



LAW OFFICES
of
McDERMOTT & CLAWSON, LLP

LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

June 2010

www.McDermott-Clawson.com

June 2010

THE OGILVIE BURDEN

The Ogilvie opinion held in significant part that the Permanent Disability Rating Schedule (PDRS) is rebuttable and, more specifically, the Diminished Future Earnings Capacity modifier (DFEC) is rebuttable. Thus, an injured worker may be allowed to show that his or her permanent disability award should be higher than that which is statutorily prescribed by the rating schedule. The Ogilvie opinions came in two WCAB *en banc* Decisions after Reconsideration, with the opinions commonly referred to as *Ogilvie I* and *Ogilvie II*: *Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 248 (Appeals Board *en banc*) (*Ogilvie I*) and *Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 1127 (Appeals Board *en banc*) (*Ogilvie II*).

When we last checked, the first DCA had not yet determined whether to grant a writ to reconsider the decisions, but because they were issued by the WCAB *en banc* (see editor's note following this article) all WCAB judges are bound to follow the mandates of the decisions unless and until the Ogilvie cases might be reversed by a higher court.

Meanwhile, a segment of the Applicant's bar gleefully threatens to challenge the PDRS using Ogilvie every time they negotiate resolution of a case where the applicant has not returned to work. How effective a threat this may be, and how much heed a defendant should pay to it in any given case, demands a clear understanding of the burden of proof required to successfully rebut the rating schedule under an Ogilvie theory.

Who has the burden? That falls on the shoulders of the party attempting to rebut the PDRS. Although a defendant can attempt to do so to manipulate a rating downward, in most instances it is the applicant who is trying to escalate the rating and thus increase the compensation dollars for permanent disability. It is the burden of the applicant in such cases to establish every element of the Ogilvie theory as it may apply to each particular injured employee.

The evidentiary burden on the applicant to obtain an award of increased disability by using a more severe DFEC is rather significant. No less significant is the burden placed on the WCAB trial judge to make sure there is an adequate record to sustain an Ogilvie-type award. The

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

Orange County / Inland Empire
1700 West Katella Avenue
Orange, CA 92867
(714) 288-1700

Ogilvie decisions themselves (especially Ogilvie II) and several subsequent panel decisions have provided enlightenment as to how heavy the burden of proof actually is in mounting an Ogilvie attack.

Ogilvie grants a WCAB judge discretion regarding what evidence to rely upon in determining an applicant's post-injury earnings, and the post-injury period upon which to base lost earnings calculations. For instance, in Ogilvie I, the WCAB stated:

"In determining an individual employee's proportional earnings loss, the first step ordinarily will be to establish the employee's actual earnings in the three years following his or her injury (as did the RAND Studies), using the employee's EDD wage data or other empirical wage information. Generally, this will be accomplished by having the employee obtain his or her wage information from EDD, either voluntarily or through an order compelling. However, other empirical earnings information also may be used, including earnings records from the Social Security Administration. Moreover, while federal and state tax records, including W-2 forms, are privileged the privilege is not absolute and does not apply where a stronger public policy controls or when a party has waived the privilege. (*Ogilvie I*, 74 C.C.C. at p. 266.)

In a subsequent panel decision which has drawn a lot of attention, the decision of a trial judge awarding increased disability pursuant to *Ogilvie* was reversed because the trial judge merely relied on the applicant's testimony as to post-injury loss of earnings. *John Shini vs. Pacific Auto Body* (2010) ADJ2079252 (SDO 0339791). The *Shini* case noted that such testimony alone was not necessarily competent to establish actual earnings loss and, more importantly, it is post-injury earnings *capacity* that is the true determining factor.

