

Combining Medical and Vocational Evidence to Achieve Accurate Permanent Disability Ratings under *Ogilvie* in Workers' Compensation Cases in California

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Abstract: The California Workers' Compensation Appeals Board (WCAB) ruled in *Ogilvie I* (2009, February 3) and *Ogilvie II* (2009, September 3) that the future earning capacity (FEC) component of the 2005 *Schedule for Rating Permanent Disabilities* (California Division of Workers' Compensation, 2005) can be rebutted through the application of a prescribed formula. While under appeal, this decision represents current California law. Subsequent panel (non-binding) decisions by the WCAB have ordered a consideration of *Montana* (1962) factors. A vocational evaluation is necessary to address many of these factors. A step-by-step methodology is described that combines medical impairments with occupational and wage data consistent with the prescribed *Ogilvie* formula and the *Montana* factors. Issues related to 100% claims, non-industrial factors, and payment of DFEC expert fees are also addressed.

Introduction

A new *Schedule for Rating Permanent Disabilities (Schedule)* (California Division of Workers' Compensation, 2005) was developed as required by *Labor Code section (LC) 4660* (Bae, 2010) following the enactment of California Senate Bill 899. *LC section 4660 (b)(1)* requires the use of the "descriptions and measurements of physical impairments and corresponding percentages of impairments published in the American Medical Association (AMA) *Guides for the Evaluation of Permanent Impairments* (5th Edition)" (Bae, 2010, p. 333).

In addition, *LC section 4660 (b)(2)* states that "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" (Bae, 2010, p. 333). Furthermore, the *Schedule* (California Division of Workers' Compensation, 2005) states:

A permanent disability rating can range from 0% to 100%. Zero percent signifies no reduction of earning capacity, while 100% represents permanent total disability. A rating between 0% and 100% represents permanent partial disability. Permanent total disability represents a level of disability at which an employee

has sustained a total loss of earning capacity. Some impairments are conclusively presumed to be totally disabling. (*LC section 4662*, pp. 1-2, 1-3)

Referring parties are often unclear about the nature and type of vocational evaluation services necessary in a particular case. Therefore, the authors have developed a checklist of various types of *Ogilvie* analyses that can be considered.

Background

LC section 4660(c) states that the *Schedule* "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury category covered by the schedule" (Bae, 2010, p. 333). The *Schedule* includes FEC adjustment factors ranging from 1.1 to 1.4 that adjust the standard permanent disability rating for the AMA *Guides* (Cocchiarella & Andersson, 2001) according to the body part that was injured. The adequacy of the FEC adjustment factors was challenged and in *Boughner* (2008) the WCAB, in

an en banc decision (a decision involving all 7 commissioners that workers' compensation judges are required to follow), found the FEC adjustment component of the *Schedule* to be legally valid. An appeal to the California Court of Appeal was denied (*Boughner*, 2009).

Controversy over the adequacy of the FEC adjustment component of the *Schedule* continues for reasons that were explained by Mark Gerlach, a former rating analyst from Kemper Insurance Company and the State of California, and a statistical consultant for the California Applicants' Attorneys Association (CAAA), in *Lario* (2006) and *Boughner* (2007). In *Diminished Future Earning Capacity (DFEC): A Primer* (2008), which Gerlach presented at the 2008 DFEC Seminar for CAAA, he notes, "In short, *diminished future earning capacity is the quantitative measure of the severity of a permanent disability* (emphasis in original) (p. 29)." Further, Gerlach stated, "the FEC adjustment does not measure either impairment or diminished future earning capacity, instead, it measures a mathematical relationship between these figures (p. 30)." Coincidentally, while *Boughner* and other cases were making their way through the court system, the commissioners at the WCAB were busy developing a mechanism for rebutting the FEC adjustment component of the *Schedule* that would be consistent with *LC 4660*.

