

REGULATION ANALYSIS FORM		This space for use by IRRC
(1) Agency Department of Labor and Industry Bureau of Workers' Compensation		RECEIVED 204 MAR 16 PM 12:03 INDEPENDENT REGULATION REVIEW COMMISSION
(2) I.D. Number (Governor's Office Use) 12-68		IRRC Number: 2485
(3) Short Title Qualifications for vocational experts		
(4) PA Code Cite 34 Pa. Code Chapter 123	(5) Agency Contacts & Telephone Numbers Primary Contact: Eileen Wunsch, Chief, Bureau of Workers' Compensation, Health Care Services Review Division (717) 772-1912 Secondary Contact: Jean T. Kupchinsky, Director, Bureau of Workers' Compensation; 717-783-5421	
(6) Type of Rulemaking (Check One) <input type="checkbox"/> Proposed Rulemaking <input checked="" type="checkbox"/> Final Order Adopting Regulation <input type="checkbox"/> Final Order, Proposed Rulemaking Omitted	(7) Is a 120-Day Emergency Certification Attached? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes: By the Attorney General <input type="checkbox"/> Yes: By the Governor	
(8) Briefly explain the regulation in clear and nontechnical language. The Department of Labor and Industry (Department) has drafted this final-form regulation to implement the act of December 23, 2003 (P. L. 371, No. 53) (Act 53), which amended the Workers' Compensation Act (WC Act) (77 P.S. §§ 77 P.S. §§ 1-1041.4 and 2501-2626). The Department has amended the qualifications promulgated at 34 Pa. Code § 123.202 (relating to Qualifications) to reflect that such qualifications are the minimum qualifications that an individual must meet in order to perform as a vocational expert under section 306(b)(2) of the WC Act (77 P.S. § 512(2)). The amendments further implement and interpret sections of Act 53 that establish ethical rules and financial interest disclosure standards for vocational experts under the WC Act.		
(9) State the statutory authority for the regulation and any relevant state or federal court decisions. This final-form rulemaking is promulgated under the authority provided in sections 401.1 and 435 of the WC Act (77 P. S. §§ 710 and 991). In addition, section 306(b)(2) of the WC Act (77 P.S. § 512(2)), as amended by Act 53, specifically authorizes the Department to establish regulations regarding the minimum qualifications for vocational experts.		

Regulation Analysis Form

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Section 306(b)(2) of the WC Act (77 P.S. § 512(2)) authorizes the Department to promulgate regulations establishing the minimum qualifications for vocational experts.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

This final-form regulation is promulgated to ensure that all parties will have a clear understanding of, and meet the requirements of, section 306(b)(2) of the WC Act (77 P.S. § 512(2)). Further, these amendments ensure that the individuals conducting vocational interviews have the requisite knowledge and skills to provide vocational expert services under the WC Act. It provides guidance for earning power assessment interviews and related workers' compensation proceedings for employees, employers, workers' compensation insurers, workers' compensation judges, attorneys and the Department.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

Non-regulation would create uncertainty for workers' compensation practitioners. Moreover, non-regulation would impede the implementation of section 306(b)(2) of the WC Act (77 P.S. § 512(2)), provide uncertainty concerning vocational expert qualifications, and would not impose ethical standards for vocational experts despite a legal requirement to do so.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Employees, employers, and workers' compensation insurers, workers' compensation judges, attorneys and the Department will benefit from these amendments because the regulation will help ensure more meaningful vocational capacity assessments of injured workers. Further, the regulated community will benefit from the additional certainty provided by these amendments in vocational capacity assessments and workers' compensation proceedings.

