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REBUTTING THE 2005 *SCHEDULE FOR RATING PERMANENT DISABILITIES* FOLLOWING THE 9/24/15 *DAHL* DECISION

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The following approaches can be used for rebutting the 2005 *Schedule for Rating Permanent Disabilities* following the 9/24/15 *Dahl* decision. The analysis below applies to a fictitious injured worker, Debra Smith. Ms. Smith sustained injuries to multiple body parts in an injury at work.

I. Labor Code Section 4662, *LeBoeuf*, and *Ogilvie III* Method 2 Analysis (100% Claim)

Labor Code section 4662 states:

> (a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:
>
> (1) Loss of both eyes or the sight thereof.
> (2) Loss of both hands or the use thereof.
> (3) An injury resulting in a practically total paralysis.
> (4) An injury to the brain resulting in permanent mental incapacity.
>
> (b) In all other cases, permanent total disability shall be determined in accordance with the fact.

An injured worker's ability to benefit from vocational rehabilitation services was determined to be a critical factor in establishing a permanent disability rating under *LeBoeuf v. WCAB* (1983). In this case, the California Supreme Court clarified this issue as follows:

> Similarly, the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent total disability rating. Just as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may

> adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating. (p. 594)

The California Supreme Court concluded:

> A permanent disability rating should reflect as accurately as possible an injured employee's diminished capacity to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability. A prior permanent disability rating and award which fails to reflect that fact is inequitable. (p. 597)

According to *Ogilvie III*, an applicant can attempt to rebut the 2005 *Schedule for Rating Permanent Disabilities* under 3 methods, as follows:

1. By showing a factual error in the calculation of a factor in the rating formula or application of the formula;

2. By demonstrating that due to the industrial injury the employee is not amenable to rehabilitation and, therefore, has suffered a greater loss of future earning capacity than reflected in the scheduled rating; or,

3. The "nature and severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor" in the rating schedule. (pp. 9-13)

In this example involving Debra Smith, given the severity of medical factors in combination with vocational factors, she may be able to rebut the scheduled permanent disability rating under Labor Code section 4662(b), *LeBoeuf*, or under the second method in *Ogilvie III.* The impact of medical and vocational factors on Ms. Smith's employability is described in relation to Labor Code section 4662(b) and *LeBoeuf* in the Employability Analysis section of the report. Ms. Smith's vocational feasibility in relation to *LeBoeuf* and her amenability to rehabilitation in relation to *Ogilvie III* are described in the Vocational Feasibility and Amenability to Rehabilitation section of the report. Ms. Smith's ability to rebut the scheduled rating in relation to the second method in *Ogilvie III* is described in the Employability Analysis, Vocational Feasibility and Amenability to Rehabilitation, and Diminished Future Earning Capacity Analysis sections of the report.

Should it ultimately be determined that Ms. Smith is less than 100% disabled, the third method in *Ogilvie III* would apply to the circumstances of her work injury. The reasons are outlined in the *Ogilvie III* Method 3 and *Dahl* Analysis section below.

II. *Ogilvie III* Method 3 and *Dahl* Analysis (Less Than 100% Claim)

According to *Ogilvie III*, an applicant can attempt to rebut the 2005 *Schedule for Rating Permanent Disabilities* under 3 methods, as follows:

1. By showing a factual error in the calculation of a factor in the rating formula or application of the formula;

2. By demonstrating that due to the industrial injury the employee is not amenable to rehabilitation and, therefore, has suffered a greater loss of future earning capacity than reflected in the scheduled rating; or,

3. By demonstrating that the "nature and severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor" in the rating schedule. (pp. 9-13)

The third method is the most appropriate *Ogilvie III* method for an applicant to use when attempting to rebut the FEC adjustment factor in the 2005 *Schedule for Rating Permanent Disabilities* for a case involving a claim for less than 100% permanent disability. It is also the most appropriate method to use for a claim for 100% permanent disability that is ultimately determined to be less than 100%. The third method applies to Ms. Smith for several reasons, which will be described below.