Ogilvie

In *Ogilvie* (2009, February 3), now commonly referred to as *Ogilvie I*, an en banc decision, the WCAB concluded:

For the reasons below, we hold in summary that: (1) the DFEC portion of the 2005 Schedule is rebuttable; (2) the DFEC portion of the 2005 Schedule ordinarily is *not* rebutted by establishing the percentage to which an injured employee's future earning capacity has been diminished; (3) the DFEC portion of the 2005 Schedule is *not* rebutted by taking two-thirds of the injured employee's estimated diminished future earnings, and then comparing the resulting sum to the permanent disability money chart to approximate a corresponding permanent disability rating; and (4) the DFEC portion of the 2005 Schedule may be rebutted in a manner consistent with Labor Code section 4660 – including section 4660(b)(2) and the RAND data to which section 4660(b)(2) refers. Further, the DFEC rebuttal approach that is consonant with section 4660 and the RAND data to which it refers consists, in essence, of: (1) obtaining two sets of wage data (one for the injured employee and one for similarly situated employees), generally through the Employment Development Department (EDD); (2) doing some simple mathematical calculations with that wage data to determine the injured employee's individualized proportional earnings loss; (3) dividing the employee's whole person impairment by the proportional earnings loss to obtain a ratio; and (4) seeing if the ratio falls within certain ranges of ratios in Table A of the 2005 Schedule. If it does, the determination of the employee's DFEC adjustment factor is simple and relates back to the Schedule. If it does not, then a non-complex formula is used to perform a few additional calculations to determine an individualized DFEC adjustment factor. (pp. 1-2)

Ogilvie I was appealed. In *Ogilvie II* (2009, September 3), another en banc decision, the WCAB concluded:

In this decision, we hold: (1) the

language of section 4660(c), which provides that “the schedule . . . shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule,” unambiguously means that a permanent disability rating established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating; and (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's DFEC adjustment factor, which may be accomplished by establishing that an individualized adjustment factor most accurately reflects the injured employee's DFEC. However, any individualized DFEC adjustment factor must be consistent with section 4660(b)(2), the RAND data to which section 4660(b)(2) refers, and the numeric formula adopted by the Administrative Director (AD) in the 2005 Schedule. Any evidence presented to support a proposed individualized DFEC adjustment factor must constitute substantial evidence upon which the Workers' Compensation Appeals Board (WCAB) may rely. Moreover, even if this rebuttal 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. Otherwise, we affirm our prior decision. (p. 2)

The importance of the above finding is illustrated in *Shini* (2010) and *Garcia* (2010), recent WCAB panel decisions (a decision involving 3 commissioners). In *Shini*, the workers' compensation judge (WCJ) applied the *Ogilvie* formula for an applicant with no post-injury earnings. The commissioners rejected this approach, remanded the decision, and stated:

In the further proceedings, the WCJ must do a complete *Ogilvie* analysis explaining, among other things, the evidence which was relied upon to find the applicant's earning loss and

explaining the earning loss period decided upon. The WCJ should discuss whether this adjusted DFEC factor is a true reflection of the applicant's lost earning capacity, including a discussion of whether the applicant was malingering, and a discussion of the *Montana* factors enumerated above. (p. 9)

The *Montana* factors referred to above are from *Argonaut Insurance Company v. Industrial Accident Commission (Montana)* (1962), a California Supreme Court case. In *Montana*, the California Supreme Court found that in estimating an applicant's earning capacity, “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” (p. 3).

Earning capacity has been defined from legal, economic, and vocational perspectives. From a legal perspective, *Black's Law Dictionary* (Garner, 1999) defines earning capacity as “a person's ability or power to earn money, given the person's talents, skills, training, and experience” (pp. 547-548). According to economists Horner and Slesnick (1999), “earning capacity is the expected earnings of a worker who chooses to maximize the expectation of actual earnings” (p. 15). Finally, from a vocational perspective, earning capacity has been defined as the “ability of an individual to obtain and hold the highest paying of jobs to which he or she would have access. Access is determined by work traits, work skills and amount of training” (Weed & Field, 2001, p. V-7).

In *Garcia*, the WCAB commissioners again rejected a mechanical application of the *Ogilvie* formula, this time for an applicant with limited post-injury earnings. Further, the commissioners noted that the *Montana* factors must be discussed in the context of a complete *Ogilvie* analysis. *Shini* and *Garcia* suggest that a complete vocational evaluation is necessary to develop an opinion under *Ogilvie* for cases with similar fact patterns, primarily cases involving no or limited post-injury earnings after the date of maximum medical improvement. Interestingly, factors to be considered in a complete vocational evaluation were the topic of discussion

by the International Association of Rehabilitation Professionals (IARP) – DFEC Work Group that met in person and by teleconference throughout 2009. The results of a meeting on 5/23/09 of the DFEC Work Group in San Diego, California can be found in White Paper: IARP – DFEC Work Group (Austin, T., et al., 2009, pp. 147-156). There was further discussion regarding evaluation and reporting guidelines at a subsequent meeting on 10/17/09 in San Diego, including a discussion of *Ogilvie II*.