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

The potential adverse effect of the promulgation of these amendments would be limited to those individuals that have not conducted earning power assessments pursuant to 306(b) of the WC Act (77 P.S. § 512(2)) prior to the effective date of these regulations. These individuals may not meet the minimum qualifications established by these amendments which could preclude them from conducting earning power assessment interviews. However, individuals who conducted earning power assessment interviews under section 306(b) of the WC Act (77 P.S. § 512(2)) prior to these amendments, will continue to meet the minimum qualifications.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

Vocational experts, employees, employers, workers' compensation insurers, workers' compensation judges and the Department will be required to comply with this regulation.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

On June 11, 2004, the Department held a stakeholder meeting regarding the Act 53 amendments. Testimony was received from Irwin Aronson and David Wildeman, representing the AFL-CIO; and Terry Leslie, representing the Pennsylvania Association of Rehabilitation Professionals. In addition, the Department received written comments from the Pennsylvania Association of Rehabilitative Professionals Administrative Services; the Pennsylvania Trial Lawyers Association; The Insurance Federation of Pennsylvania Inc.; CEC Associates, Inc.; and the Honorable Noah Wenger. The Department published a notice of proposed rulemaking at 35 Pa.B. 3820 (July 9, 2005) with a 30-day public comment period. The Department received comments from the Independent Regulatory Review Commission (IRRC), as part of its review of the proposed rulemaking under the Regulatory Review Act (71 P.S. §§ 745.1-745.12). The Department also received public comments from Galfand Berger LLP (GB), The Insurance Federation of Pennsylvania, Inc. (IFP) and The Pennsylvania Workers' Compensation Judges' Association (PWCJA). The Department has reviewed and considered all comments received.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

No significant costs or savings are anticipated.

Remedial Analysis Form

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

No significant costs or savings are anticipated.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures which may be required.

No significant costs or savings are anticipated.

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings	N/A					
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs	N/A					
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses	N/A					

(20a) Explain how the cost estimates listed above were derived.

Any potential costs associated with these amendments are insignificant and not quantifiable.

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY-3	FY-2	FY-1	Current FY
Workers' Compensation Administration Fund	\$ 53,906,888.00	\$ 50,025,529.00	\$ 48,803,730.00	\$ 57,525,000.00 (appropriation for year)

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

There are no adverse effects and costs.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Act 53 permitted the Department to establish regulations relating to the qualifications of vocational experts under section 306(b) of the WC Act (77 P.S. § 512 (2)). Non-regulatory alternatives cannot create a legally enforceable standard, and therefore, were not considered.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No other regulatory schemes were considered because the Department considers the current amendments as the most appropriate and reasonable method for effectuating a proper program for carrying out the WC Act's earning power assessment interview provisions.

Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

There are no comparable federal standards.

(25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

Comparison to other states' provisions is impractical because statutory requirements and systems differ substantially from state to state.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

These amendments revise the qualification standards found in 34 Pa. Code § 123.202 (relating to Qualifications), and amend 34 Pa. Code §§ 123.201 (relating to Purpose) and 123.203 (relating to Credibility determinations). Further, the final-form rulemaking deletes the statement of policy contained in 34 Pa. Code § 123.201a.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

Currently, the Department does not anticipate that any other meetings will be scheduled.

Regulatory Analysis Form

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

The Department does not anticipate any changes in existing reporting, record keeping, or other paperwork requirements.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

There is no need for special provisions.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The final-form regulation is effective when published in the *Pennsylvania Bulletin*. These regulations require no new licenses, permits or approvals.

(31) Provide the schedule for continual review of the regulation.

The Department will continue to monitor the impact and effectiveness of the regulations. Changes to the WC Act and subsequent court decisions may lead to amendment of the regulations.

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INDEPENDENT REGULATORY
REVIEW OFFICE

<p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>BY:</p> <p>DEPUTY ATTORNEY GENERAL</p> <p>DATE OF APPROVAL</p> <p>Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p align="center">Department of Labor & Industry (AGENCY)</p> <p>DOCUMENT / FISCAL NOTE NO. 12-88</p> <p>DATE OF ADOPTION:</p> <p>BY:  Stephen M. Schmerin</p> <p>TITLE: Secretary (EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>BY:  MAR 07 2006 DATE OF APPROVAL</p> <p>Executive Deputy General Counsel DAVID J. DEVRIES</p> <p>Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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FINAL-FORM REGULATION

Title 34. LABOR AND INDUSTRY

**DEPARTMENT OF LABOR AND INDUSTRY
[34 PA. CODE CH. 123]**

QUALIFICATIONS FOR VOCATIONAL EXPERTS

RULES AND REGULATIONS

Title 34. LABOR AND INDUSTRY

DEPARTMENT OF LABOR AND INDUSTRY [34 PA. CODE CH. 123]

