

*SPRING IARP CONFERENCE TACOMA, WASHINGTON.* 8:15—9:45 am

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*VOCATIONAL CONSULTING, INC. - SEATTLE, WA*

***OBSERVATIONS OF WHY VOCATIONAL  
SERVICES MAY FAIL WHEN CHALLENGED AT  
THE BOARD OF INDUSTRIAL INSURANCE  
APPEALS***

A panoramic view of the Seattle skyline, featuring the Space Needle prominently in the center. The city is surrounded by lush green trees in the foreground, and the sky is a clear, bright blue. The overall scene is vibrant and modern.



# EXPERT CONSULTATION: A THROUGH Z

*STAND ALONE JOB ANALYSIS*

*ABILITY TO WORK ASSESSMENTS*

*MENTAL MEASUREMENT/PSYCHOMETRICS*

*PLAN DEVELOPMENT*

*FOLLOW-UP OF PLANS*

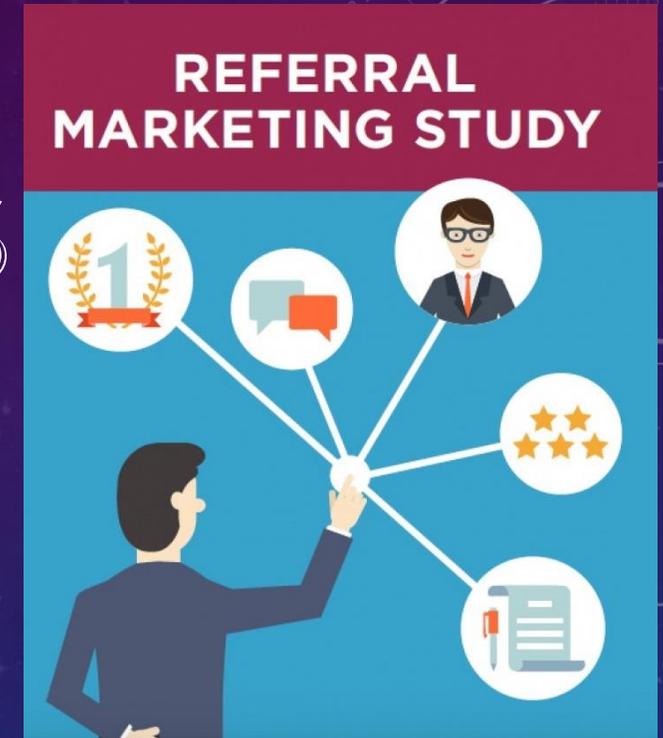
*CLOSING REPORTS*

*PREPARATION FOR BOIIA LEGAL TESTIMONY*



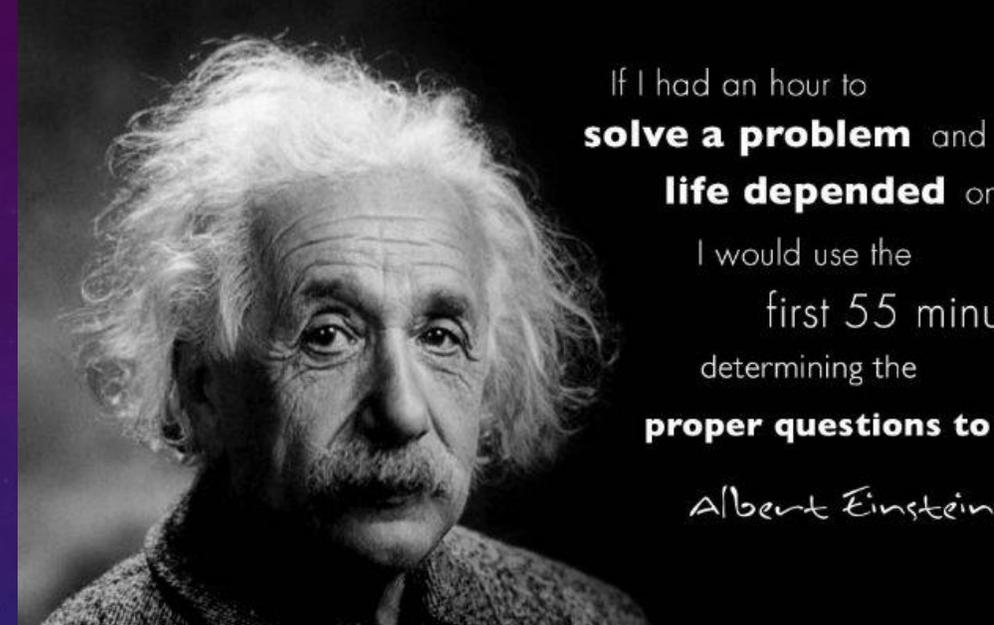
“A” -

# REFERRAL ACTIONS



- *WHAT TO ASK UPON THE FIRST CONTACT*
- *CLARIFY EMPLOYER TYPE, LOCATION, SPECIAL CONDITIONS, AND INJURY TYPE.*
- *STAND ALONE JOB ANALYSIS OR ABILITY TO WORK ASSESSMENT?*
- *IS ONE ASSIGNED VRC BETTER SUITED FOR THIS PARTICULAR CASE?*

# **“B” – WHAT IS THE CLAIM ABOUT? WHO IS THE CLIENT?**



- *OBTAIN INFORMATION; COMPREHENSIVE BACKGROUND FACTS*
- *WHERE TO INTERVIEW AND WHY?*
- *MOTIVATION TO WORK #1 & RELATIONSHIP WITH EMPLOYER*
