)

The WCAB panel agreed with the WCJ that the applicant's vocational expert's report did not constitute substantial evidence. The vocational expert's opinion that the applicant was limited to part-time work was not supported by the medical reports. The vocational expert also relied on non-industrial medical conditions such as COPD and psychological conditions that required the use of medication as factors that limited the applicant's employability.

Pinzon v. RC Gramer Construction (2014), a panel decision

The WCAB panel found that the opinion of the applicant's vocational expert did not constitute substantial evidence because the vocational expert disregarded the opinion of the orthopedic and psychiatry agreed medical evaluators in testifying at trial that the applicant was 100% disabled. The panel noted that the opinions of an agreed medical evaluator should be followed unless there is good reason to find them unpersuasive. Among other things, the applicant's vocational expert conducted no vocational testing and prepared no written report. The orthopedic agreed medical evaluator reported that the applicant could lift and carry 50 pounds and sit, stand, and walk 4 to 8 hours per day. The orthopedist found 10% apportionment to the low back. The psychiatry agreed medical evaluator reported that the applicant could return to his usual job as a carpenter.

Duplessis v. Network Appliance, Inc. (2014), a panel decision

The WCAB affirmed that the applicant's industrial back injuries of 3/18/02 and 3/3/03 resulted in 69% orthopedic disability, before apportionment and 15% psychiatric disability. The applicant also had a 1979 non-industrial automobile accident and two industrial injuries in 1999 and 2000. The applicant's vocational expert's opinions were insufficient to rebut the scheduled rating or support a finding of 100% disability under Labor Code section 4662 (Melchoir, 2015). The court concluded that both vocational experts should provide an apportionment analysis for the two new industrial injuries and the prior non-industrial automobile accident and the 1999 and 2000 industrial injuries. The applicant's vocational expert also did not conclude that one of the current industrial injuries alone would result in 100% permanent disability.

Paz v. Marie Callender's, Inc. (2014), a panel decision

The WCAB panel affirmed the WCJ's award of 80% permanent disability, after apportionment based on applicant's pre-existing diabetes, which required dialysis and right foot amputation. There was also a related stroke. The medical evaluators and the defense vocational expert considered apportionment and the applicant's vocational expert did not. The applicant's vocational expert stated that the applicant reported no pre-existing work restrictions, physical limitations, or work function limitations that prevented him from returning to work. The court responded by explaining that apportionment to pre-existing, non-industrial factors does not require that they be labor disabling at the time. Moreover, apportionment can be based on pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions. The court also explained that a finding of 100% permanent disability under Labor Code section 4662 does not automatically preclude apportionment.

Morris v. WCAB, San Gorgonio Hospital (2014), a writ denied decision

The WCAB panel held that apportionment was applicable even though the applicant was determined to be 100% permanently disabled under Labor Code section 4662 (d), (Melchoir, 2015). The panel also found that the applicant was unable to rebut the scheduled rating without vocational evidence. Neither side had retained a vocational expert. The court concluded that it was improper for a physician to conclude that an applicant was unable to compete in the open labor market.

Diaz v. State of California, Corrections & Rehabilitation Parole (2014), a panel decision

The WCAB panel remanded the case to the WCJ for further development of medical and vocational apportionment. The panel disagreed with the WCJ's determination that there was no medical apportionment when the psychiatry agreed medical evaluator found 20% apportionment and the internal medicine agreed medical evaluator found 25% apportionment. The court also concluded that the agreed vocational evaluator's vocational history of the applicant was incomplete since the applicant had not disclosed concurrent part-time employment as a security guard at the time he was injured while employed as a police officer. The court ruled that an incomplete vocational history is similar to an incomplete medical history. Such a report cannot be relied upon as substantial evidence to support a finding of permanent total disability.

Mercer v. State of California, Department of Motor Vehicles (2014), a panel decision

The WCAB panel amended the WCJ's 93% permanent disability after apportionment to 100%. The panel determined that the defendant had not met its burden to prove apportionment combined with the agreed vocational expert's opinion that the applicant was permanently totally disabled. Additionally, since the applicant was found to be 100% disabled based on the opinions of the orthopedic evaluator alone, there was no need to consider the 20% apportionment opinion of the psychology evaluator.

Pound v. WCAB (2014), a writ denied decision

The WCAB panel affirmed the WCJ's decision that the industrial injury to the cervical spine, lumbar spine, and irritable bowel syndrome caused 60% permanent disability, after apportionment to non-industrial factors found by the agreed medical evaluator. The WCJ found that apportionment to causation applied although a vocational expert had reported that the applicant was permanently totally disabled, citing *Borman* (2013).