QUALIFICATIONS FOR VOCATIONAL EXPERTS

The Department of Labor and Industry (Department), Bureau of Workers' Compensation (Bureau), amends Chapter 123 (relating to general provisions--Part II) to read as set forth in Annex A. The final-form regulation provides guidance regarding the act of December 23, 2003 (P. L. 371, No. 53) (Act 53), which amended the Workers' Compensation Act (act) (77 P.S. §§ 1-1041.4 and 2501-2626), and implements Act 53. Specifically, Act 53 contains amendments to section 306(b) of the act (77 P.S. § 512(2)). This final-form regulation also repeals § 123.201a (relating to effect of Act 53 regarding qualifications of vocational experts—statement of policy).

Statutory Authority

This final-form regulation is adopted under the authority provided in sections 401.1 and 435 of the act (77 P.S. §§ 710 and 991). Additionally, section 306(b) of the act specifically authorizes the Department to promulgate regulations establishing the minimum qualifications for vocational experts. 77 P.S. § 512.

Background

On December 23, 2003, Governor Edward G. Rendell signed Act 53 into law. Act 53 amended section 306(b)(2) of the act. Before its amendment, section 306(b)(2) of the act provided a means for insurers to assess an employee's earning power through an interview "by an expert approved by the department and selected by the insurer." Act 53 has eliminated the requirement that the Department approve these experts. Instead, insurers may select experts "who meet[] the minimum qualifications established by the Department through regulation."

Act 53 further amended section 306(b)(2) of the act by providing that vocational experts "shall comply with the Code of Professional Ethics for Rehabilitation Counselors pertaining to the conduct of expert witnesses." Act 53 also added section 306(b)(2.1) (77 P.S. § 512(2.1)) of the act, which requires an insurer to disclose to the employee prior to his referral to an earning power assessment interview, any financial interest that the insurer has in the person or entity that will conduct the earning power assessment interview.

Purpose

This final-form regulation implements Act 53. It provides guidance to Bureau staff, workers' compensation insurance carriers, self-insured employers, employees, workers' compensation judges, workers' compensation practitioners and other interested parties concerning the qualifications and role of vocational experts in workers' compensation proceedings under sections 306(b) of the act and 449 of the act (77 P.S. § 1000.5). Other than in instances when a workers' compensation judge has determined that a vocational expert or insurer has not met the requirements of §§ 123.202 or 123.202a, or has failed to comply with §§ 123.204 and 123.205 (relating to conduct of vocational experts; and financial interest disclosure), this final-form regulation is not intended to restrict or limit the authority that workers' compensation judges currently possess.

Compliance with Executive order 1996-1, Regulatory Review and Promulgation

On June 11, 2004, the Department held a stakeholder meeting regarding the Act 53 amendments. Testimony was received from Irwin Aronson and David Wildeman, representing the AFL-CIO; and Terry Leslie, representing the Pennsylvania Association of Rehabilitation Professionals. In addition, the Department received written comments from the Pennsylvania Association of Rehabilitative Professionals Administrative Services; the Pennsylvania Trial Lawyers Association; The Insurance Federation of Pennsylvania Inc.; CEC Associates, Inc.; and the Honorable Noah Wenger.

Summary of Comments and Responses to Proposed Rulemaking

The Department published a notice of proposed rulemaking at 35 Pa.B. 3820 (July 9, 2005) with a 30-day public comment period. The Department received comments from the Independent Regulatory Review Commission (IRRC) on September 13, 2005, as part of its review of the proposed rulemaking under the Regulatory Review Act (71 P.S. §§ 745.1-745.12). The Department also received public comments from Galfand Berger LLP (GB), The Insurance Federation of Pennsylvania, Inc. (IFP) and The Pennsylvania Workers' Compensation Judges' Association (PWCJA).

1. § 123.201a. Definitions.

