

## Myth Busting—Methods of Debunking Vocational Testimony

### *More Approaches to Vocational Expert Testimony*

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And you.  
Are you a potted plant?



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**Kerner v. Flemming, 283 F.2d 916, 921 (2d Cir. 1960).**

- ▶ Kerner v. Flemming put the SSA in a bind, it had to do something. That something was the DOT.
- ▶ ... the Secretary had nothing save speculation to warrant a finding that an applicant thus handicapped could in fact obtain substantial gainful employment.

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- ▶ Initially, the Social Security Administration attempted to meet these requirements by citing selected government and industrial studies.

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- ▶ **Enter the DOT and the SCO**
- ▶ **The *Dictionary of Occupational Titles, Structure, History, Reliability, and Validity***
- ▶ Sources of Error in the DOT

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- ▶ [http://www.nap.edu/catalog.php?record\\_id=92](http://www.nap.edu/catalog.php?record_id=92)
- ▶ **A Critical Review of the Dictionary of Occupational Titles**
- ▶ **National Academy of Sciences, National Research Council, 1980.**

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- ▶ What's the point of talking about the DOT?
- ▶ Use your knowledge as a shield
- ▶ Use it as a sword.
- ▶ At five the burden shifts to the Commissioner.
  
- ▶ "Consistency is the hobgoblin of little minds."

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## Sources of error in the 4<sup>th</sup> Edition and Revised 4<sup>th</sup> Edition of the DOT included:

- ▶ Errors by raters, measurement error
- ▶ The DOT's scales measured vague and ambiguously defined factors
- ▶ Worker functions reflected skill estimates
- ▶ High correlations between some worker traits and occupational prestige (GED).
- ▶ Difficulty assigning scores on certain factors such as SVP and aptitudes

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- ▶ An Ancient and Abandoned Taxonomy
- ▶ The Revised Fourth Edition was released by the U.S. Department of Labor in 1991, and it has become a dead letter.

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- ▶ The DOT Is a Dead Letter Because it Is Obsolete

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- ▶ Dictionary of Occupational Titles, Revised 4<sup>th</sup> Edition, 1991.
- ▶ 2007 minus 1991 = 16 years.
- ▶ The DOT is a dead letter outside of the world of the Social Security Administration and Immigration Law.

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- ▶ The Production of the DOT Was Seriously Under-Documented and Under-Published

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- ▶ The *Critical Review* found that instructions on how to study jobs were inadequate, the procedures used to produce the DOT were insufficiently documented, with little or no information about the criteria to be used in decision making, the production of the DOT was poorly planned and poorly coordinated, which resulted in poorer quality than prior editions. *Critical Review* at 146.

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- ▶ A major drawback to the use of DOT data in research is the lack of reliability estimates for the worker trait and worker function scales. *Critical Review* at 86.

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- ▶ How Were the Industries Selected for Analysis?
- ▶ There is “no systematic way of assessing the extent, nature, or implications of employers’ noncooperation.” *Critical Review* at 120.

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- ▶ Most of these jobs were “picked up piecemeal, analysts often entering an establishment to analyze one or two jobs.” *Critical Review* at 140.

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- ▶ The DOT Never Differentiated Between Full-Time and Part-Time Work

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- ▶ The Analysis of “Procedures and Processes” Was Haphazard

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- ▶ Despite these conceptual distinctions between a job and its component parts, analysts generally accepted the establishment’s definition of which positions constituted a job. *Critical Review* at 124.

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- ▶ Shortcuts Were Taken in Writing the Job Descriptions and Assigning the DOT Codes

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- ▶ Environmental Conditions and Physical Demands Were Not Measured

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- ▶ Aptitude Ratings Were Most Ambiguous

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- ▶ Some Jobs in the DOT Were Never Reanalyzed After 1965

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- ▶ Which occupations marked “1977” in the Revised Fourth Edition DOT are actually based on data from when the Beatles first burst on the stage in the United States? It appears nobody knows anymore. There was no way of knowing “whether and to what extent changes in the content of these jobs occurred between the third and fourth editions.” *Critical Review* at 156.

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- ▶ Problems are found in the validity of the worker functions and traits because they are “vague and ambiguously defined.” *Critical Review* at 164.

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- ▶ Specific Vocational Preparation (SVP) Was Not Accurately Assessed

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- ▶ Eleven percent of the DOT titles in the Fourth Edition of the DOT have no supporting documentation other than the Third Edition definition, which was based on analyses conducted prior to 1965. *Critical Review* at 156.

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## Sources of error in the DOT

- ▶ Analysts found it efficient to go to a few locations where they could examine numerous jobs quickly.

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## A leaky funnel

“652 job analysis schedules for Materials Handler.”  
-*Critical Review* at 9.

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## Much ado about nothing.

