

**Providing Vocational Evaluation and
Testimony Services in California Under the
New Vocational Expert Fee Schedule
and SB 863**

American Board of Vocational Experts
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I. Vocational Expert Fee Schedule Laws

A. AB 1168, 2011

B. SB 863, 2012

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AB 1168, As Signed Into Law in September 2011

Labor Code section 5307.7 was added:

(a) On or before January 1, 2013, the administrative director shall adopt, after public hearings, a fee schedule that shall establish reasonable hourly fees paid for services provided by vocational experts, including, but not limited to, vocational evaluations and expert testimony determined to be reasonable, actual, and necessary by the appeals board.

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(b) *A vocational expert shall not be paid, and the appeals board shall not allow, vocational expert fees in excess of those that are reasonable, actual, and necessary.*

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SB 863 (2012) Amended AB 1168 (2011)

Section 5307.7 of the Labor Code as amended:

5307.7. (a) On or before January 2013, the administrative director shall adopt, after public hearings, a fee schedule that shall establish reasonable hourly fees paid for services provided by vocational experts, including, but not limited to, vocational evaluations and expert testimony determined to be reasonable, actual, and necessary by the appeals board.

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(b) *A vocational expert shall not be paid, and the appeals board shall not allow, vocational expert fees in excess of those that are reasonable, actual, and ~~necessary~~. necessary, or that are not consistent with the fee schedule adopted by the administrative director.*

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A Vocational Expert Fee Schedule Writing Group was Formed

A subcommittee of the Legislative Committee for the California Chapter of the International Association of Rehabilitation Professionals.

The Writing Group included the Legislative Committee, interested members of the Board of Directors and IARP-Cal lobbyists.

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CCR Title 8, § xxxx

Proposed Workers' Compensation Vocational Expert Fee Schedule

Services

This section establishes reasonable hourly fees paid for services provided by vocational experts, including, but not limited to, vocational evaluations and expert testimony that are reasonable, actual, and necessary to develop and present written or oral opinions about an individual's employability and earning capacity. Vocational evaluations and expert testimony may include, but are not limited to:

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1. Review of medical, employment, school, and wage records, deposition transcripts, surveillance videos and related records, opposing expert's report(s), supplemental reports and evaluation activities related to them.
2. Clinical interview of the applicant.
3. Administration of vocational testing as applicable to develop opinions.
4. Transferable skills analysis (TSA).
5. Evaluation of the ability to benefit from rehabilitation.
6. Employability analysis to determine labor market access (LMA) and to identify suitable post-injury occupations, if any.
7. Labor market survey and/or labor market research.
8. Determining pre-injury and post-injury earning capacity.
9. Clarifying the time frame used to determine loss of earning capacity, if any.
10. Quantifying diminished future earning capacity (DFEC), if any, in comparison to pre-injury earning capacity.

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11. Report preparation.
12. Updating vocational opinions resulting from new information or the passage of time.
13. Case-related communication by any means with any person.
14. Job analysis and report.
15. Preparation for any expert testimony including, but not limited to, conferences, teleconferences, pre-deposition, deposition, pre-trial and/or trial.
16. Post-deposition review of transcript.
17. Deposition and Trial appearance – actual time plus half the remaining time reserved as requested by the retaining party, but not used.
18. Any additional services requested by a party or a judge that are related to the vocational evaluation or testimony.

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Reimbursable expenses related to vocational evaluation services and expert testimony may include:

1. Transportation expenses, including time, mileage, parking, air fare, and public transit charges, etc.
2. Necessary lodging and meals.
3. Cancellation and no show fees.
4. Unanticipated additional expenses related to services such as a day office or meeting room rental for interview and testing of the applicant, or other expenses.

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§ xxxx.2 – Reasonable Hourly Fee for Vocational Expert Services

- (a) The fees set forth in this section shall be prima facie evidence of the reasonableness of fees charged for vocational expert services and testimony.
- (b) The reasonable hourly fee for vocational expert services other than deposition or trial testimony described in Section xxxx shall be \$ xxx.00 per hour.
- (c) The reasonable hourly fee for vocational expert deposition and trial testimony described in this Section shall be modified by multiplying the hourly fee in subdivision (b) by 1.5.
- (d) In recognition of the efficiency of retaining the services of an Agreed Vocational Expert rather than retaining one Vocational Expert for each party, the hourly fee set forth in this section, when provided by an Agreed Vocational Expert (AVE) shall be modified by multiplying the hourly fee in subdivision (b) by 1.25.