In another panel decision related to *Ogilvie* (*Bowden*, 2009), the WCAB delayed a decision on whether the applicant was able to rebut the FEC adjustment factor in the *Schedule* until *Ogilvie* is ultimately decided by the courts. In the interim, the applicant would be paid benefits according to the FEC adjustment factor in the *Schedule*. The delay in *Bowden* was related to overpayments for temporary and permanent disability that could not be recovered by the defendant should *Ogilvie* be overturned on appeal.

In *Ochoa* (2010), a panel decision, the WCAB denied reconsideration of the Findings and Award of the workers'

compensation judge (WCJ). In the Report and Recommendation on Petition for Reconsideration, the WCJ confirmed that the disputing party has the burden of proof in attempting to rebut the FEC adjustment factor in the *Schedule*. The WCJ also did not find the applicant's testimony alone regarding pre-injury earning capacity to be considered substantial evidence. Additionally, the WCJ commented on the applicant's lack of an attempt to return to work at a lighter job after his work injury.

In *Cortez* (2010), a panel decision, the WCAB granted reconsideration and reversed the WCJ's decision on permanent disability after finding that the applicant had not met the burden of proof in attempting to rebut the FEC adjustment factor in the *Schedule*. This was based on the conclusion that the agreed DFEC expert's opinion was not substantial evidence. Among other things, the commissioners disagreed with the control group of similarly situated employees selected by the DFEC expert. The commissioners disagreed with the DFEC expert's conclusion that the applicant had a 100% loss of post-injury earning capacity, because it was based in part on the non-industrial

factors that the applicant was monolingual and nearly illiterate. Further, the DFEC expert's opinion was not substantial evidence because his opinion was based in part on the applicant's prior back injury. Therefore, the *Ogilvie* calculations did not constitute substantial evidence.

Types of *Ogilvie* Analyses

Referring parties are often unclear about the nature and type of vocational evaluation services necessary in a particular case. Therefore, the authors have developed a checklist of various types of *Ogilvie* analyses that can be considered. The checklist of the Types of *Ogilvie* Analyses can be seen in Table 1 below. Three types of analyses are described: Basic *Ogilvie* Analysis, Comprehensive *Ogilvie* Analysis, and Combination Diminished Future Earning Capacity (DFEC) Evaluation including an *Ogilvie* Analysis and a Vocational Evaluation for a 100% claim under *LC section 4662* (Bae, 2010) or *LeBoeuf* (1983). An estimate of the time needed to complete each type of analysis is also included.

Table 1
Types of *Ogilvie* Analyses

- A. Basic *Ogilvie* Analysis with actual post-injury earnings.
 1. Using the *Ogilvie* Analysis Data Sheet* information only. (Estimated time for the Basic *Ogilvie* Analysis: 2-4 hours.)
 2. Using the *Ogilvie* Analysis Data Sheet plus interviewing the applicant. Among other things, post-injury return to work efforts are reviewed. (Estimated time for the Basic *Ogilvie* Analysis: 6-8 hours.)
- B. Comprehensive *Ogilvie* Analysis including actual post-injury earnings and expected post-injury earnings.
 1. Using the *Ogilvie* Analysis Data Sheet information and a transferable skills analysis (TSA) only. (Estimated time for the Comprehensive *Ogilvie* Analysis: 4-6 hours.)
 2. Using B.1. above and labor market research only. (Estimated time for the Comprehensive *Ogilvie* Analysis: 14-16 hours.)
 3. Using B.1. and B.2. above and interviewing and testing the applicant. Among other things, post-injury return to work efforts are reviewed. (Estimated time for the Comprehensive *Ogilvie* Analysis: 22-24 hours.)
- C. Combination Diminished Future Earning Capacity (DFEC) Evaluation including an *Ogilvie* Analysis and a Vocational Evaluation for a 100% claim under *LC 4662* or *LeBoeuf*.

The Combination DFEC Evaluation requires a review of all pertinent medical, vocational, and wage records, deposition transcripts, and related records; interviewing and testing the applicant; assessing vocational feasibility, employability, and earning capacity; labor market research; and an *Ogilvie* analysis. (Estimated time for the Combination DFEC Evaluation: 20-40 hours.)

* The *Ogilvie* Analysis Data Sheet is an outline of case information provided by the referring attorney or adjuster.