IFP commented that the definition of "financial interest" was broad and ambiguous. IFP contends that the definition arguably requires that any relationship between the insurer and vocational expert constitutes a "financial interest". The Department agrees and has amended this section to restrict "financial interest" to three specific criteria. The section now provides that a "financial interest" exists in the vocational expert or his employer only where the insurer has a present or former ownership interest, or a present or former employment relationship, with the entity or individual conducting the earning power assessment interview, or when a contractual or referral arrangement exists between the insurer and the vocational expert or his employer.

IRRC and IFP commented that subsection (ii)'s divergent use of the term "employment relationship" as distinguished from the terms "employs" and "employing" used elsewhere in the

section, was confusing and could be interpreted to permit the application of this provision in circumstances other than those pertaining to employment. The Department agrees and has amended this section to remove the terms “employs” or “employing” to clarify and promote consistent use of the term “employment relationship” throughout the section.

IFP commented that subsection (ii)’s inclusion of a “former employer relationship” could not constitute a current financial interest. The Department, however, maintains that the existence of a past employment relationship properly constitutes a financial interest for disclosure purposes. For example, a former employee could receive interests such as pension benefits, 401(k) proceeds, or severance benefits.

IFP commented that the reference to “a managerial, fiduciary or controlling interest” in subsection (iii) is confusing and duplicative of this section’s earlier provisions. Also, IFP remarked that this subsection creates confusion regarding the financial interest disclosure requirements of § 123.205. The Department agrees that the reference may be confusing and has deleted this amendment.

2. § 123.202a. *Qualifications for vocational experts under Act 53 of 2003.*

IRRC commented that subsection (a)(1)’s standard for qualification potentially allowed an individual without adequate earning power assessment knowledge and skills to serve in this capacity. Specifically, IRRC pointed out that a license for a professional counselor issued under the Social Workers, Marriage and Family Therapists and Professional Counselors Act (63 P.S. §§ 1901-1920.2) could include disciplines not relevant to the performance of earning power assessment interviews. The Department agrees and has amended this section to reflect that a vocational expert must possess both a professional counselors’ license and certification by an appropriate Nationally- recognized professional organization.

IRRC noted that subsection (a)(2) permitted an individual to perform as a vocational expert if that person held a Bachelor’s degree and certification by a professional organization or had 1 year’s experience. The Department agrees that this provision created an unnecessarily diminished qualification standard and has amended this section to require all vocational experts to hold a certification issued by an appropriate Nationally-recognized professional organization.

3. § 123.203. *Role of workers’ compensation judges.*

PWCJA commented that its members were concerned that subsection (c) was not authorized by statute. This provision prohibits a workers’ compensation judge from considering the results of an earning power assessment interview if the vocational expert has not complied with §§ 123.204 and 123.205 (relating to conduct of vocational experts; and financial interest disclosure). The Department maintains that section 435 of the act, which allows the Department to issue rules and regulations to explain and enforce the provisions of the act, properly authorizes the regulation. Further, section 306(b) of the act dictates that vocational experts “shall comply with the Code of Professional Ethics for Rehabilitation Counselors pertaining to the conduct of expert witnesses”, and that the insurer referring an employee for an earning power assessment interview “shall disclose [any] financial interest to the employe prior to the referral.”

Further, in response to the PWCJA's comments, the Department has clarified section 123.204 to provide that WCJs will resolve disputes regarding vocational experts' qualifications, and retain all other authority to make findings and conclusions regarding such qualifications, as well as experts' potential bias or objectivity.

4. § 123.204. *Conduct of expert witnesses.*

IFP commented that the title of this section should be changed to "conduct of vocational experts." The Department agrees and has amended the final-form rulemaking to reflect this change.

IFP commented that subsection (a) is "broad and vague" and creates confusion related to the "financial interest" definition in § 123.201a. The Department has amended this section to remove reference to the insurer. This provision now clearly requires that the vocational expert make appropriate disclosures to the employee.

PWCJA and IRRC commented that subsection (a), which requires that the vocational expert disclose the "role and limits" of their relationship with the employee, should reference a specific time frame for disclosure to occur. IRRC further requested that disclosure be made in writing. The Department agrees and has amended this section to clarify that a vocational expert must disclose the role and limits of his relationship with the employee, in writing, prior to the earning power assessment interview.