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(c) In addition to the hourly fee for professional services, a vocational expert shall also be reimbursed for the following expenses:

- i) The cost of reasonable and necessary meals and lodging, mileage at the approved government rate, parking, other transportation and tolls, and other incidental expenses when required to travel in connection with a vocational evaluation or expert testimony.
- ii) Travel time for depositions and trial testimony at the rate of 100 percent of the hourly rate established herein.
- iii) Evaluations, depositions or trials cancelled less than three business days prior to the scheduled date will result in a cancellation fee of 50 percent of the time reserved.

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- iv) Evaluations, depositions or trials within 24-hours of the scheduled date and time will result in a cancellation fee of 100 percent of the time reserved.
- v) Failure of an evaluate to appear for a schedule appointment will result in a cancellation fee of 100 percent of the time reserved.
- vi) When a Vocational Expert is noticed for trial appearance but placed on-call, the on-call rate will be 50 percent of the trial testimony hourly fee for the reserved time. The trial testimony fee only applies upon being called to testify.

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§ xxxx.3 – Payment for Vocational Expert Services

(a) All vocational expert fees and/or expenses for which the employer is liable shall be paid to whom the funds and expenses are due within 30 days after receipt by the employer of an itemized billing, and where payment is not made within this period, that portion of the billed sum then unreasonably unpaid shall be increased by 10 percent, together with interest thereon at the rate of 7 percent per annum retroactive to the date of receipt of the bill by the employer. Where the employer, within the 30-day period, contests the reasonableness and necessity for incurring the fees, services, and expenses, payment shall be made within 20 days of the filing of an order of the appeals board directing payment.

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(b) If payment of any contested amounts is ordered by the appeals board, the employer shall also pay an additional penalty equal to the penalty plus interest as ordered or \$1,000, whichever is greater. This additional penalty shall be paid into the Workers' Compensation Administration Revolving Fund.

VEFS Proposed in the Medical-Legal Fee Schedule (MLFS) Format

CCR Title 8, § xxxx –
Reasonable Hourly Fees for Vocational Expert Services that are Reasonable, actual, and Necessary: Follow-up, Supplemental and Comprehensive Vocational Expert Evaluations and Vocational Expert Testimony.

(a) The schedule of fees set forth in this section shall be prima facie evidence of the reasonableness of fees charged for vocational expert evaluation reports and fees for vocational expert testimony.

(b) The fee for each evaluation is \$____ per hour, with the addition of any amount applicable because of the modifier permitted under subdivision (c). The complexity of the evaluation is the dominant factor that determines the appropriate level of service under this section; the time to perform necessary procedures is expected to vary due to clinical circumstances, and is therefore not the controlling factor in determining the appropriate level of service.

(c) The vocational expert shall include in his or her report verification, under penalty of perjury, of the time spent in each of the following activities: review of records, interview time with the injured worker, research, preparation of the report and any other necessary Vocational Expert services.

(d) Vocational expert evaluation reports and vocational expert testimony shall be reimbursed as follows:

CODE	HOURS	PROCEDURE DESCRIPTION
VE 101	Actual	Follow-up Vocational Expert Evaluation

Limited to a follow-up vocational expert evaluation by a vocational expert, which occurs within nine months of the date on which the prior vocational expert evaluation was performed. Time spent shall be tabulated in increments of 15 minutes or portions thereof, rounded to the nearest quarter hour. The vocational expert shall be reimbursed at the hourly rate pursuant to subdivision (b), or his or her usual or customary hourly fee, whichever is lower, for each quarter hour.

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CODE	HOURS	PROCEDURE DESCRIPTION
VE 102	Up to 10	Basic Comprehensive Vocational Expert Evaluation.

Includes all comprehensive vocational expert evaluations other than those included under VE 103 or VE 104.

CODE	HOURS	PROCEDURE DESCRIPTION
VE 103	Up to 15	Complex Comprehensive Vocational Expert Evaluation.

Includes evaluation which require three of the complexity factors set forth below.

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In a separate section at the beginning of the report, the vocational expert shall clearly and concisely specify which of the following complexity factors were required for the evaluation, and the circumstances which made these complexity factors applicable to the evaluation.