Sample Report Formats

Tables 2, 3, and 4 below have been developed by the authors to provide a structure of the topics to be addressed in a report for an *Ogilvie* analysis. For example, the format in Tables 2 and 3 can be used for a Basic *Ogilvie* Analysis. The format in Tables 2, 3, and 4 would be used for a Comprehensive *Ogilvie* Analysis as well as for a Combination DFEC Evaluation and *Ogilvie* Analysis regarding a 100% claim. The report format will vary according to the circumstances of a particular case.

Table 2
***Ogilvie* Analysis Report Format: Background Information**

Overview

Scope of Evaluation

Methodology

Record Review (if completed)

Interview (if completed)

Financial

Note the average weekly wage (AWW) at the date of injury (DOI), and whether the parties have stipulated to this wage.

List all post-injury earnings from all employers by hour, week, year, etc.

Medical

Describe the diagnosis(es) by the physician(s) that the judge will rely upon in rendering a decision. For each physician, list the maximum medical improvement date, the whole person impairment (WPI) by body part, and any permanent work restrictions.

School and Training History

Military Service

Work History

Note whether the parties stipulated to the occupational title at the time of injury.

Include all significant pre-injury occupations. Describe the job at the time of injury in detail. Include all post-injury employment.

Self-initiated Return to Work Efforts

Report in detail the results of any and all post-injury job search efforts. This is relevant to the *Montana* factors regarding the applicant's willingness to return to work.

Transferable Skills Analysis (if completed) Rehabilitation Plan Options (if developed and considered)

This is the first element of the *RAPEL Method* (Weed & Field, 2001), and may be significant for all 3 Types of *Ogilvie* Analyses.

Access to the Labor Market (if considered)

Developing an opinion regarding labor market access would be particularly important when evaluating a claim for 100% disability.

Labor Market Research (if completed)

Researching job availability is most useful for a Comprehensive *Ogilvie* Analysis and a Combination DFEC Evaluation and *Ogilvie* Analysis for a 100% claim.

Placeability (if considered)

Placeability refers to the ability to obtain and maintain employment. It is significant to any claim for permanent and total disability.

Earning Capacity

Under *Ogilvie*, following RAND, pre-injury earning capacity is equal to the wage of the control group of similarly situated employees. Post-injury earning capacity is equal to actual post-injury wages for the Basic *Ogilvie* Analysis. Post-injury earning capacity is equal to expected post-MMI wages for the second scenario of a Comprehensive *Ogilvie* Analysis and a Combination DFEC Evaluation and *Ogilvie* Analysis for a 100% claim.

Labor Force Participation (Worklife Expectancy) (if considered)

Montana Factors

Ogilvie I states at page 33:

... Yet, 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 Ace. Com. (Montana)* (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130,133] (*Montana*):

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 Cal.2d at pp. 594-595 [27 Cal. Comp.Cases at p. 133] (internal citations omitted).)

The results of an assessment of the *Montana* factors for Mr./Ms. _____ are summarized below.

Ability to work. Summarize the applicant's work restrictions and whole person impairments, or refer to the section of the report that provides this information. Consider any physical capacity assessment results as well as subjective factors of disability. In addition, consider vocational factors such as any work capacity evaluation results and placeability issues.

Age. Provide the applicant's current age. Also provide the age at the time of injury or MMI, if significant.

Health. Comment on the applicant's health with respect to the impact of his or her medical condition on his or her ability to work. Refer to the section(s) of the report or an attached record review where this information is provided, if appropriate.

Willingness and opportunities to work. Provide an opinion on these issues. Refer to above report section(s) that are related to these issues.

Skills and education. Summarize work skills and education or refer to above report section(s) that provide this information.

General conditions of the labor market. Provide the current unemployment rate for the county where the applicant currently resides and for additional geographic areas and timeframes, if significant.

Employment opportunities for persons similarly situated. Summarize the results of the analysis of the applicant's employability or refer to above report section(s) for this information. Also, summarize the results of any labor market research regarding specific suitable occupations for the applicant, or refer to the report sections or attachment that provide this information.

Table 3
Report Format for a Basic *Ogilvie* Analysis (using actual post-injury earnings)

Ogilvie Analysis

A. Scenario 1: Using Actual Post-injury Earnings

1. Establishing Mr./Ms. _____'s Individualized Proportional Earnings Loss

a. Determine Mr./Ms. _____'s post-injury earnings.

