

PREPARING VOCATIONAL EXPERTS FOR THE LONGSHORE TRIAL

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WHY THIS TOPIC

- The only defense in most cases
- Modifications slow and difficult to obtain
- Lombardi issue
- Even knowledgeable vocational experts are not litigation savvy
- Failed vocational defenses bring more challenges to LMS/litigation



WHY THIS TOPIC

- Long term impression on court, District Director and claimant counsel
- Team concept



ATTITUDE ADJUSTMENT

- Different than state comp (earning capacity never assumed under LHWCA;
Air America case almost never applied)
- Cannot wash one's hands after providing LMS
- Explain litigation process to experts
- Highlight damage issues; what is at stake here
- Let experts know that they are THE ISSUE at hearing/trial

THE LAW

- “Totally Disabled” defined
- Burden shift to Employer and legal standards
 - Positions must be open
 - Medically and vocationally appropriate
 - Take claimant as you find him
 - Factor in all limitations, even non-work related
 - Visit and speak with employers

THE LAW

- “Burden shift to Employer and legal standards
 - Detailed description of duties needed
 - Can claimant realistically compete for positions identified
 - Obtain written job descriptions

COMMON PROBLEMS

- Ambiguity of changes in physician restrictions
- Pros/cons of DOT
- Minimum number of jobs that are required
- Advantages of providing a range of jobs from part-time, entry level upward
- Reducing wages to date of injury

COMMON PROBLEMS

- Where to do the LMS
- Employment agencies
- Retroactivity
- Re-training
- Vocational testing
- Use of assistants

CROSS EXAMINATION ISSUES OR (PREFERABLY) ADDRESS ON DIRECT EXAMINATION

- DOT job descriptions are outside physician restrictions
- Transportation issues
- Drug screens and pain meds
- Criminal record
- Competing restrictions
- Failure to review appropriate documentation

CROSS EXAMINATION ISSUES OR (PREFERABLY) ADDRESS ON DIRECT EXAMINATION

- Lack of experience with computers
- Court's favorite question: have you factored in pain
- Discrimination despite ADA
- Prejudice against applicants with industrial backgrounds

CROSS EXAMINATION ISSUES OR (PREFERABLY) ADDRESS ON DIRECT EXAMINATION

- Can the employer accommodate THIS EMPLOYEE'S restrictions
- Sit/Stand option, breaks, hired disabled/elderly workers in the past?

BURDEN ON CLAIMANT TO SHOW DUE DILIGENCE – HOW THE VOCATIONAL EXPERT CAN HELP

- Responding to Employee's unsuccessful job search
- Follow-up with Employers to verify that they received application and how claimant presented

BURDEN ON CLAIMANT TO SHOW DUE DILIGENCE – HOW THE VOCATIONAL EXPERT CAN HELP DEFEAT

- Value of Vocational Experts is strength of their contacts with employers
- Employee may contact vocational expert – how to respond

TOOLS TO BUILD A SUCCESSFUL VOCATIONAL DEFENSE

- Vocational assessment interview
- Deposition of Employee
- Employment application on file/personel file
- Speak with supervisors regarding work ethics, skills, training completed (don't sell yourself short -- attendance/punctuality, QC and productivity standards, deadlines, able to obtain security clearance)

TOOLS TO BUILD A SUCCESSFUL VOCATIONAL DEFENSE

- Counsel's discovery tools and subpoena power
- Have supervisor attend trial
- Communication the key
- Supplement LMS even one additional job at a time
- Have treating doctors approve jobs
- FCE's – watch out for next day issue

MUST DO'S FOR VOCATIONAL EXPERTS

- Save old LMS for retroactive analysis
- Preserving work product/electronic discovery issue
- Assist counsel with cross-examining claimant experts
- Qualifications (OWCP, SSA)

MUST DO'S FOR VOCATIONAL EXPERTS

- Be cognizant of positions taken when doing employee work
- Document “stone-walling” by employee’s counsel
- Advise early if have conflicts

CONCLUDING THOUGHTS

- Start early
- Communication is the key – purposes of LMS (8(i), Lombardi, etc.
- Success stories
- Hard to find good, local experts

THREE SHORT, BUT IMPORTANT TOPICS

- Electronic discovery (burdensome, potentially embarrassing and can adversely impact outcome of case or lien)

THREE SHORT, BUT IMPORTANT TOPICS

- Settlements (5 issues in every settlement)
 - Ongoing payments?
 - State Act liability
 - All injuries
 - Medicals Closed
 - Attorney's fees

THREE SHORT, BUT IMPORTANT TOPICS

- Expense/Delay escalators
 - IME's vague on aggravation/acceleration issue or on restrictions
 - Chasing medicals, films, and pathology