PWCJA, IRRC and GB commented that subsection (b)'s requirement that a vocational expert generate written documentation of his involvement in the litigation and results of the earning power assessment interview be amended to specifically require that a copy of the vocational expert's report be served on the employee within a proscribed period of time. The Department agrees and has amended this section to state that the vocational expert must serve a copy of the report to the employee, and counsel if known, within 30 days of the date of the earning power assessment interview.

IFP and IRRC commented that section 204 should include reference to the Code of Professional Ethics for Rehabilitation Counselors (Code) to provide a standard for compliance with the Code in the regulations. The Department agrees and has amended this section to include subsection (c), which clarifies that those vocational experts who have satisfied the requirements of subsections (a) and (b) are in compliance with requirements of the Code pertaining to the conduct of expert witnesses.

5. § 123.205. *Financial interest disclosure.*

IFP commented that the "breadth and vagueness" of § 123.201b(iii) and § 123.201b(iv) makes disclosure under the section unclear. The Department agrees and has amended § 123.201a (related to definitions) to clearly describe what constitutes a "financial interest" for purposes of disclosure under this section.

Affected Persons

The persons affected by this final-form rulemaking are employees, self-insured employers, workers' compensation insurance carriers, workers' compensation judges, workers' compensation practitioners and individuals who wish to serve as vocational experts under the act.

Fiscal Impact

There is no significant fiscal impact associated with this final-form regulation.

Reporting, Recordkeeping and Paperwork Requirements

The Department does not anticipate any changes in existing reporting, recordkeeping or other paperwork requirements.

Sunset Date

A sunset date is not appropriate for these regulations. However, the Department will continue to monitor the impact and effectiveness of the regulation.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on June 27, 2005, the Department submitted a copy of the notice of proposed rulemaking published at 35 Pa.B. 3820 (July 9, 2005), to IRRC and to the Chairpersons of the Senate Labor and Industry Committee and the House Labor Relations Committee for review and comment.

The Department also provided the Committees and IRRC with copies of the comments received as well as other documentation in accordance with section 5(c) of the Regulatory Review Act (71 P.S. § 745.5(c)). In preparing these final-form regulations, the Department considered all the comments from IRRC and the public. The House and Senate Committees did not provide comments.

Under section 5.1(j.1)-(j.3) of the Regulatory Review Act (71 P.S. § 745.5a(j.1)-(j.3)), these final-form regulations were approved/deemed approved by the House and Senate Committees on _____, IRRC met on _____, and approved this regulation in accordance with section 5.1(e) of the Regulatory Review Act (71 P.S. § 745.a(e)).

Contact Person

Persons who require additional information about this final-form regulation may submit inquiries to Eileen K. Wunsch, Chief, Health Care Services Division, Bureau of Workers' Compensation, 1171 South Cameron Street, Harrisburg, PA 17104, (717) 772-1912, ewunsch@state.pa.us.

Findings

1. Public notice of proposed rulemaking was given under section 201 and 202 of the act of July 31, 1968 (P.L. 769, No 240) (45 P.S. §§ 1201 and 1202) and the related regulations at 1 Pa. Code §§ 7.1 and 7.2.

2. A public comment period was provided as required by law and all comments were considered.

3. The final-form regulation is necessary and appropriate for the administration of Act 53.

Order:

The Department, acting under the authorizing statutes, orders that:

1. The regulation of the Department, 34 Pa. Code Chapter 123 is amended and adopted to read as set forth in Annex A.

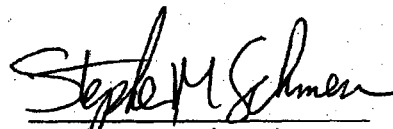
2. Section 123.201a (relating to Act 53 regarding qualifications of vocational experts—statement of policy) is repealed with the promulgation of this final-form regulation.

3. The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and to the Office of Attorney General for review and approval as to legality and form as required by law.

4. The Secretary of the Department shall submit this order and Annex A to IRRC, the Senate Labor and Industry Committee and the House Labor Relations Committee as required by law.