Dufresne v. Sutter Maternity & Surgery Center of Santa Cruz (2014), a panel decision

The WCAB panel concurred with the WCJ that the applicant was 100% disabled, without regard to apportionment. The panel found that apportionment is permissible under Labor Code section 4662(d), in accordance with the facts of the case. While the applicant's vocational expert concluded that the applicant was unemployable and had a total loss of earning capacity, the vocational expert did not demonstrate that the applicant's diminished future earnings were directly related to the work injury and not due to non-industrial factors. The commissioners stated that the vocational expert's assessment of the applicant's loss of earning capacity must be apportioned to causation when the applicant's non-amenability to rehabilitation is due to a combination of industrial and non-industrial factors.

Joberg v. Illuminations, Inc. (2014), a panel decision

The WCAB panel found that the WCJ must address the substantial apportionment found by the orthopedic and psychiatric evaluators, despite the defense's vocational expert's opinion that the applicant was 100% disabled. The vocational expert's testimony did not address the apportionment opinions of the orthopedic and psychiatric evaluators. The defense vocational expert did not conduct vocational testing.

There was no applicant's vocational expert in *Joberg v. Illuminations, Inc.* (2014). The defense vocational expert was provided incomplete orthopedic and psychiatric records by the defense attorney. The defense attorney instructed the defense vocational expert not to prepare a written report since the vocational expert's opinion was that the applicant was 100% disabled based on the opinions of the psychiatric evaluator.

Joberg, continued

The applicant's attorney then contacted the defense vocational expert and requested a report at the applicant's attorney's expense. The vocational expert felt ethically and legally bound to the referring defense attorney and declined the applicant's attorney's request. The applicant's attorney subpoenaed the defense vocational expert to trial, where the vocational expert testified the applicant was 100% disabled. The defendant refused to pay the defense vocational expert's trial fee. The court ordered further development of the record, including the defense vocational expert meeting with the applicant to complete the rest of the vocational evaluation. The defendant still refused to pay the fees of the defense vocational expert and petitioned to have the judge removed.

Joberg, continued

The defense vocational expert advised the applicant's attorney that a court order to pay the past and future fees would be needed before proceeding. The defendant lost the petition to remove the judge and paid the defense vocational expert's invoices. The applicant's attorney requested sanctions and penalties against the defense because of failure to pay in a timely manner. The defense vocational expert was then provided the rest of the orthopedic and psychiatric records, which revealed significant orthopedic and psychiatric apportionment. The defense vocational expert was then scheduled to meet with the applicant to complete the remainder of the vocational evaluation and to prepare a written report.

Walter v. International Capital Group (2015), a panel decision

The WCAB panel returned the matter to the WCJ after concluding that the applicant's vocational expert's report was not substantial evidence since the vocational expert failed to consider the orthopedic agreed medical evaluator's opinion on apportionment. The defense vocational expert's report was also not substantial evidence for failing to consider the opinion of the consulting psychiatrist. The matter was returned to the trial level with a recommendation that the parties select an agreed vocational evaluator to evaluate the applicant's future earning capacity.

Aima v. Buestad Construction, Inc. (2015), a panel decision

The WCAB panel affirmed the WCJ's findings that the applicant was 100% disabled, without apportionment. The WCJ rejected the 15% apportionment to non-industrial factors found by the orthopedic agreed medical evaluator. The 15% non-industrial apportionment found by the psychiatry agreed medical evaluator was also rejected since the psychiatrist had adopted the apportionment opinion of the orthopedic agreed medical evaluator. The defendant had not met the burden of proof to justify orthopedic apportionment to degenerative changes. The WCJ then concluded that the applicant was 100% disabled based on the non-apportioned opinions of the orthopedic and psychiatry agreed medical evaluators, the applicant's trial testimony regarding cognitive impairment caused by side effects of medication, and the opinions of the applicant's vocational expert.

Vocational Apportionment Analysis Process

The Vocational Apportionment Analysis Process (VA Process) can assist vocational experts in discussing, analyzing, and developing empirically-based opinions regarding diminished future earning capacity that consider apportionment. Reviewing this process will assist other interested parties in understanding the issues addressed by vocational experts in developing opinions regarding diminished future earning capacity that consider apportionment. The process can be applied to workers' compensation, third party, personal injury, medical malpractice, and other types of cases. The process is outlined below.

I. Review Records Regarding Medical Factors Affecting Apportionment

1. Request, obtain, and review any medical, psychiatric, and related opinions regarding apportionment that will likely be relied upon by the court.
2. Reviewing a complete medical record is a critical part of the process.
3. Request medical reports and depositions that may contain an opinion on permanent work restrictions for the current and any prior medical conditions.
4. Request court awards regarding prior conditions.
5. Interview the applicant or plaintiff regarding the current and any prior conditions and their impact on employability and earning capacity.