Date of injury: _____

Date of MMI: _____ (_____, M.D.), _____ (_____, Ph.D.)

Actual post-injury earnings

Year Wages

According to *Ogilvie I*, at page 22:

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 and other empirical wage information . . .

Yet, although the 2003 and 2004 RAND Studies used three years of post-injury earnings as the basis for their proportional earnings loss calculations, there is nothing magical about a three-year period . . . In cases of individual injured employees, however, a longer or shorter period of post-injury earnings may be appropriate. For example, if an employee's injury results in a long period of temporary disability, then it might be appropriate to use a longer period than three years – or a three-year period with a starting date later than the time of injury, such as the injured employee's permanent and stationary date – for assessing the injured employee's "long-term loss of income." (Lab. Code section 4660 (b)(2).) As another example, where an injured employee becomes permanent and stationary (i.e., reaches maximum medical improvement) shortly after the date of his or her industrial injury, then an attempt to rebut the DFEC portion of the 2005 schedule need not be delayed until three years of post-injury wage data becomes available. In such a case, it might be appropriate to use a shorter period of wage data or to make projections that *estimate* three years of post-injury earnings.

While *Ogilvie II* affirmed *Ogilvie I*, it also noted at page 31:

Second, even if a party elects to challenge the DFEC component of a scheduled permanent disability rating, nothing in our February 3, 2009 opinion requires that the first three years of post-injury earnings be used. . .

Third, we recognize that, by definition, when an employee is receiving temporary disability indemnity he or she is unable to work for full wages. Indeed, "[t]he primary element of temporary disability is wage loss." (*Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399, 403 [33 Cal.Comp.Cases 647, 650]; see also *Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 801 [71 Cal.Comp.Cases 1044, 1052-1053].) Accordingly, where an injured employee has been off work (or partially off work) and receiving temporary disability indemnity for a period of two years, it may be difficult to assess the employee's actual earning capacity for a three-year period. In such a circumstance, however, the scheduled DFEC adjustment factor may be used to initially rate the employee's permanent disability. Then, if within five years of the date of injury it later becomes clear that the employee's individualized proportional earnings loss is significantly higher or lower than anticipated, a party may seek to reopen the issue of permanent disability by challenging the originally used DFEC adjustment factor. (Lab. Code, §§ 5410, 5803, 5804; see *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 242-243 [48 Cal.Comp.Cases 587, 594] (original 60% permanent disability rating reopened and increased to 100% after it was later determined that the injured employee could not be vocationally retrained for suitable gainful employment) (*LeBoeuf*).)

(For this evaluation, it is assumed that the applicant has decided to attempt to rebut the FEC adjustment factor in the 2005 *Schedule for Rating Permanent Disabilities*. Therefore, while considering all available information, the DFEC expert will then determine the most appropriate time period for the comparison of the applicant's actual earnings post-injury with those of the control group of similarly situated employees for the same time period.)

- b. Determine the post-injury earnings of similarly situated employees (control group).

(This wage data will typically be taken from EDD, a union bargaining statement, the webpage of a large employer, or some similar source.)

- c. Determine Mr./Ms. _____'s estimated earnings loss.

Control group earnings (\$ _____) – Mr./Ms. _____'s earnings (\$ _____) = estimated earnings loss (\$ _____).

- d. Determine Mr./Ms. _____'s proportional earnings loss.

Estimated earnings loss (\$____) ÷ control group earnings (\$____) = proportional earnings loss (____%).

- e. Divide Mr./Ms. _____'s standard whole person impairment rating(s) by his or her proportional earnings loss to calculate his or her individualized ratio(s) of rating over proportional earnings loss, as follows:

WPI ÷ ____% proportional earnings loss = individualized ratio.

Body Part WPI Indiv. Ratio

For _____, M.D., AME (Orthopedic Surgery, Psychiatry, etc.)

For _____, M.D., Applicant's QME (Urology, etc.)

For _____, M.D., Defense QME (Urology, etc.)

2. Determine whether the 2005 *Schedule* has been rebutted and identify the partially adjusted impairment rating.

- a. Situations in which the 2005 *Schedule* is not rebutted.

Consult Table A and Table B in the 2005 *Schedule*.