5. The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

6. This order shall take effect upon publication in the *Pennsylvania Bulletin* as a final-form regulation.


Stephen M. Schmerin
Secretary

FISCAL NOTE: 12-68

Annex A

TITLE 34. LABOR AND INDUSTRY

PART VIII. BUREAU OF WORKERS' COMPENSATION

CHAPTER 123. GENERAL PROVISIONS – PART II

Subchapter C. QUALIFICATIONS FOR VOCATIONAL EXPERTS

§ 123.201. Purpose.

This subchapter implements and interprets provisions of the act which [require] permit the Department to [approve] establish qualifications for vocational experts who will conduct earning power assessment interviews under sections 306 (b)[(2)] and 449 of the act (77 P.S. §§ 512 [b](2) and 1000.5). [The experts contemplated by this subchapter are vocational evaluators.] THIS SUBCHAPTER ALSO IMPLEMENTS the act's requirements for compliance with the Code of Professional Ethics for Rehabilitation Counselors PERTAINING TO THE CONDUCT OF EXPERT WITNESSES and DISCLOSURE OF financial interest disclosure are also contained in this subchapter.

§ 123.201a. [Effect of Act 53 regarding qualifications of vocational experts—statement of policy.] (Reserved).

[(a) The Department adopts this section so that all parties will have a clear understanding of their rights and obligations under section 306(b) of the act (77 P. S. § 512). This does not constitute a rule or regulation and is temporary. The Department intends to promulgate regulations on this topic.

(b) The minimum qualifications in § 123.202 (relating to qualifications) are the minimum qualifications established by the Department for vocational experts as specified in Act 53 of 2003 (P. L. 371, No. 53)(Act 53) which amended section 306(b) of the act, effective December 23, 2003.]

§ 123.201b. Definitions.

The following WORDS AND terms, when used in this subchapter, have the following meaning UNLESS THE CONTEXT CLEARLY INDICATES OTHERWISE:

Financial interest – An interest equated with money or its equivalent, and includes any of the following:

(i) An A PRESENT OR FORMER ownership interest in OR WITH the entity OR INDIVIDUAL CONDUCTING THE EARNING POWER ASSESSMENT INTERVIEW which employs the vocational expert.

(ii) A present or former employment relationship WITH THE ENTITY OR INDIVIDUAL CONDUCTING THE EARNING POWER ASSESSMENT INTERVIEW between the vocational expert and the insurer making the referral.

(iii) A managerial, fiduciary or controlling interest in the vocational expert or entity employing the vocational expert.

(iv) A contractual or referral arrangement that would require or allow the insurer to provide compensation or other consideration based upon the vocational expert's opinion or THE outcome of the vocational expert's earning power assessment interview.

Insurer – An insurer is any of the following:

(i) A workers' compensation insurance carrier.

(ii) The State Workers' Insurance Fund of the Department.

(iii) An employer authorized by the Department to self-insure its workers' compensation liability under section 305 of the act (77 P.S. § 501).

(iv) A group of employers authorized by the Department to act as a self-insurance fund under section 802 of the act (77 P.S. § 1036.2).

§ 123.202. Qualifications for current vocational experts under Act 57 of 1996.

(a)[To be an expert approved by the Department for the purpose of conducting] This section applies to individuals who, before _____ (Editors Note: The blank refers to the effective date of adoption of the final-form regulation), conducted earning power assessment interviews[, the individual shall possess a minimum of one of] under section 306(b) of the act (77 P.S. § 512(2)). These individuals continue to meet the MINIMUM qualifications established under section 306(b) if they possess ~~a minimum of~~ one of the following:

(1) Both of the following:

(i) Certification by one of the following Nationally recognized professional organizations:

(A) The American Board of Vocational Experts.

(B) The Commission on Rehabilitation Counselor Certification.

(C) The Commission on Disability Management Specialists Certification.

(D) The National Board of Certified Counselors.

(E) Other Nationally recognized professional organizations [approved], published by the Department in the Pennsylvania Bulletin.

(ii) One year experience in analyzing labor market information and conditions, industrial and occupational trends, with primary duties providing actual vocational rehabilitation services, which include the following:

(A) Job seeking skills.

(B) Job development.