- *IS A RETURN TO WORK EVER POSSIBLE WITH EOI?*

# "C" – REPORTS & LETTERS

- *DOCUMENT INTERVIEWS, CONTACTS WITH EOI AND TESTING.*
- *PROGRESS RPEORTS; WHAT IS HELPFUL TO YOU, CUSTOMER OR CLIENT.*
- *JOB ANALYSIS TO ATTENDING PHYSICIAN, VS. IME VS. PCE/FCE PROVIDER.*
- *RELEASE TO WORK BASED ON ACCEPTED CONDITION OR "WHOLE PERSON?"*
- *WHAT TO ASK FCE AND MEDCIAL PROVIDERS IN WRITING & WHY*



# ***“D” – RECORDS REQUEST***



- DO YOU NEED HIGH SCHOOL AND ANY PAST COLLEGE OR VOCATIONAL TRAINING TRANSCRIPTS?
- HOW TO HANDLE POTENTIAL “MISSING” FACTS OR DATA. PAST WORK, WAGES AND WORK PATTERN BY EMPLOYMENT SECURITY OFFICE(S), EMPLOYER APPLICATIONS THEY HAVE.
- RECORDS REQUESTS CAN BE CONSIDERED THROUGHOUT SERVICES, SO ASK AND RE-ASK AS THE CASE PROGRESSES.
- OLD WORKER COMPENSATION CLAIM FILES OR BASIC FACTS AND REASON FOR USE

# "E" - RECORD MANAGEMENT

- HOW TO OBTAIN RECORDS. HARD COPIES, CD, PDF, DVD, THUMB DRIVE. WHAT IS BEST?
- STORAGE AT OFFICE; CONFIDENTIALITY AND ETHICAL CONCERNS
- WHO IS WORKING WITH YOU IF ANY AT YOUR FIRM? ARE THEY ALLOWED BY CUSTOMER?
- WILL THEY GET DEPOSED?
- WHAT DO YOU DO WITH THE CLOSED RECORDS?



- GARBAGE CAN? SHREDING COMPANY, RETURN-TO-SENDER, YOUR OWN SHREDER, OR BONFIRE

# "F" – ABILITY TO WORK EVALS

- THE HOW TO'S - WHAT WORKS BEST?
- PITFALLS, WEAKNESSES, AND OR ERRORS COMMON
- .