The vocational expert shall be reimbursed at the hourly rate pursuant to subdivision (b), or his or her usual customary hourly fee, whichever is lower, for each quarter hour or portion thereof, rounded to the nearest quarter hour, spent by the vocational expert for any of the following:

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- (1) Two or more hours of record review;
- (2) Two or more hours of interview time by the vocational expert with the injured worker;
- (3) Two or more hours of vocational testing;
- (4) One or more hours of transferable skills analysis
- (5) Two or more hours of wage and labor market research
- (6) Four or more hours spent on any combination of two of the complexity factors (1)-(5), which shall count as two complexity factors. Any complexity factor in (1)-(5) used to make this combination shall not also be used as the third required complexity factors;
- (7) Six or more hours spent on any combination of three complexity factors (1)-(5), which shall count as three complexity factors;
- (8) Addressing injuries or illnesses to multiple body parts.
- (9) Addressing psychiatric or psychological conditions.
- (10) Addressing irregular or seasonal employment and earnings.

CODE	HOURS	PROCEDURE DESCRIPTION
VE 104	Actual	Comprehensive Vocational Expert Evaluation Involving Extraordinary Circumstances

In a separate section at the beginning of the report, the vocational expert shall clearly and concisely specify which of the following complexity factors were required for the evaluation, and the circumstances which made these complexity factors applicable to the evaluation.

The vocational expert shall be reimbursed at the hourly rate pursuant to subdivision (b), or his or her usual customary hourly fee, whichever is lower, for each quarter hour or portion thereof, rounded to the nearest quarter hour, spent by the vocational expert for any of the following:

- (1) An evaluation which requires four or more of the complexity factors listed under VE 103.
- (2) An evaluation involving prior multiple injuries to the same body part or parts being evaluated, and which requires three or more of the complexity factors listed under VE 103, including three or more of the complexity factors listed under VE 103, including three or more hours of record review by the vocational expert.
- (3) An evaluation that requires developing opinions based upon more than one *Schedule for Rating Permanent Disabilities* or addressing a case where a dispute regarding which *Schedule* applies.
- (4) A comprehensive vocational expert evaluation for which the vocational expert and the parties agree, prior to the evaluation, that the evaluation involves extraordinary circumstances.
- (5) Any Vocational Expert service or combination of Vocational Expert services that total more than 15 hours to complete.
- (6) Addressing a claim for permanent and total (100%) disability.

When billing under this code for extraordinary circumstances, the vocational expert shall include in his or her report (i) a clear, concise explanation of the extraordinary circumstances related to the issues being evaluated which justify the use of this procedure code, and (ii) verification under penalty of perjury of the total time spent by the vocational expert in each of these activities: reviewing the records, interview time with the injured worker, vocational testing, transferable skills analysis, wage and labor market analysis, preparing the report, and if applicable, any other activities.

CODE	HOURS	PROCEDURE DESCRIPTION
VE 105	Actual	Fees for Vocational Expert Deposition or Trial Testimony.

The vocational expert shall be reimbursed at the hourly rate pursuant to subdivision (b), or his or her usual and customary hourly testimony fee, whichever is lower, for each quarter hour or portion thereof, rounded to the nearest quarter hour, spent by the vocational expert for all itemized reasonable and necessary time spent related to the testimony, including reasonable preparation and travel time. The vocational expert shall be paid a minimum of two (2) hours for a scheduled deposition and four (4) hours for a scheduled trial plus a reasonable estimate of preparation and travel time when the *requesting party* is informed in writing a minimum of five days in prior to the date of the deposition and trial.

CODE	HOURS	PROCEDURE DESCRIPTION
VE 106	Actual	Fees for Supplemental Vocational Expert Services not involving an interview with the injured worker.

The vocational expert shall be reimbursed at the hourly rate pursuant to subdivision (b) or his or her usual and customary hourly fee, whichever is lower, for each quarter hour or portion thereof, rounded to the nearest quarter hour, spent by the vocational expert.

(e) The services described by Procedure Code VE 101 through VE 106 may be modified using the modifier 1.25 when the procedure code is performed by an Agreed Vocational Evaluator.

(f) In addition to the hourly fee for professional services, a vocational expert shall also be reimbursed for the following expenses:

- i) The cost of reasonable and necessary meals and lodging, mileage at the approved government rate, parking, other transportation and tolls, and other incidental expenses when required to travel in connection with a vocational evaluation or expert testimony.
- ii) Evaluations, depositions or trials cancelled less than three business days prior to the scheduled date will result in a cancellation fee of 50 percent of the time reserved.
- iii) Evaluations, depositions or trials cancelled within 24-hours of the scheduled date and time will result in a cancellation fee of 100 percent of the time reserved.
- iv) Failure of an evaluate to appear for a scheduled appointment will result in a cancellation fee of 100 percent of the time reserved.
- v) When a Vocational Expert is noticed for trial appearance but placed on-call, the on-call rate will be 50 percent of the trial testimony hourly fee for the reserved time. The trial testimony fee only applies upon being called to testify.