(C) Job analysis.

(D) Career exploration.

(E) Placement of individuals with disabilities.

(F) Vocational testing and assessment.

(2) Certification by a Nationally recognized professional organization specified in subparagraph (1)(i) under the direct supervision of an individual possessing the criteria in paragraph (1).

(3) Possession of a Bachelor's degree or a valid license issued by the Department of State's Bureau of Professional and Occupational Affairs, as long as the individual is under the direct supervision of an individual possessing the criteria in paragraph (1).

(4) At least 5 years experience primarily in the workers' compensation field prior to August 23, 1996, as a vocational evaluator, with experience in analyzing labor market information and conditions, industrial and occupational trends, with primary duties providing actual vocational rehabilitation services, which include; but are not limited to, the following:

(i) Job seeking skills.

- (ii) Job development.
- (iii) Job analysis.
- (iv) Career exploration.
- (v) Placement of individuals with disabilities.

(b) Individuals meeting the minimum qualifications under subsection (a) are approved to conduct earning power assessment interviews under section 449 of the act (77 P.S. § 1000.5).

§ 123.202a. Qualifications for vocational experts under Act 53 of 2003.

(a) This section applies to individuals who, before _____ (Editor's Note: The blank refers to the effective date of adoption of the final-form regulation), have not conducted earning power assessment interviews under section 306(b) of the act (77 P.S. § 512(2)). These individuals meet the MINIMUM qualifications established under section 306(b) if they possess one of the following:

(1) A current license, in good standing, as a Licensed Professional Counselor under the Social Workers, Marriage and Family Therapists and Professional Counselors Act (63 P.S. §§ 1901-1920.2) AND CERTIFICATION BY ONE OF THE FOLLOWING NATIONALLY RECOGNIZED PROFESSIONAL ORGANIZATIONS:

~~(2) A Bachelor's or post graduate degree in rehabilitation or a related counseling field and one of the following:~~

~~(i) Certification by any of the following Nationally recognized professional organizations:~~

~~(Ai) The American Board of Vocational Experts.~~

~~(Bii) The Commission on Rehabilitation Counselor Certification.~~

~~(Ciii) The Commission on Disability Management Specialists Certification.~~

~~(Div) The National Board of Certified Counselors.~~

~~(E) Other Nationally recognized professional organizations, published by the Department in the *Pennsylvania Bulletin*.~~

~~(ii) One year's experience in vocational analysis, evaluation and testing, placement of individuals with disabilities, and analyzing labor market information and occupational trends.~~

~~(b) Individuals meeting the minimum qualifications under subsection (a) are approved to conduct earning power assessment interviews under section 449 of the act (77 P.S. § 1000.5).~~

§ 123.203. [Credibility determinations] Role of workers' compensation judges.

[Credibility determinations relating to the experts contemplated by this subchapter are within the province of the workers' compensation judge.]

~~(a) A workers' compensation judge will RESOLVE DISPUTES REGARDING determine whether a vocational expert meets the minimum qualifications established in sections 123.202 and 123.202a (relating to qualifications for current vocational experts under Act 57 of 1996; and qualifications for vocational experts under Act 53 of 2003).~~

~~(b) Except for AS SET FORTH IN subsection (c), this subchapter does not limit a workers' compensation judge's other statutory or regulatory authority and the ability to determine a vocational expert's QUALIFICATIONS UNDER SECTIONS 123.202 AND 123.202a OR A VOCATIONAL EXPERT'S bias or objectivity.~~

~~(c) A workers' compensation judge may not consider the results of an earning power assessment interview if the vocational expert has not complied with section 123.204 (relating to conduct of VOCATIONAL EXPERTS expert-witness) or if the insurer has not complied with the requirements of section 123.205 (relating to financial interest disclosure).~~

§ 123.204. Conduct of expert-witness VOCATIONAL EXPERTS.