Table A

Range of Ratios		FEC Rank	Adjustment Factor
Low	High		
1.647	1.810	One	1.1000
1.476	1.646	Two	1.1429
1.305	1.475	Three	1.1857
1.134	1.304	Four	1.2286
0.963	1.133	Five	1.2714
0.792	0.962	Six	1.3143
0.621	0.791	Seven	1.3571
0.450	0.620	Eight	1.4000

Table B

Part of the Body	Ratio of Rating over Losses	FEC Rank
Hand/fingers	1.810	One
Vision	1.810	One
Knee	1.570	Two
Other	1.530	Two
Ankle	1.520	Two
Elbow	1.510	Two
Loss of grasping power	1.280	Four
Wrist	1.210	Four
Toe(s)	1.110	Five
Spine Thoracic	1.100	Five
General lower extremity	1.100	Five
Spine Lumbar	1.080	Five
Spine Cervical	1.060	Five
Hip	1.030	Five
General upper extremity	1.000	Five
Heart disease	0.970	Five
General Abdominal	0.950	Six
PT head syndrome	0.930	Six
Lung disease	0.790	Seven
Shoulder	0.740	Seven
Hearing	0.610	Eight
Psychiatric	0.450	Eight

The FEC Rank for the “Other” category is based on average ratings and proportional earnings losses for the following impairments:

- Impaired rib cage
- Cosmetic disfigurement
- General chest impairment
- Facial disfigurement or impairment
- Impaired mouth or jaw
- Speech impairment
- Impaired nose
- Impaired nervous system
- Vertigo
- Impaired smell
- Paralysis
- Mental Deterioration
- Epilepsy
- Skull aperture

In light of this, we conclude that the Schedule is *not* rebutted if the injured employee’s individualized rating to loss ratio either (1) is the *same* as the ratio contained in the Table B of the 2005 Schedule for the same impairment (i.e., body part) or (2) falls within the range of ratios of the FEC Rank for that impairment (and, therefore, takes the same DFEC adjustment factor as the impairment otherwise would). (*Ogilvie I*, pp. 27-28)

b. Situations in which the 2005 Schedule is rebutted.

If, however, the employee’s individualized rating to loss ratio (1) is *less than or greater than* the ratio contained in Table B of the 2005 Schedule for the same impairment (i.e., body part) *and* (2) falls outside of the range of ratios of the FEC Rank for that impairment, then the Schedule has been rebutted. (*Ogilvie I*, p. 28)

- i. Situations in which the individualized ratio falls within the range of ratios for one of the other seven FEC Ranks.

Should this occur, "the FEC Rank and DFEC adjustment factor corresponding to that particular range of ratios shall be used" (*Ogilvie I*, p. 29).

- ii. Situations in which the individualized ratio falls outside all of the range of ratios for all FEC Ranks.

In this case, the following formula is applied:

$([1.81/a] \times .1) + 1$, where "a" is the applicant's individualized rating to loss ratio to determine the individualized FEC adjustment factor.

<u>Body Part</u>	<u>WPI</u>	<u>Indiv. Ratio</u>	<u>Indiv. FEC Adjustment Factor</u>
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For _____, M.D., AME (Orthopedic Surgery, Psychiatry, etc.)

_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

For _____, M.D., Applicant's QME (Urology, etc.)

_____	_____	_____	_____
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For _____, M.D., Defense QME (Urology, etc.)

_____	_____	_____	_____
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Then, multiply the WPI(s) by the individualized FEC adjustment factor to identify the partially adjusted impairment rating before adjusting for age and occupation.

<u>Body Part</u>	<u>WPI</u>	<u>Indiv. FEC Adjustment Factor</u>	<u>=</u>	<u>Partially Adjusted Impair. Rtg.</u>
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For _____, M.D., AME (Orthopedic Surgery, Psychiatry, etc.)

_____	_____	_____	=	_____
_____	_____	_____	=	_____
_____	_____	_____	=	_____

For _____, M.D., Applicant's QME (Urology, etc.)

_____	_____	_____	=	_____
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For _____, M.D., Defense QME (Urology, etc.)

_____	_____	_____	=	_____
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The partially adjusted impairment ratings can then be combined in the manner described on pages 1-10 and 1-11 of the 2005 *Schedule for Rating Permanent Disabilities*.

Table 4

Report Format (used together with Table 3) for a Comprehensive Ogilvie Analysis and a Combination DFEC Evaluation and Ogilvie Analysis while using expected post-injury earnings

B. Scenario 2: Using Expected Post-injury Wages

1. Establishing Mr./Ms. _____'s Individualized Proportional Earnings Loss

- a. Determine Mr./Ms. _____'s expected post-injury earnings.