# “G” – PSYCHOMETRIC TESTING

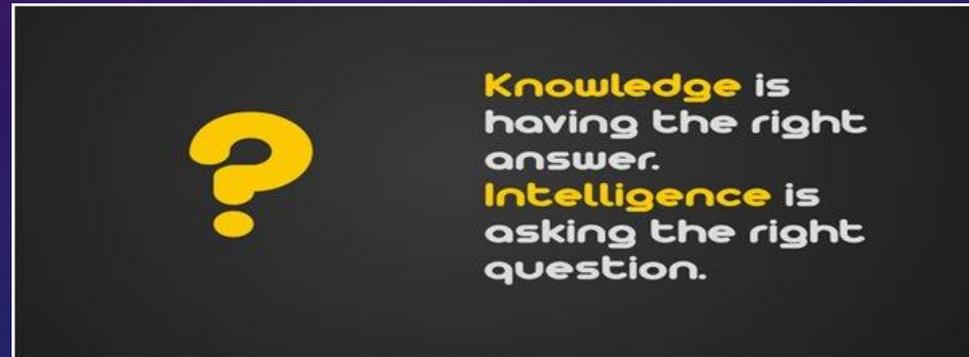
- *EXTREMELY IMPORTANT! A BASELINE TO PROGNOSTICATE SUCCESS OR FAILURE ON THE ACADEMIC ABILITY OR CAPACITY TO COMPLETE ANY CURRICULUM INCLUDING OJT.*
- *WHO DOES THE TESTING? INSIDE V. OUTSOURCE. QUALIFICATIONS FOR TESTING*
- *HOW MANY TESTS ARE SUFFICIENT?*
- *READ CODE OF ETHICS PERIODICALLY IN YOUR CREDENTIALLED WEBSITES; EACH PROFESSION HOLDS A DIFFERENT SET OF CODES AND MAY NOT CONNECT WITH YOUR OWN*
- *PRE-COLLEGE TESTING (COMPASS, ETC.)*



# "H" – LABOR MARKET "SURVEYS" (LABOR MARKET SEARCH



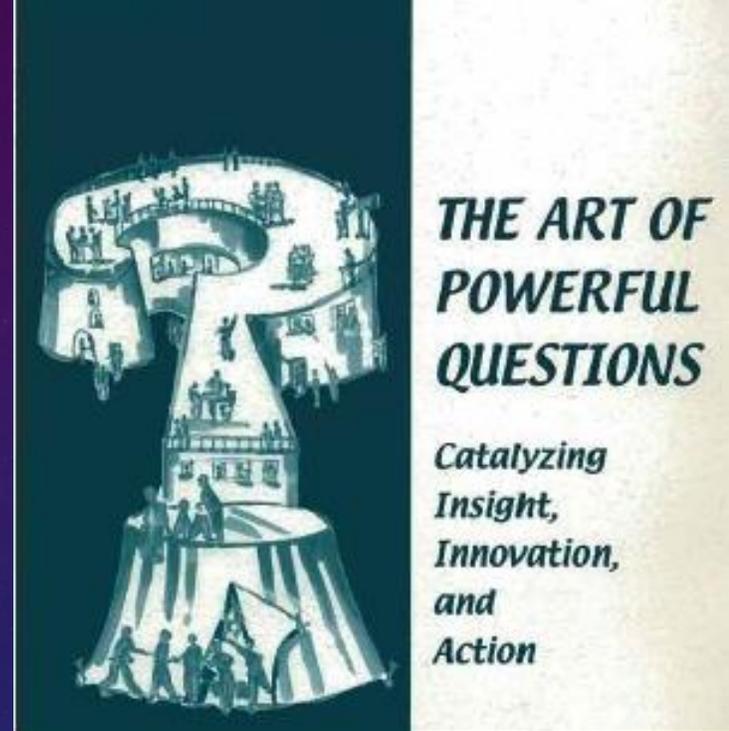
- OCCUPATIONS IN DEMAND
- SOURCES OF LABOR MARKET DATA. SHOULD WE USE AND RELY ON MORE THAN ONE FOR VALIDITY AND RELIABILITY?
- WHAT SPECIAL SKILLS ARE NEEDED? CERTIFICATE VS. DEGREE? WHAT WAGE IS CLAIMANT EXPECTING?



- PHONE CONSULTATIONS OR IN-PERSON CONTACT WITH FORMER EMPLOYERS, AND WHO IS THE "AUTHORITY"?
- DOES THE LMS DATA FIT THE JOB ANALYSIS AND TESTING? DO YOU HAVE A SUPERVISOR OR SECOND REVIEW FOR "Q.C. AT YOUR OFFICE?"