The third method that an applicant can use to attempt to rebut the 2005 *Schedule for Rating* Permanent Disabilities is described in *Ogilvie III,* as follows:

> The briefs and arguments of the parties and amici also point out a third basis for rebuttal of a scheduled rating that is consistent with the statutory scheme. In certain rare cases, it appears the amalgamation of data used to arrive at a diminished future earning capacity adjustment may not capture the severity or all of the medical complications of an employee's work-related injury. After all, the adjustment is a calculation based upon a summary of data that projects earning losses based upon wage information obtained from the California Employment Development Department for a finite period and comparing the earnings losses of certain disabled workers to the actual earnings of a control group of uninjured workers. (Working Paper at p. 3.) A scheduled rating may be rebutted when a claimant can demonstrate that the nature or severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor. For example, a claimant who sustains a compensable foot fracture with complications resulting from nerve damage may have greater permanent effects of the injury and thereby disprove the scheduled rating if the sampling used to arrive at the rating did not include any workers with similar complications. In such cases, the scheduled rating should be recalculated taking into account the extent to which the claimant's disability has been aggravated by complications not considered within the sampling used to compute the adjustment factor. In this way, the employee's permanent disability rating gives "consideration" to an employee's diminished earning capacity that remains based

> upon "a numeric formula based upon empirical data and findings . . . prepared by the RAND Institute." (§ 4660, subds. (a) & (b)(2).) We leave it to the WCAB in the first instance to prescribe the exact method for such a recalculation that factors the employee's anticipated diminished earning capacity into the data used by the RAND Institute. (See § 300.)
>
> Although Senate Bill No. 899 enacted extensive changes to California's workers' compensation system, the rebuttable presumption in section 4660 was unaltered. "Given the apparent absence of any legislative intent to change the law in this regard, we have no occasion to resort to reliance on the statutory rule of liberality" that is commonly employed to construe ambiguities in the workers' compensation laws to favor the extension of benefits. *(Brodie v. Workers' Comp. Appeals Bd., supra,* 40 Cal.4th at p. 1332.) The result we reach today furthers the Legislature's objectives by ensuring that an injured worker may dispute his or her scheduled rating on the grounds that it does not accurately reflect that worker's true diminished earning capacity due to an industrial injury. (pp. 12-14)

In the present case, Ms. Smith may be able to rebut the 2005 *Schedule for Rating Permanent Disabilities* under the third method outlined above. Regarding the third method, Ms. Smith has sustained injuries to multiple body parts. Having injuries to more than one body part often has an increased negative effect on an individual's employability and earning capacity. RAND studied injured workers with a single impairment (Reville, Seabury, & Neuhauser, 2003, December, pp. 21 and 23). Injured workers with injuries to multiple body parts were not included in the sampling of disabled workers that was analyzed by RAND and used to compute the FEC adjustment factor in the rating schedule. As such, the results of the RAND study do not apply to Ms. Smith. Therefore, the FEC adjustment factor in the 2005 *Schedule for Rating Permanent Disabilities* does not in any way apply to Ms. Smith. In other words, the amalgamation of data used by RAND to arrive at the FEC adjustment factor does not capture the severity or all of the medical complications of Ms. Smith's work injury.

Additionally, the data from the RAND study that were used to develop the 2005 *Schedule for Rating Permanent Disabilities* most likely do not accurately reflect Ms. Smith's true diminished future earning capacity in relation to her work injury since more recent wage data used in the development of the proposed 2009 *Schedule for Rating Permanent Disabilities* assign different FEC ranks to many body parts. For example, the proposed 2009 *Schedule* assigned a FEC rank of 8 to lumbar spine conditions while the 2005 *Schedule* used a FEC rank of 5 for lumbar spine conditions.