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The Proposed VEFS Announced by the
Administrative Director on _____

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Public Hearings for the Vocational Expert
Fee Schedule

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Options Regarding Non-payment of VE Invoices

- A. File a lien.
- B. Go through Independent Bill Review.
- C. Be proactive with a contract.

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Adjusting to SB 863

VE reports in lieu of direct examination at trial

Labor Code section 5703:

(j) Reports of vocational experts. If vocational expert evidence is otherwise admissible, the evidence shall be produced in the form of written reports. Direct examination of a vocational witness shall not be received at trial except upon a showing of good cause. A continuance may be granted for rebuttal testimony if a report that was not served sufficiently in advance of the close of discovery to permit rebuttal is admitted into evidence.

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(1) Statements concerning any bill for services are admissible only if they comply with the requirements applicable to statements concerning bills for services pursuant to subdivision (a).

(2) Reports are admissible under this subdivision only if the vocational expert has further stated in the body of the report that the contents of the report are true and correct to the best knowledge of the vocational expert. The statement shall be made in compliance with the requirements applicable to medical reports pursuant to subdivision (a).

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SEC. 81. Section 5703 of the Labor Code is amended to read:

5703. The appeals board may receive as evidence either at or subsequent to a hearing, and use a proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing:

- (a) Reports of attending or examining physicians.
 - (1) Statements concerning any bill for services are admissible only if made under penalty of perjury that they are true and correct to the best knowledge of the physician.
 - (2) In addition, reports are admissible under this subdivision only if the physician has further stated in the body of the report that there has not been a violation of Section 139.3 and that the contents of the report are true and correct to the best knowledge of the physician. The statement shall be made under penalty of perjury.

Labor Code Section 4660

4660. *This section shall only apply to injuries occurring before January 1, 2013.*

- (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.
- (2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on 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 administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice and upon data from additional empirical studies.

Labor Code Section 4660.1

SEC. 60. Section 4660.1 is added to the Labor Code, to read:

4660.1. *This section shall apply to injuries occurring on or after January 1, 2013.*

- (a) *In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of injury.*
- (g) *Nothing in this section shall preclude a finding of permanent total disability in accordance with Section 4662.*

Labor Code Section 139.48

SEC. 6.5. Section 139.48 is added to the Labor Code, to read:

139.48. There shall be in the department a return-to-work program administered by the director, funded by one hundred twenty million dollars (\$120,000,000) annually derived from non-General Funds of the Workers' Compensation Administration Revolving Fund, for the purpose of making supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss. Eligibility for payments and the amount of payments shall be determined by regulations adopted by the director, based on findings from studies conducted by the director in consultation with the Commission on Health and Safety and Workers' Compensation. Determination of the director shall be subject to review at the trial level of the appeals board upon the same grounds as prescribed for petitions for reconsideration.

Supplemental Job Displacement Benefits (Training Voucher)

4658.7. (a) This section shall apply to injuries occurring on or after January 1, 2013.

(b) If the injury causes permanent partial disability, the injured employee shall be entitled to a supplemental job displacement benefit as provided in this section unless the employer makes an offer of regular, modified, or alternative work, as defined in Section 4658.1, that meets both of the following criteria:

(1) The offer is made no later than 60 days after receipt by the claims administrator of the first report received from either the primary treating physician, an agreed medical evaluator, or a qualified medical evaluator, in the form created by the administrative director pursuant to subdivision (b), finding that the disability from all conditions for which compensation is claimed has become permanent and stationary and that the injury has caused permanent partial disability.

(3) Payment for the services of licensed placement agencies, vocational or return-to-work counseling, and résumé preparation, all up to a combined limit of 10 percent of the amount of the voucher.

Section 4600, Home Health Care Services

Section 4600 of the Labor Code is amended to read:

(b) Home health care services shall be provided as medical treatment only if reasonably required to cure or relieve the injured employee from the effects of his or her injury and prescribed by a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, and subject to Section 5307.1 or 5703.8. The employer shall not be liable for home health care services that are provided more than 14 days prior to the date of the employer's receipt of the physician's prescription.

Alternative Dispute Resolution

Labor Code section 3201.5 addresses ADR.

Previously, ADR was limited to construction workers.
Under SB 863, ADR applies also to public employees.

Vocational experts acting as mediators can assist the parties
in settling disputes under ADR.