II. Review Records Regarding Vocational Factors Affecting Apportionment

1. Request, obtain, and review any vocational records that may address current and any pre-existing or non-industrial vocational factors.
2. Request the deposition and other discovery records regarding the applicant or plaintiff.
3. Interview the applicant or plaintiff regarding current and any pre-existing, non-industrial, or other vocational factors of a personal, social, legal, educational, or employment nature.
4. Administer a complete battery of tests, the results of which may reveal non-industrial or unrelated factors.
5. Consider interviewing or reviewing deposition transcripts of co-workers, supervisors, or family members.

6. For California workers' compensation cases, request, review and consider information regarding impermissible non-industrial factors cited in *Ogilvie III* (2011), such as "general economic conditions, illiteracy, proficiency to speak English, or an employee's lack of education" (p. 11).
7. Regarding "lack of education," consider the level of education that is consistent with mandatory school attendance, which is designed to result in a high school diploma or GED certificate.
8. Assuming a high school diploma or GED certificate post-injury would require a similar assumption pre-injury. Note that this educational assumption may or may not have an impact on any diminished future earning capacity.
9. Examples of other factors to consider that may not be related to the injury include a learning disability, felony conviction, relocation to a geographic area with a poor labor market, family, child care, or elder care responsibilities, or lack of a financial incentive to work.

III. Clarify the Impact of Medical and Vocational Factors Affecting Apportionment on Employability

1. Clarify the impact of medical and vocational factors affecting apportionment on employability through a complete and empirically-based transferable skills analysis.
2. Complete a comprehensive and empirically-based employability analysis to clarify the percentage of the labor market that is related to the current claim, before apportionment, as well as the percentage of the labor market, if any, that was precluded by any pre-existing, non-industrial, or unrelated medical conditions or vocational factors.
3. Focus on the most current medical opinions, and related work restrictions regarding apportionment by body part, e.g., cervical spine, headaches, GERD, cognition disorder, or psyche.
4. Consider any related side effects of medication for the apportioned medical conditions.

5. Conduct a transferable skills analysis while considering only the portion of the medical condition and associated work restrictions that are related to the current claim.
6. For comparison, conduct a transferable skills analysis based on any work restrictions for pre-existing non-industrial, or unrelated medical conditions.
7. For further comparison, consider completing a transferable skills analysis while considering all medical conditions, without apportionment.
8. Regarding impermissible vocational factors, conduct a transferable skills analysis under 2 scenarios.
   a. One scenario would include the results of the vocational tests administered by the vocational expert and a second would exclude test results and be based on the skill level of jobs in the applicant's or plaintiff's work history.
9. Doing so provides an empirical method for analyzing the impact of any non-industrial or unrelated vocational factors on employability.

IV. Clarify the Impact of Medical and Vocational Factors Affecting Apportionment on Earning Capacity

1. Clarify the impact of medical and vocational apportionment factors on the applicant's or plaintiff's pre-injury and post-injury earning capacity. Clarify pre-injury earning capacity both with and without apportionment factors.
2. Compare the applicant's or plaintiff's post-injury earning capacity excluding apportionment factors.
3. More specifically, compare the post-injury earning capacity for occupations with the work restrictions for the work injury alone with the pre-injury earning capacity, absent any non-industrial vocational factors both pre-injury and post-injury.
4. Compare the post-injury earning capacity for occupations with work restrictions that are unrelated to the current work injury with the pre-injury earning capacity, absent any non-industrial vocational factors both pre-injury and post-injury.
5. The examples below provide further clarification of these issues.

V. Determine Diminished Future Earning Capacity for the Current Injury Alone

A. In the ideal case, the vocational expert will have separate medical opinions regarding
   1. work restrictions for the current work injury alone and
   2. for any pre-existing work injuries and any non-industrial medical conditions.

B. Similarly, the vocational expert will have sufficient information regarding any
   1. non-industrial or
   2. unrelated vocational factors.

C. With this combination of medical opinions regarding work restrictions and information on vocational factors, the vocational expert can identify representative suitable occupations and expected wages consistent with the current injury alone.