The opinion in *Shini* recited language in *Ogilvie I* as follows:

"When a proportional earnings loss calculation is made for a particular employee in a DFEC rebuttal case, the employee's post-injury earnings portion of that calculation may not accurately reflect his or her true earning capacity. As the Supreme Court stated years ago in *Argonaut Ins. Co. v. Industrial Accident. Com.* (Montana) (1962) 57 Ca1.2d 589 [27 Cal.Comp.Cases 130, 133]: "An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured [A] prediction [of earning capacity for purposes of permanent disability] is...complex because the compensation is for loss of earning power over a long span of time In making a permanent award, [reliance on an injured employee's] earning history alone may be misleading [A]ll facts relevant and helpful to making the estimate must be considered. The applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant.' (Montana, supra, 57 Ca1.2d at pp. 594-595 [27 Cal.Comp.Cases at p. 133] (internal citations omitted)."

"Certainly, an individual employee should not be able to manipulate the proportional earnings loss calculation through malingering or otherwise deliberately minimizing his or her post-injury earnings. Similarly, motivational or other factors may play a role in determining whether a particular employee's post-injury earnings accurately reflect his or her true post-injury earning capacity. Further, an employee may voluntarily retire or partially retire for reasons unrelated to the industrial injury. [Citations.] Temporary economic downturns or other factors

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

Orange County / Inland Empire
1700 West Katella Avenue
Orange, CA 92867
(714) 288-1700

may also come into play. Accordingly, the trier-of-fact may need to take a variety of factors into consideration.”

Thus, it is clear that the mere fact that an employee has not returned to work for a given period of time is not, in and of itself, sufficient to successfully argue for increased PD pursuant to *Ogilvie*. Not only does the applicant need hard data regarding similarly situated workers, but the applicant’s attorney must also show that the earnings capacity of this particular employee is diminished, and to what extent it is diminished because of the industrially-related impairment as opposed to extrinsic factors. Assuming a *prima facie* case can be made, the defendant will then be able to attempt to rebut the case by demonstrating that earning capacity either is not impaired beyond what the PDRS envisioned or, if it is, it is due to extrinsic factors as discussed in *Montana*.

Nor does the burden end here. If a case is sufficiently made to support an *Ogilvie* increase in the PD rating, the judge may still decide against the increase, especially where the defense has introduced rebuttal evidence. "Even if the ...evidence is legally substantial, the WCAB as the trier-of-fact may still determine that the evidence does not 'overcome' the DFEC adjustment factor component of the scheduled permanent disability rating. (See *Glass v. Workers' Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297, 307] [45 Cal.Comp.Cases 441] ('While the Rating Schedule is prima facie evidence of the proper disability rating, it may be controverted and overcome.'; see also *Black's Law Dictionary* (6th ed. 1990), at p. 1190 (one definition of 'prima facie evidence' is '[t]hat quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence; once a trier of fact is faced with conflicting evidence, it must weigh the prima facie evidence with all of the other probative

evidence presented.' (Ogilvie II, 74 Cal.Comp.Cases at pp. 1143- 1144.)” (*Shini* at p. 9)

In another case the WCAB issued a panel decision suggesting a stop-gap remediation in a case where the evidence did not properly support an *Ogilvie* determination, but where the possibility of such an outcome could not be permanently discarded. In the case of *Bertha Noriega Garcia vs. Patrick Hinrichsen, et.al.* ADJ6721939, the applicant sought to overcome the DFEC and the judge issued an F&A without adequate explanation of the evidence relied upon to reach a conclusion supporting the applicant. The WCAB remanded and outlined the burden on the judge to support the award: “In this case, the WCJ gave no explanation in either his Opinion on Decision or Report regarding the period used to calculate the applicant’s post-injury earnings and earnings loss. At the time of trial, three years had not yet elapsed from the applicant's date of injury. Additionally, we note that in this case the applicant was not found to be permanent and stationary until August 5, 2008, more than one and one-half years after the industrial injury, but only about one year before trial. In the further proceedings, the WCJ should more fully analyze the proper time period for an earnings loss calculation and whether applicant's earnings during that time period are more indicative of her earning capacity than the scheduled rating. Additionally, to the extent that the WCJ believes that a proper DFEC adjustment factor cannot yet be determined, the WCJ should consider issuing an award utilizing the scheduled DFEC rating, subject to a later petition to reopen, as discussed in *Ogilvie II*.”