~~(a) A vocational expert who conducts BEFORE CONDUCTING an earning power assessment interview, THE VOCATIONAL EXPERT on an insurer's behalf shall disclose to the employee, IN WRITING, the role and limits of the vocational expert's relationship with the insurer-EMPLOYEE.~~

~~(b) A vocational expert who conducts an earning power assessment interview on an insurer's behalf shall generate a written documentation, in the form of case notes or in a report, as to the expert's involvement in the litigation and conclusions from the interview. THE VOCATIONAL EXPERT SHALL SERVE A COPY OF THE REPORT ON THE EMPLOYEE, AND COUNSEL IF KNOWN, WITHIN 30 DAYS OF THE DATE OF THE EARNING POWER ASSESSMENT INTERVIEW.~~

~~(C) A VOCATIONAL EXPERT WHO SATISFIES THE REQUIREMENTS OF § 123.204(A) AND § 123.204(B) COMPLIES WITH THE CODE OF PROFESSIONAL ETHICS FOR REHABILITATION COUNSELORS PERTAINING TO THE~~

CONDUCT OF EXPERT WITNESSES FOR PURPOSES OF SECTION 306(B)(2) OF THE ACT (77 P.S. § 512(2)).

§ 123.205. Financial interest disclosure.

- (a) For the purposes of this section, a third-party administrator or another entity that performs services on behalf of an insurer, as specified in section 441(c) of the act (77 P.S. § 997(c)), is an insurer.
- (b) Before an insurer refers an employe EMPLOYEE for an earning power assessment interview, the insurer shall disclose to the employee, IN WRITING, under section 306 (b)(2.1) of the act (77 P.S. § 512(2.1), any financial interest the insurer has with the person or entity conducting the earning power assessment interview.
- ~~(c) The insurer is not required to disclose under this section the mere payment of the vocational interview's cost, without receipt of some other additional form of consideration.~~



DEPARTMENT OF
LABOR & INDUSTRY
COMMONWEALTH OF PENNSYLVANIA

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THE SECRETARY
1700 LABOR AND INDUSTRY BUILDING
SEVENTH AND FORSTER STREETS
HARRISBURG, PA 17120

March 16, 2006

The Honorable John R. McGinley, Esquire
Independent Regulatory Review Commission
14th Floor, Harrisstown 2
333 Market Street
Harrisburg, PA 17101

Re: Final-Form Regulation
Department of Labor & Industry
Vocational Experts, No. 12-68

Dear Chairman McGinley:

Enclosed please find a regulatory package consisting of a face sheet, preamble, annex and regulatory analysis form prepared by the Department of Labor and Industry for this final-form regulation. This regulation concerns qualifications for vocational experts in workers' compensation proceedings and establishes ethical rules and financial interest disclosure requirements.

The regulation will amend the Pennsylvania Code (34 Pa. Code, Chapter 123).

Written comments, suggestions or questions should be directed to Eileen K. Wunsch, Chief, Health Care Services Division, Bureau of Workers' Compensation, P.O. Box 15121, Harrisburg, PA 15121 (Telephone: 717-772-1912; Fax: 717-772-0342; Email: ewunsch@state.pa.us)


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Final Form Regulation
Vocational Expert No. 12-68
Page 2

The Department's staff will provide your staff with any assistance required to facilitate your review of this proposal.

Sincerely,

A handwritten signature in black ink that reads "Stephen M. Schmerin". The signature is written in a cursive style with a large, prominent "S" at the beginning.

Stephen M. Schmerin

Enclosures

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT

RECEIVED

I.D. NUMBER: 12-68
SUBJECT: Qualifications for Vocational Experts
AGENCY: DEPARTMENT OF LABOR & INDUSTRY

2006 MAR 16 PM 12:03

INDEPENDENT REGULATORY
REVIEW COMMISSION

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
<u>B. Dypson</u>	<u>3/16/06</u>	HOUSE COMMITTEE ON LABOR RELATIONS
<u>M. Eckhart</u>	<u>3/16/06</u>	
<u>Mandi Estep</u>	<u>3/16/06</u>	SENATE COMMITTEE ON LABOR & INDUSTRY
<u>Kathleen Bowen</u>	<u>3/16/06</u>	
<u>3/16/06</u>	<u>J. Belmont</u>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____		ATTORNEY GENERAL (for Final Omitted only)
_____		LEGISLATIVE REFERENCE BUREAU (for Proposed only)