In addition to the comments regarding *Ogilvie I* and *II* above, *Ogilvie I* states at page 34:

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 . . . Temporary economic downturns or other factors may also come into play. Accordingly, the trier-of-fact may need to take a variety of factors into consideration.

(The DFEC expert will then determine the most appropriate time period for the comparison of the applicant's expected earnings with the earnings of the control group of similarly situated employees for the same period of time.)

(List the wages for the most suitable jobs from EDD or another appropriate source for the post-injury comparison time period).

- b. Determine the post-injury earnings of similarly situated employees (control group).

Same as for Scenario 1 above (A. 1. b.).

- c. Determine Mr./Ms. _____'s estimated earnings loss.

Control group earnings (\$_____) – Mr./Ms. _____'s earnings (\$_____) = estimated earnings loss (\$_____).

- d. Determine Mr./Ms. _____'s proportional earnings loss.

Estimated earnings loss (\$_____) ÷ control group earnings (\$_____) = proportional earnings loss (_____%).

- e. Divide Mr./Ms. _____'s standard whole person impairment rating(s) by his or her proportional earnings loss to calculate his or her individualized ratio(s) of rating over proportional earnings loss, as follows:

WPI ÷ ____% proportional earnings loss = individualized ratio.

2. Determine whether the 2005 *Schedule* has been rebutted and identify the partially adjusted impairment rating.

- a. Situations in which the 2005 *Schedule* is not rebutted.

Same as for Scenario 1 above.

- b. Situations in which the 2005 *Schedule* is rebutted.

Same as for Scenario 1 above.

- i. Situations in which the individualized ratio falls within the range of ratios for one of the other seven FEC Ranks.

Same as for Scenario 1 above.

- ii. Situations in which the individualized ratio falls outside all of the range of ratios for all FEC Ranks.

Same as for Scenario 1 above.

Summary and Conclusions

Claims for Permanent and Total (100%) Disability

According to *Ogilvie I* and *II*, the prescribed formula outlined above applies to cases that are expected to rate less than 100%. A complete and thorough DFEC evaluation is often necessary for cases involving a claim for permanent and total (100%) disability. Footnote 11 of *Ogilvie I* refers to *LC 4662* for these types of cases, as follows:

We recognize, however, that there may be some circumstances where an injured employee's DFEC might be the sole or dominant factor in determining permanent disability, such as where the employee's injury causes a total loss of earning capacity or something approaching a total loss of earning capacity (see *Labor Code 4662*). This question, though, is not before us now. (p. 14)

In the experience of the authors, it is usually important to develop an opinion regarding *Ogilvie* for 100% cases as part of an overall DFEC evaluation. Among other things, knowing the partially adjusted rating(s) under *Ogilvie* may provide information helpful to the parties in reaching a settlement. This information may also be useful to a judge in encouraging the parties to settle or in rendering a decision. Therefore, using the Combination DFEC Evaluation and *Ogilvie* Analysis format is recommended when evaluating an applicant with a 100% claim.

In *County of Los Angeles v. WCAB (LeCornu)* (2009), a panel decision, the WCAB found that *LeBoeuf* (1983) could still be followed after SB 899. This is true at least for injuries rated under the 1997 *Schedule for Rating Permanent Disabilities*

(California Division of Workers' Compensation, 1997). In *LeCornu*, the workers' compensation judge combined medical evidence with vocational evidence to find 100% disability while making reference to *Labor Code section 4662*. There have been additional panel decisions where the WCAB upheld the workers' compensation judge's ability to rely on vocational evidence and *Labor Code section 4662* to find 100% disability, including *Sherry* (2008), *Perez* (2008), and *Adkins* (2008).

In *Baldrige* (2010), a panel decision, the WCAB concluded in its Order Denying Reconsideration that *LeBoeuf* (1983) "does not apply directly to injuries that are subject to the 2005 Permanent Disability Rating Schedule" (p. 1) since *LeBoeuf* (1983) refers to an applicant's ability to compete in the labor market. This factor was changed to an applicant's diminished future earning capacity in the 2005 *Schedule*. The WCAB states further in *Baldrige* (2010) that:

Nevertheless, under current law, the injured employee's diminished future earning capacity is one of the core elements of a permanent disability rating (*Lab. Code § 4660(b)(2)*) and *LeBoeuf* indirectly supports the principle that an employee's permanent disability rating may be affected where the industrial injury causes a total loss of earning capacity. That is, a complete loss of future earning capacity is analogous to a complete inability to compete in the open labor market. Moreover, as the WCJ's report points out, the 2005 *Schedule* (at pp. 1-2 - 1-3) expressly declares that "permanent total disability represents a level of disability at which

an employee has sustained a total loss of earning capacity." (See also *Lab. Code § 4662* [providing that certain disabilities shall be conclusively presumed to be total and that "in all other cases, permanent total disability shall be determined in accordance with the fact."].)