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D. The Earning Capacity Analysis Formula (EC Formula) (Van de Bittner, 2015), can be used by the vocational expert to develop an overall opinion of diminished future earning capacity attributable to the current work injury alone. Through the EC Formula, the calculation of diminished future earning capacity is expressed by the following equation:

$$DFEC = f(WLE) \times \left[\frac{PRE\text{-}POST}{PRE} \right]$$

where:

DFEC = diminished future earning capacity
WLE = worklife expectancy
PRE = pre-injury earning capacity
POST = post-injury earning capacity
f = function of

VI. Application of Vocational Apportionment Analysis Results

The results of the vocational apportionment analysis can then be used by the attorneys in the case for their settlement negotiations. Should no settlement be reached, the results of the vocational apportionment analysis can be used by the court in rendering a decision.

Examples of Vocational Expert Opinions with the Vocational Apportionment Analysis Process (VA Process)

Example 1

A union carpenter with a high school diploma sustains a serious orthopedic injury with psychiatric and internal medicine complications. The orthopedic agreed medical evaluator concludes the applicant has no orthopedic apportionment and has permanent work restrictions of a limitation to part-time, irregular employment. The psychiatric and internal medicine evaluators conclude that apportionment is 50% industrial and 50% non-industrial in their respective specialties. The vocational expert concludes that the applicant is 100% disabled based on the opinions of the orthopedic evaluator alone since the vocational expert found no jobs in the open labor market within the orthopedic restrictions. As a result of the vocational evaluation, overall vocational apportionment based on medical and vocational factors combined is 100% industrial and 0% non-industrial. It is not necessary to opine on the apportionment opinions of the psychiatric and internal medicine evaluators since the opinions of the orthopedic evaluator are sufficient for an overall opinion on vocational apportionment.

Example 2

A plumber with only 6 years of formal education and tested reading comprehension and math computation achievement at the sixth grade level sustained a serious orthopedic injury and a head injury in a fall from a scaffold. The applicant was earning $110,000.00 per year at a union job. The orthopedic agreed medical evaluator provided a permanent work restriction of 20 pounds lifting and no apportionment. The neuropsychology agreed medical evaluator reported that the applicant was unable to work at jobs that required good memory and sustained concentration and attention, which was consistent with the results of the vocational expert's interview and vocational testing of the applicant. The neuropsychology evaluator found 20% apportionment to a pre-existing learning disability.

As a result of the vocational evaluation, the vocational expert concluded that the applicant's diminished future earning capacity was 78%. The vocational expert also concluded that although there was apportionment of employability due to the pre-existing learning disability, apportionment of diminished future earning capacity was 100% industrial and 0% non-industrial. Among other things, the results of the vocational evaluation confirmed that the applicant had been earning wages at the 90th percentile for plumbers in his geographic area. The vocational expert also learned through wage research that the applicant's pre-injury earnings were twice as high as the earnings of the average wage of all workers in his geographic area. As such, it was unlikely that his pre-injury earning capacity absent his learning disability would have been higher than his actual earnings at the time of injury.

Example 3

A truck driver was involved in an accident in 2008 and injured his low back. His wage was $25.00 per hour. He had permanent work restrictions that precluded commercial truck driving. He obtained subsequent employment as a dispatcher with a trucking company and earned $18.00 per hour. He sustained a serious injury in 2012 when he tripped over a telephone cord at work, including multiple orthopedic injuries, and had a permanent work capacity of 3 hours per day, 3 days per week. The orthopedic agreed medical evaluator, the only medical evaluator in the case, found that medical apportionment was 50% to the 2008 injury and 50% to the 2012 injury. As a result of a vocational evaluation, the vocational expert concluded that the applicant was unemployable in the open labor market. Apportionment of diminished future earning capacity was 28% due to the 2008 injury and 72% due to the 2012 injury based on 2008 earnings of $25.00 per hour and 2012 earnings of $18.00 per hour.

Example 4

A janitor with no education in the United States and no ability to speak English was injured at work and sustained a shoulder injury with no medical apportionment. The janitor earned $15.00 per hour pre-injury and $12.00 per hour after returning to work at a less demanding job. Regarding vocational apportionment based on vocational factors of education and no English language achievement, the vocational expert concluded that the applicant could have worked as a janitor supervisor at a wage of at least $18.75 per hour with high school level achievement, and post-injury could have earned at least $15.00 per hour.

As a result, the vocational expert concluded that overall vocational apportionment based on combined medical and vocational factors was 25%, the difference between $15.00 per hour actual pre-injury earning capacity and $18.75 per hour as the expected pre-injury earning capacity, and the difference between $12.00 per hour expected post-injury earning capacity and $15.00 per hour as the expected post-injury earning capacity, when considering the vocational apportionment factors of no education in the United States and no English language achievement. The vocational expert then applied the expected pre-injury and post-injury earning capacity to the EC Formula and learned that the applicant's diminished future earning capacity was 20%, when considering vocational apportionment.