# ***“I” – THE “PLAN”***

- COMPREHENSIVE FACTUAL DATA (AGE, ED., WORK, TESTING, LABOR MARKET FINDINGS, JOB ANALYSIS APPROVED FULL OR WITH MODIFICATIONS, ETC.).
- DOWNFALL IF LACKING SUFFICIENT FACTS AND DATA.
- ANSWER THE QUESTIONS UP FRONT WHERE THE CLAIM CAN FAIL TO PROTECT YOURSELF, CREDIBILITY, AND BE CAPABLE OF EXPLAINING TO A IMPARTIAL JUDGE MAYBE 1-3 YEARS LATER IF APPEALED.
- LIST MEDICAL PROVIDERS, INFORMATION ON OTHER CONDITIONS THAT YOU HAVE CONSIDERED AND ADDRESS WHY OR IF THE CONDITIONS WILL INTERFER OR NOT
- PLANS ARE A “CONTRACT” BETWEEN ALL CONCERNED PARTIES



# “J” – FOLLOW-UP WHO/WHAT/WHY?

- *EFFECTIVE METHOD TO ESTABLISH TRUST IS BY MAINTAINING OPEN COMMUNICATION.*
- *BACK UP PERSON TO CONTACT AT FIRM?*
- *MEETINGS WITH TEACHERS OR TRAINERS IN PERSON, ON PHONE, BY LETTER AND RATIONALE FOR EACH. DOCUMENT, DOCUMENT!*
- *MEDICAL CHANGES AND TREATMENT WHILE IN PLANS.*
- *ABSENCES AND WHAT OCCURS (I.E. VACATIONS, HOLIDAYS, BIRTH/DEATH).*