Another basis for rebutting the FEC adjustment factor in the 2005 *Schedule for Rating Permanent Disabilities* is the 3-year timeframe for comparing pre-injury and post-injury wages used by RAND. The use of a 3-year timeframe for comparing pre-injury and post-injury earnings is unique to the RAND study. It is not a method that is employed by vocational experts or economists in an analysis of loss of earning capacity in third party, personal injury, medical malpractice, employment law and other civil cases. Using a 3-year timeframe for comparing pre-injury and post-injury earnings results in an inaccurate amount

or percentage of diminished future earning capacity. Vocational experts and economists customarily use the timeframe encompassed by worklife expectancy in assessing loss of earning capacity since doing so results in an accurate amount or percentage of loss of earning capacity. For example, adult workers commonly will be earning wages at the 50th or even the 75th percentile for their occupation at the time of injury. By contrast, the typical individual with a disability will return to work at a new occupation at an entry-level wage and will gradually progress to the median level wage for the new occupation after three to five years of new employment. Some individuals, depending on their skills and abilities and their medical condition will be expected to advance beyond the 50th percentile with additional work experience in the new occupation. Therefore, it is easy to see that stopping the analysis after three years for the comparison of pre-injury and post-injury earning capacity will result in an inaccurate conclusion regarding the amount or percentage of diminished future earning capacity.

The 9/24/15 *Dahl* decision states that:

> . . . Dahl sought to invoke the second method approved in *Ogilvie* (the *LeBoeuf* method)[2] under which the employee shows she "will have a greater loss of future earnings than reflected in a rating because, due to the industrial injury, the employee is not amenable to rehabilitation." *(Ogilvie,* 197 Cal.App.4th at p. 1275.) Dahl's "rebuttal," however, included no evidence that the industrial injuries she sustained to her neck and shoulder rendered her incapable of rehabilitation. Rather, her "rebuttal" consisted solely of a vocational expert's opinion that his method for determining Dahl's diminished future earnings capacity produced a higher rating than that of the rating produced by the Schedule and that his method more accurately measured Dahl's diminished future earnings.
>
> Dahl's attempted rebuttal did not comport with any of the methods approved in *Ogilvie* for rebutting the rating provided using the rating schedule and is therefore foreclosed by *Ogilvie.* Accordingly, we reverse the WCAB's decision, and annul the award.
>
> [2] The method was approved by the California Supreme Court in *LeBoeuf v. Workers' Compensation Appeals Board* (1983) 34 Cal.3d 234 *(LeBoeuf).* (pp.1-2)

The *Dahl* decision continues, by describing the applicant's vocational expert's reasoning for concluding that Ms. Dahl was not amenable to rehabilitation, as follows:

> In this case, the County presented evidence Dahl's injury did *not* prevent her from taking advantage of retraining opportunities or finding another job. Dahl's medical evaluator has not provided any formal work restrictions. Moreover, Cohen, the County's vocational expert, concluded Dahl had the ability to work in selected occupations in the open labor market, including sedentary, semi-sedentary and light work positions. Cohen also found Dahl possessed above-average problem solving, reading, spelling and arithmetic skills, commensurate with the college degree she

> earned in 2003, indicating she has the cognitive ability to perform any of the occupations for which her college degree prepared her.
>
> Malmuth, Dahl's vocational expert, did not present contrary evidence. He testified Dahl had at least some earning capacity, and concluded there was no medical evidence she could not work eight hours per day. When asked if Dahl was an ideal candidate for rehabilitation, Malmuth responded that, with some training, including voice recognition and other things, "she would be helped." Malmuth further testified Dahl performed "very well" on testing, and that her college education could increase her earning capacity. Malmuth also opined that, even with her injury, Dahl could perform certain jobs without retraining.
>
> Nevertheless, Malmuth concluded Dahl is not amenable to rehabilitation because it would not restore her, or a similarly situated worker, to full pre-injury earning capacity. But this is precisely what the statutory formula for diminished future earning capacity factor is intended to capture. Most work-related injuries that qualify an employee for workers' compensation benefits reduce earning potential to some degree. Thus, allowing a claimant to rebut his or her permanent disability rating through a showing of some diminished future earning capacity would render the statutory formula virtually meaningless. Nothing in *Ogilvie* or any of the case law on which it relies suggests departure from the statutory rating system is permissible whenever an employee cannot be returned to his or her pre-injury earning capacity.
>
> Based on this record, there was no basis for the WCJ or the WCAB to conclude Dahl had rebutted her scheduled diminished future earning capacity by showing she was not amenable to vocational rehabilitation. In fact, it appears no such finding was made in the proceedings below. The WCJ initially held Dahl could not rebut her scheduled rating because she failed to show her injury resulted in a total loss of earning capacity. On a petition for review, the WCAB disagreed that rebuttal based on a claimant's ability to rehabilitate was only available in cases involving 100-percent total permanent disability. The WCAB accepted Dahl's contention "that a *LeBoeuf* type of analysis may be properly applied . . . when it is shown that the injury impairs the employee's rehabilitation, as in this case." However, the WCAB did not refer to any specific evidence that would support such a finding as to Dahl's rehabilitation prospects. On remand, the WCJ held the WCAB's decision after reconsideration conclusively established Dahl had rebutted the scheduled rating but did not identify any evidence showing Dahl's injuries precluded rehabilitation. We disagree. (pp. 12-13)