- ▶ “About **16** percent of the occupational descriptions included in the fourth edition DOT were prepared **without the benefit of a single job analysis schedule**,
- ▶ **29** percent were based on information from one job analysis schedule, and
- ▶ **19** percent were based on information from two schedules; thus nearly two thirds of the occupations described in the fourth edition DOT were based on the observation of fewer than three jobs.” *Critical Review* at 10

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- ▶ “three fourths of the job analysis schedules used in compiling the fourth edition DOT do not meet the standards specified for a complete job analysis”
  - *Critical Review* at 10

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- ▶ “Occupations in the DOT are not intended to be either firm or region specific, and in some cases not even industry specific. Rather, the descriptions are intended to reflect the occupation as it typically occurs in the national economy, **although what is meant by ‘typical’ is not explicitly defined.**”  
*Critical Review* at 116

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## DOT Spin-offs

- ▶ The Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles
- ▶ The SCO provides additional sets of data not found in the two volumes of the DOT.
- ▶ Physical Demands
- ▶ Environmental Demands



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- ▶ The Duck Survey.
- ▶ How to count.

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## DOT spin-offs and wannabes

- ▶ Various non-governmental sources
- ▶ E-DOT
- ▶ U.S. Stats Publishing
- ▶ WestLaw and to some extent Lexis

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## TYPES OF OCCUPATIONAL DATA REPORTS

- ▶ Direct Government Sources
- ▶ County Business Patterns
- ▶ State Projections
- ▶ Wage and Salary Reports

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## PROBLEMS – OCCUPATIONAL DATA REPORTS

- ▶ Do they record and report by “skill” or “exertional” demands?
- ▶ Do they report by generic occupations or by industry?
- ▶ Do they record and report “skill” or “exertional” demands?
- ▶ Do they report by generic occupations or by industry?
- ▶ Who says they work at the micro level?

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## Current Federal Occupational Information – BLS

- ▶ Occupational Outlook Handbook
- ▶ Occupational Outlook Quarterly
- ▶ Employment
- ▶ Wages by Area and Occupation
- ▶ Injuries, Illnesses, and Fatalities
- ▶ Employment Projections
- ▶ Standard Occupational Classification (SOC)

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## Current Federal Occupational Information – Census

- ▶ **County Business Patterns**
- ▶ **Zip Code Business Patterns**
- ▶ **Metro Business Patterns**

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## SSA's Problems with O\*Net, BLS, and DOL

- ▶ They fly over the economy to see broad occupations and economic sectors.
- ▶ They never land to take the close look desired by SSA.

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## Non-Government "U.S. Publishing"

- ▶ "When using the Occupational Employment Quarterly in conjunction with the SOS Manual to estimate the number of individuals employed in a specific DOT job, local knowledge of the labor market should be used. No government agency reports employment by specific DOT codes."

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## Are these reliable sources of vocational information?

- ▶ "I've testified in over 4,000 hearings!"
- ▶ "I have 25-years experience."
- ▶ "I'm an occupational therapist!"
- ▶ "I'm a drug and alcohol counselor, but I read a lot!"

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- ▶ Vocational Science does not have anything to do with labor market analysis.
- ▶ VEs are not labor market guys.

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- ▶ Solutions!
- ▶ Practical things that you can do to use a shield and a sword.

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## The Angermeier comprehensive approach – Rule Number One

▶ “It is not *your job* to educate the VE about *his job*.”

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## The Angermeier comprehensive approach

- ▶ Use a cross examination checklist
- ▶ Right Way
- ▶ Wrong Way
- ▶ Avoid the Blow-Up
- ▶ The proper care and feeding of the common vocational expert.

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- ▶ Sample cross examination
- ▶ See page 450 in your materials

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## The Angermeier comprehensive approach

- ▶ Be ready for the unskilled sedentary jobs

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## The Angermeier comprehensive approach

- ▶ Be ready for specific jobs

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## The Angermeier comprehensive approach

- ▶ Have the letters ready: e.g. letter from Don Vander Vegt

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## The Angermeier comprehensive approach

- ▶ Have your Census forms ready

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## The Angermeier comprehensive approach

- ▶ Keep track of VE testimony using a standardized format that is comfortable for you.

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## The Angermeier comprehensive approach

- ▶ Verify everything.
- ▶ Get vocational reports after the hearing – do the research and submit a brief.

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## The Angermeier comprehensive approach

- ▶ Request a subpoena. Use the letter!
- ▶ Raise the issue at the hearing
- ▶ Get the DOT codes
- ▶ Get book titles and page numbers

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## The Angermeier comprehensive approach

- ▶ Make a “Vocational Binder”

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## The Angermeier comprehensive approach

- ▶ Get your own vocational report or;
- ▶ Submit a close-out letter

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## Objecting.

- ▶ I'll probably be objecting! So help me God, I'll do it. I'm telling ya!
- ▶ I'm objecting! I told you so, I warned you, but you made me do it!
- ▶ I objected! I didn't want to, but here I am and here I stand!
- ▶ Do all three.