Proper  
Preparation  
Prevents  
Poor  
Performance

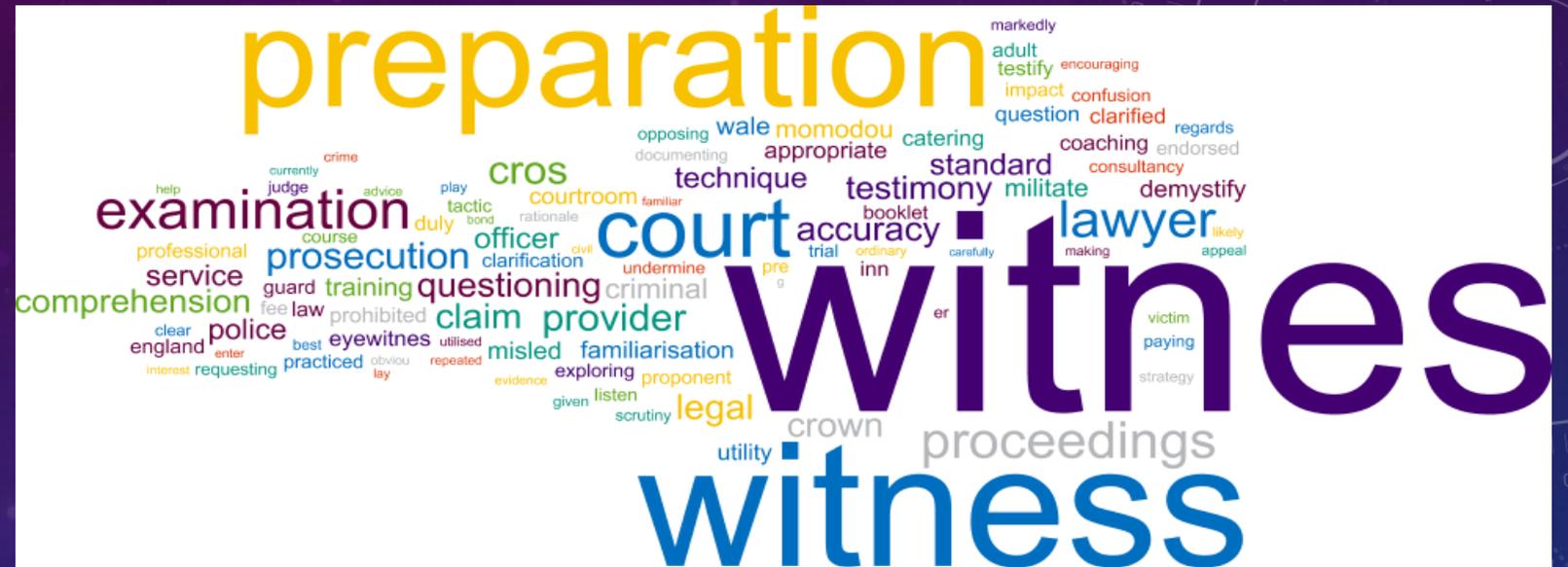


# “K” –CLOSING REPORTS



- *HOW MUCH DETAIL IS SUFFICIENT?*
- *ATTACHING TRANSCRIPTS, LETTERS OF COMPLETION, CERTIFICATIONS, ETC.*
- *CLAIRIFY WHAT THEY CAN NOW DO, WHERE AND IF ANY CHANGES IN THE LABOR MARKET OR MEDICAL CONDITON WARRANT A PLAN MOD. OR MEDICAL PROVIDER CLARIFICATION. RE-CONTACT A/P IF NEEDED.*

# “L” NOITCES AND WITNESS PREPARATION



- AAG HANDLES MOST DEFENSE LITIGATION ON L&I CLAIMS IN APPEAL FOR MEDICAL, VOCATIONAL, LOEP OR PENSIONS. SOME HAVE OUTSIDE COUNSEL WITH 3<sup>RD</sup> PARTY ADMINISTRATORS.
- MEETING WITH THE DEFENCE COUNSEL TO PREPARE CASE AND YOUR TESTIMONY
- OBTAINING PERMISSION FOR POTENTIAL ADDITIONAL WORK IN PREP FOR BOIIA.
- NEW EVIDENCE; ANY CHANGES ALLEGED FOR WORK RESTRICTIONS AND IMPAIRMENT?
- ORGANIZE YOUR FILE, LABELS, TAGS, AND SUMMARIZE FACTS ON SEPARATE SHEET.
- DATES OF TRAINING, END DATE, ASSISTANCE IF APPICABLE FOR “JOB SEARCH”, EXPECTED RETURN TO WORK OCCUPATIONL TITLES, NUMBER OF JOBS IN REGION, WAGE AND WHAT PROBABLE PLACEMENT.

# “M” – TESTIMONY

- KNOW YOUR CASE FACTS
- ANY MISSING ELEMENTS?
- ARRIVE EARLY TO MEET WITH ATTORNEY ON POTENTIAL NEW FACTS or EVIDENCE TO CONSIDER
- GO OVER WHAT YOU CAN AND WHAT YOU CANNOT EXPRESS IN THE REPORT (NO SURPRISES)
- ARE THERE ANY OTHER EXPERTS YOU NEED TO SPEAK TO FIRST ? (that could increase your credibility before the BOIIA hearing?)



# ***“N- OTHER EXPERTS***



- Insist that you review each of the opposing expert reports no matter their specialty (PhD, MD/Psych./Physiatry/Ortho/Neuro)
- Review all other relevant depositions taken before your testimony esp. Physician and or opposed vocational expert witness.
- Consult with the defense attorney at least by phone; he/she shall review & rely on the vocational report factors. *In person is better to see what there file contains.*
- Label your file with each or the other relevant report for speedy access

# “O”- DEPOSITIONS

- Most states have formal discovery for depositions.
- Others like Oregon do not. If you are not familiar with the State working in, work closely with the assigned attorney.
- Do not assume he/she knows your understanding.
- Often, attorneys chose not to conduct depositions due to cost, travel, or “let the cat out of the bag”. It allows the opposing side to know your case strengths and weakness.
- Prepare, review and organize. Know your case without much need to see the report(s).
- Meet with the assigned attorney by phone or best, in person to prepare for the depo.
- Do you have everything?



# "P" – TRIAL PREPARATION

Proper  
**Preparation**  
Prevents  
Presentation  
Predicaments

- This is where the rubber meets the road!
- Have you done everything possible to prepare?



- Meet with the assigned attorney in person. Go over the file and all records.
- You can offer to write direct exam questions. This is not arrogance, but good professional consultive service. Do not assume the attorney is good or has much experience taking vocational experts to trials.
- What is the “theme” of this case? What evidence is likely allowed vs. excluded?
- Did you prepare demonstratives? If so, why and what are they and how to be used?
- What technology is available at the specific trial court? Federal courts tend to be more modern with monitors at each jury box and expert, judge and court assistants.
- Preparation is a form of theatre preparation, a dress rehearsal.