The *Dahl* decision continues as follows:

> We are skeptical of WCAB's conclusion that an employee may invoke the second *Ogilvie* rebuttal method where the inability to rehabilitate results in less than a 100-percent permanent disability.[6] However, we need not decide this issue since the County did not seek a writ from the WCAB decision adopting the partial

> impairment rule. In any event, even if an employee's ability to rehabilitate need only be impaired (and not eliminated) in order to rebut the schedule, Dahl failed to make such a showing here. As discussed above, both Dahl and the County's rehabilitation experts agreed Dahl was a good rehabilitation candidate, and the evidence suggests she can increase her earning potential through retraining. There is no evidence that the injury even limited her rehabilitation prospects.
>
> [6] For the same reason as the rule advocated by Malmuth allowing rebuttal whenever an employee shows she cannot be expected to earn the same as she did prior to injury, a partial impairment rule would allow for rebuttal in a wide swath of cases. Many injured employees cannot return to the precise position they held before their injury or to an equally remunerative one. *Ogilvie* does not appear to contemplate rebuttal of the scheduled rating in this circumstance, since the Schedule's formula for determining diminished future earning capacity takes into account such limitations. Notably, the two cases cited by *Ogilvie* which found claimants were unable to rehabilitate involved injuries that rendered the claimants unable to return to *any* type of gainful employment. (See *LeBoeuf, supra,* 34 Ca1.3d at pp. 239-240; *Gottschalks v. Workers' Compensation Appeals Bd., supra,* 68 Cal.Comp.Cases at p.1716.) (pp.14-15)

The court concludes in the *Dahl* decision by stating:

> In sum, we find WCAB's approach in this case flies in the face of *Ogilvie* and the 2004 amendments to the workers' compensation scheme. Under the 2004 amendments, a claimant's scheduled rating is presumptively correct. *Ogilvie* confirmed the Legislature meant what it said, and that claimants may not rebut their disability rating merely by offering an alternative calculation of their diminished future earning capacity. While *Ogilvie* found the 2004 amendments did not overthrow certain long-held approaches to calculating earning capacity, it clearly did not intend those approaches to be construed so broadly as to return us to the ad-hoc decision making that prevailed prior to 2004. Following the WCAB's approach in this case would do just that. Claimants could rebut their presumptively correct disability rating merely by presenting an analysis that shows a greater diminished future earning capacity than that determined by applying the Schedule. As *Ogilvie* makes clear, this approach is no longer permissible. (p. 16)

In summary, the *Dahl* decision does not apply to Ms. Smith for several reasons. The most significant is that Ms. Smith would attempt to rebut the 2005 *Schedule for Rating Permanent Disabilities* with the third *Ogilvie* method, should the court ultimately determine that Ms. Smith is less than 100% disabled. In contrast to Ms. Dahl, Ms. Smith would attempt to rebut the *Schedule* under the third method. Among other things, as indicated above, since Ms. Smith has injuries to more than one body part, the nature and severity of Ms. Smith's work injury were not captured within the sampling of disabled workers that was used to create the FEC adjustment factor in the 2005 *Schedule for Rating Permanent Disabilities.*