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## CASE LAW

- ▶ **Donahue v. Barnhart, 279 F.3d 441 (7th Cir. 2002).**
- ▶ Brings Daubert to an administrative law setting via Rule 702 of the Federal Rules of Evidence
- ▶ About 82 Social Security cases and nine briefs on Lexis citing Donahue

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## **Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002).**

- ▶ We asked the parties at oral argument what makes a vocational expert an "expert" (and where the information in the Dictionary [of Occupational Titles] came from). They did not know. Maybe both the authors of the Dictionary and the vocational expert in this case are talking out of a hat.

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Daubert v. Merrell Dow Pharmaceuticals, Inc.,  
509 U.S. 579 (1993).

- ▶ No junk science.
- ▶ No pseudoscience.
- ▶ No guesses.
- ▶ No “guestimates.”
- ▶ No hunches.

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Kumho Tire Co. v. Carmichael, 526 U.S.  
137, 152 (U.S. 1999)

- ▶ Daubert's gatekeeping requirement. . . .  
makes certain that an expert, whether basing  
testimony upon professional studies or  
personal experience, employs in the  
courtroom the same level of intellectual rigor  
that characterizes the practice of an expert in  
the relevant field. . . .

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Thomas J. Kline, Inc. v. Lorillard, Inc., 878  
F.2d 791, 800 (4th Cir. 1989)

- ▶ “Although it would be incorrect to conclude  
that [witness's] occupation as a professional  
expert alone requires exclusion of her  
testimony, **it would be absurd to conclude  
that one can become an expert simply by  
accumulating experience in testifying.**”

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**Trust but verify.**

- ▶ As an initial reminder,  
some VEs and ALJs  
are known to make up  
DOT titles as needed  
to fit the situation.
- ▶ You will never know  
unless you check each  
one. Every time.  
Every case.

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**Clark v. Chater, 1996 U.S. App. LEXIS 5746 (9th Cir. 1996) (unpublished).**

- ▶ “The expert stated that Clark could perform the job of plastic molder foreman as it is ‘generally performed’ and as it is described in the Dictionary of Occupational Titles (‘DOT’). The ALJ’s opinion specifically relied on Dr. Jones’ testimony that Clark could perform the ‘past work of plastic molder foreman, as is described in the Dictionary of Occupational Titles.’”
- ▶ **What’s wrong with that?**

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**Clark v. Chater, 1996 U.S. App. LEXIS 5746 (9th Cir. 1996) (unpublished).**

- ▶ **“The problem, however, is that the DOT does not list any occupation of ‘plastic molder foreman.’”**

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**Burnett v. Commissioner of SSA, 220 F.3d 112, 124 (3d Cir. 2000).**

- ▶ The ALJ found the job of ‘delicatessen clerk’ to be convincing proof of Burnett’s ability to work.
- ▶ **What’s wrong with that?**

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**Burnett v. Commissioner of SSA, 220 F.3d 112, 124 (3d Cir. 2000).**

- ▶ “In this case, the ALJ made up the occupational title of ‘delicatessen clerk.’ It is simply nowhere to be found in the DOT, nor did the ALJ give any reference to a particular DOT code. An illusory definition in the DOT cannot be relied upon and is not contradictory evidence.”

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▶ Bad law, good law . . .

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**Bayliss v. Barnhart, 427 F.3d 1211, 1218 n.4 (9th Cir. 2005).**

- ▶ “The requirements established in Federal Rule of Evidence 702, Daubert, and Kumho do not govern the admissibility of evidence before the ALJ in the administrative proceeding in this Social Security case.”

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**Crane v. Barnhart, 224 Fed. Appx. 574, 578 (9th Cir. 2007) (unpublished).**

- ▶ We have previously stated that “[a] VE’s recognized expertise provides the necessary foundation for his or her testimony.
- ▶ [VE] relied on the Dictionary of Occupational Titles (“DOT”), a publication recognized by the Social Security regulations as a source of “reliable job information.” 20 C.F.R. § 404.1566(d)(1) (2006).

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**McKinnie v. Barnhart, 368 F.3d 907 (7th Cir. 2004)**

- ▶ “. . . Presumably a vocational expert establishes the foundation for her opinions before she expresses them at a hearing. It is not apparent why a claimant should pay a vocational expert to do the preparatory research that she should have completed prior to testifying. The data and reasoning underlying a vocational expert’s opinions are not ‘available on demand’ if the claimant must pay for them.”

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## Iipse Dixit

- ▶ Latin for "he himself said it." The term labels something that is asserted but unproved.  
[www.Nolo.com](http://www.Nolo.com)
- ▶ **Ipsedixitism** is the pejorative term for an unsupported rhetorical assertion; the term in Logic for a missing argument.  
[www.en.Wikipedia.org](http://www.en.Wikipedia.org)

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## Resources

- ▶ *Social Security Disability Advocate's Handbook*, James Publishing.
- ▶ <http://ssaconnect.com>
- ▶ <http://germaniapublishing.com>



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