# **“Q” – ORDER OF TESTIMONY**

- Most attorneys have a good sense on the order taken for testimony. If you have some control, discuss pros and cons on your order available.
- I prefer to testify later in order after a solid foundation is established by all parties involved.
- Plaintiff, spouse, coworkers, friends, PT/OT, Doctors, psychologist(s), liability experts, reconstruction experts, economist, vocational and life care planner.
- Being last or later allows a form of **“Recency Effect.”**



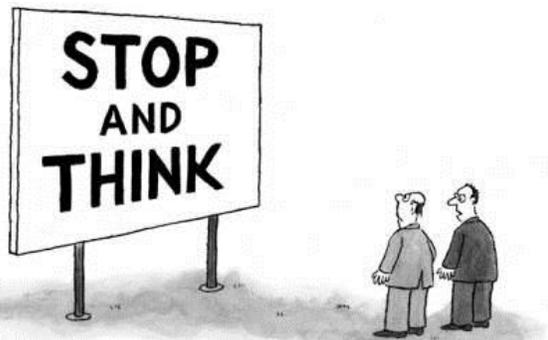
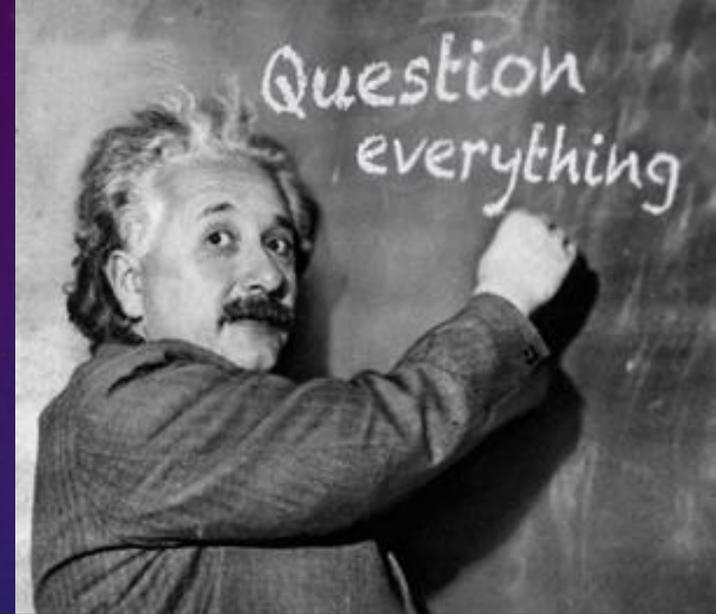
# "R" – WHAT ARE MOST COMMON ERRORS?

- Do you have special training, certifications, license, experience in the past with the impairment type? Why should the hearing Judge give you more "weight" or persuasive power than the opposing witness? **For every expert witness, there are equal and opposite opinions.**
- As an expert at the BOIIA, do you know the past occupational base of the claimant well to speak in detail?
- Have you worked cases similar or written successful plans very similar?



# QUESTIONS AND ANSWERS

*\* I have 8-more alphabet letters to follow-up some day!*



*"It sort of makes you stop and think, doesn't it."*

☺ *Thank you, IARP-WA for the invitation!*

# BACKGROUND STUFF – WORK COMP/WASHINGTON

- WC started in Washington State by the Legislature in 1911
- Vocational Rehabilitation Witness: First one found in BOIIA started in 1972 was by VRC called by the name of Frank G. Swinehart, a State of WA employee. Case is considered a highly important one, called “FOCHTMAN v. Dept. Labor & Industries”<sup>7</sup> Wn. Pp. 286, 499 P. 2d (1972).
- The concept of Employability “In the Competitive Work Market” was coined at the Fochtman case.
- Catherine Leeper v. Dept. of L & I 123, Wn. 2d 803 (1994) is the critical case law at the Supreme Court by appeal from David Vail, Small/Snell, etc. who successfully argued a claimant post injury, must be able to both be capable of employment to “perform and obtain reasonable, continuous basis”. The reason I know more about this is I was the retained non-assigned VRC by Jack Eng, AAG (Now at the BOIIA) in 1988 on this LPN who sustained injury at Western State Hospital. It was a defense verdict overturned by the Supreme Court nearly 5-years later. Related case law is connected to Leeper called Donald Taasevigen, an Attendant Counselor (who had a 25-year incarceration history pre injury) and J.M. Jones, a former Grocery Checker.