The WCAB explained that the WCJ relied on the opinions of the agreed DFEC expert and the agreed medical evaluators to conclude that the applicant had a total loss of earning capacity, which resulted in 100% permanent disability. The WCAB concluded that the applicant was "effectively unemployable, and therefore, has suffered a total loss of earning capacity" (*Baldrige*, p. 3). Therefore, this decision supports the value of a complete and thorough vocational rehabilitation evaluation of employability and earning capacity in assessing a claim for permanent and total (100%) disability for individuals injured on or after 1/1/05.

Non-industrial Factors

In *Hertz Corporation v. WCAB (Aguilar)* (2008), the California Court of Appeal held that the employer, Hertz, was not liable for non-industrial factors, including the inability to read and write in English, in determining permanent disability. There is considerable controversy surrounding this decision. Defense attorneys generally find the decision is justified since it is clear that the applicant's inability to read and write in English impacted his pre-injury and post-injury employability and earning capacity. However, applicants' attorneys usually disagree with the decision contending that the applicant's work injury alone has resulted in a total loss of employability and earn-

ing capacity for the applicant's particular labor market that was available to him at the time of injury. Further, they argue that it was not possible for the applicant, a 20-year, 80-hour-per-week vehicle cleaner, to have the opportunity to expand his pre-injury labor market by going to school to learn English. Applicants' attorneys often refer to *University of California, Berkeley v. WCAB (Barraza)* (2007), a panel decision, in which the court found 100% disability and no apportionment to limited education and poor English language skills. *Aguilar* was appealed to the California Supreme Court.

Aguilar was appealed to the California Supreme Court. On May 20, 2010, the Supreme Court dismissed the case, but did not certify the Court of Appeal decision for publication. Therefore, the decision has no precedential value, meaning it cannot be cited or relied upon in other cases. The implication of this decision for vocational experts is that they will be asked to focus on the vocational impact of medical factors on an applicant's employability and earning capacity when conducting a vocational evaluation for permanent disability rating purposes. For example, a vocational expert may be asked to comment on the impact of the medical need to use a cane or to work part-time on an applicant's employability and earning capacity. Non-industrial factors have been previously addressed by Van de Bittner (2003).

Payment of DFEC Expert Fees

The courts have been clear that DFEC expert fees are an allowable expense under *LC section 5811* (Van de Bittner, 2003, 2006; Van de Bittner & Cottle, 2008). In a panel decision (*Costa III*, 2009), the WCAB ordered the defendant to pay the DFEC expert's fee. In addition, in *Barr* (2008), the Court of Appeal ordered that DFEC expert costs be awarded even if the expert's report is inadmissible. Moreover, in *County of San Diego v. WCAB (Sabin)* (2009), the Court of Appeal held that the DFEC expert's fee should be awarded under *LC section 5811*, even though the expert's opinions were not followed by the court.

Conclusions

In an en banc decision in *Ogilvie I* (2009, February 3), the WCAB provided a formula to be used to determine whether an applicant is able to rebut the FEC adjustment factor in the 2005 *Schedule for Rating Permanent Disabilities* (California Division of Workers' Compensation, 2005). While under appeal, *Ogilvie I*, as affirmed by *Ogilvie II*, is law in California because WCJs are bound by en banc decisions. Therefore, the importance of understanding the implications of the prescribed *Ogilvie* formula is readily apparent. In addition, the recent panel decisions of *Shini* and *Garcia* underscore the need for a complete *Ogilvie* analysis that, among other things, address the *Montana* factors.

An evaluation by a DFEC expert will be needed in many cases, particularly those where the applicant has little or no post-injury employment and those cases involving a claim for 100% disability under *LC section 4662* or *LeBoeuf*. In addition, non-industrial factors may need to be addressed by the DFEC expert. Finally, the courts have continued to order the payment of the fees of DFEC experts.

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