When an *Ogilvie* argument is raised in settlement negotiations or otherwise, we recommend defendants make demand for each and every document and item of evidence which the applicant intends to submit in an attempt to support a modification of the scheduled DFEC

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

Orange County / Inland Empire
1700 West Katella Avenue
Orange, CA 92867
(714) 288-1700

modifier. We also recommend demanding early disclosure of the identity of any expert witness the applicant intends to call on the subject of loss of earning capacity, coupled with an offer to disclose the same information on behalf of the defendant. If there is significant potential exposure, depositions of experts is recommended to determine where the *Ogilvie* case is well supported, and where it may be weak. Careful analysis of the potential case for modification of the DFEC in light of the requirements in *Ogilvie* I and II, as well as *Shini* and *Garcia* as discussed above, will allow both sides to make a good determination as to how realistic the probability of success with these complex arguments may be.
Article by Howard J. Stevens, Orange Office

Editor's note: WCAB panel decisions, unless they have been officially designated as a "Significant Panel Decision" by the WCAB, are not binding authority on trial judges but are useful in that they may give some indication of what a trial judge may do, or what the WCAB may do with an issue on Reconsideration. Reports concerning writ denied cases are published in the California Compensation Cases and may be cited at trial level but are not binding authority on a trial judge. WCAB *en banc* decisions, published opinions of the Court of Appeal and of the Supreme Court are controlling case law on the issues addressed in the opinion.

ABOUT PAYING THOSE DOCTORS

The following is a reprint from the 4/28/10 *DWC Newslines*:

"The Division of Workers' Compensation (DWC) is responding to recent inquiries regarding discounted payments for medical-legal services. DWC advises that the Labor Code provisions for medical treatment do not apply to medical-legal services.

Claims administrators have asked whether medical provider networks (MPN) or preferred

provider organization (PPO) contracted discounts apply to payments for medical-legal evaluations under the California official medical-legal fee schedule (MLFS). Payors applying these discounts are doing so citing the provisions of Labor Code section 5307.11 as their legal justification for using the contract rates.

Labor Code section 5307.11 addresses whether or not it is permissible to contract for reimbursement rates different from those in the fee schedule. This statute specifically indicates that health care providers and contracting agents, employers or carriers, may contract for rates different than those found in fee schedules adopted and revised pursuant to Labor Code section 5307.1, [of] the official medical fee schedule (OMFS)

The MLFS is set forth in Labor Code section 5307.6, not 5307.1, and therefore services rendered under its provisions would not be subject to the contracting provisions described in section 5307.11.

Unless the medical-legal provider and the payor have made a specific written agreement regarding medical-legal service payment at rates different than the MLFS, a general MPN or PPO discount **does not** apply.

Claims administrators are also reminded to pay all undisputed amounts in a timely manner as required by Labor Code section 4622."

Need Assistance with Training?

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

Orange County / Inland Empire
1700 West Katella Avenue
Orange, CA 92867
(714) 288-1700

[Howard Stevens](#) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

Legal Briefs is a publication of [McDermott & Clawson, LLP](#) - [Howard Stevens](#) (Orange office), Editor

Legal Briefs is provided free of charge as a service to our valued clients to provide general assistance in the day to day review of claims and cases. Comments and recommendations provided are not necessarily meant to apply to any specific case currently under review, as many cases present unique facts and circumstances which should be reviewed by legal counsel when litigation is involved. Please feel free to call our [Education Committee](#) with questions or comments. Contact [Howard Stevens](#) in the Orange office, 714 288-1700, or any of our [managing attorneys](#) for more information.

Los Angeles
16530 Ventura Boulevard, Suite 209
Encino, CA 91436
(818) 997-2100

Orange County / Inland Empire
1700 West Katella Avenue
Orange, CA 92867
(714) 288-1700