# “ODD LOT WORK”

- Sometimes, plaintiff’s argue the claimant can only work at Odd Lot work settings.
- “Services other than those which are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist, may well be classified as totally disabled”.
- Case law of Odd Lot exists in many States. In Washington, Kuhnle v Dept. L&I speaks to odd lot doctrine. Kuhnle v. DL&I 12 Wn. 2<sup>nd</sup> 191 (1942).
- More recent cases with Odd Lott argument are: Betty Helm BOIIA Docket 87 1511 (1988)
- Larry McBride BOIIA Docket 88 0882 (1989)
- In 1950, Lee v. Minneapolis St. Ry., 230, Minn. 315, 320, 41 N.W. 2d 433 was likely the first known case appeal that was the genesis of this Odd Lot argument in many other states, though Washington had Kuhnle, an injured Hook Tender at Simpson Logging 76-years ago!

# “OPTION 1/2 ISSUES”

- Bill Ackley v. Dpt. Of L&I, Docket # 09 11392 (2010). He became a pension while a plan failed. Sometimes, a person is not successful in plan in part due to geographic location impacting job training or how commute, pain, age, pre-existing conditions, and degree of medical impairment interact to show a plan is “not likely to benefit”. John F. Berg was the plaintiff expert at the BOIIA hired by Gerald Casey, Plaintiff attorney at Port Orchard, WA.
- Another example is found in Roxanne L. England Docket 11 23387 (03/05/2013)
- See “SIGNIFICANT DECISIONS” *Board of Industrial Insurance* on line listing significant cases by name, docket number, dates, often indexed to a topic of interest.

# THE DECEASED CLAIMANT

- What happens when a client dies during services?
- Widow pensions can be argued at the BOIIA. The claimant could be in AWS or Plan and die. What is next? Sometimes, plaintiff counsel will ask for a vocational analysis of the probability of success but for the death of a claimant while open.
- One case I was hired by the AGG office to defend a pension was Lowrey Pugh BOIIA docket 86 2693.
- He died when falling into a lake fishing near Moses Lake wearing full leg waders and had been an owner operator of a plumbing firm in Seattle.
- The pension was denied as he could have been trained or RTW due to his skilled work history.

# SUMMARY OF COMMON ERRORS MADE

- 1) Job Analysis developed from WOIS/DOT/SkillTrans etc. without any actual employer to validate or present as potential “actual” occupational demands vs. generic or hypothetical.
- 2) Relying solely on an IME examiner opinions to sign/date and give opinions on JA’s. Allowing the CM to tell you how to do your work. Ignoring the attending physician (they will have the most weight at the BOIIA), or not connecting the FCE performance to the occupational demands. Do not let the OT/PT solely interpret the raw physical data, that is your job and training.
- 3) Labor Market Search (LMS): Often with “cut and paste” approach, all read nearly identical, seem as to “face validity” to be factious or embellished. Contact person without role to show authority to hire. Quantify words per minute if computer used, and if the employer actually hired someone from the college plan in the past. Combine real job openings from Employment Security (Workforce Explorer). No statistical reliability exists for LMS so pay attention to the details.
- 4) Poor follow-up during plans. Meet the claimant at school or training in-person. Document, assist and do plan mods as quickly as possible.

## COMMON ERRORS CONTINUED:

- #5: Closing Reports: Take your time, document the details, capture the case in a comprehensive manner, point out “Vocational Assets” as well as the balance of problems that occurred as all cases have issues. Often it is important to re-visit the attending doctor at the last month or so to further indicate the claimant is able to work if that is the probable outcome. If non related medical or issues arise, that too should have clear details outlined to explain to a reader what happened and how it may or may not impact services or employability. Sometimes, the JA’s need a second date and review. Make sure the reader knows WHO did the work as so many firms have two on a case sometimes more.
- #6: Get transcripts or reviews from the training facility. Add to the closing report. Add an accurate Resume of the claimant if provided.
- #7: Be careful what you write in EMAILS to a customer. That paper trail comes back during legal discovery. Anyone can then read them if appealed.