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Appropriate Use of Vocational Opinions to Rebut a Scheduled Rating in California Workers' Compensation Claims for Permanent Partial Disability After *Dahl* and After Senate Bill 863

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Abstract. *The opinions of vocational experts have been used for many years in California workers' compensation cases to support a more accurate permanent disability rating for injured workers with claims for permanent total disability and for claims for permanent partial disability. This article describes the history of the use of vocational expert opinions over several decades in California workers' compensation cases. Several methods are presented for the use of vocational opinions in attempting to rebut a scheduled rating in a permanent partial disability case in relation to Ogilvie III (2011) after Dahl (2015) and after Senate Bill 863 (2012).*

Introduction

In *Contra Costa County v. Workers' Compensation Appeals Board and Doreen Dahl (Dahl)* (2015), the California Court of Appeal reversed the decision of the Workers' Compensation Appeals Board (WCAB) in a case involving a claim for permanent partial disability. The Court of Appeal determined that the applicant had not rebutted the schedule since she had not demonstrated that her amenability to rehabilitation was eliminated, or even impaired. However, the Court of Appeal did not provide an opinion on the general ability of an injured worker to attempt to rebut a scheduled rating in a permanent partial disability case. Permanent partial disability relates to a claim for less than 100% permanent disability. The current article will describe rebuttal methods under *Ogilvie v. WCAB* and *City and County of San Francisco v. WCAB (Ogilvie III)* (2011) that are compatible with the findings in *Dahl* (2015).

When California Senate Bill 863 (SB 863) (2012) was enacted into law in the fall of 2012 by Governor Edmund G. Brown, questions soon arose regarding the use of vocational opinions in attempting to rebut a scheduled rating for permanent partial disability cases. SB 863 applies to work injuries that occurred on or after January 1, 2013. The opinions of vocational experts have been relied on by attorneys, claims administrators, and the court for several decades in California workers' compensation cases. The language in SB 863 confirmed the need for vocational opinions in claims for permanent total disability (100% permanent disability), which is not the subject of this article.

The need for vocational opinions after SB 863 related to claims for permanent partial disability is not as readily apparent. Still, as will be explained in this article, there continues to be a need for an evaluation by a vocational expert in rare cases involving a claim for permanent partial disability after SB 863.

The current article will explain how *Dahl* (2015), SB 863 (2012), court decisions, and governmental regulations indicate the need for vocational expert opinions after *Dahl* (2015) and after SB 863 (2012) to determine the most accurate permanent disability rating for claims of permanent partial disability that have special circumstances or unique features. Several methods will be presented that include an individualized vocational evaluation of an injured worker to assist the parties and the court in determining whether a scheduled rating for permanent partial disability has been rebutted after *Dahl* (2015) and after SB 863 (2012). These methods apply directly to the California workers' compensation system. They will probably apply to workers' compensation systems in other states and in other venues as well. Any specific application to another state will require researching the state's laws, governmental regulations, and court decisions to determine which may be similar to those discussed regarding California, and the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (5th Edition) (Cocchiarella & Andersson, 2001) (if applicable). An understanding of the use of vocational opinions in California can provide a starting point for exploring a similar use of vocational opinions in other states.

History of the Problem

There is a rich history related to the use of vocational expert opinions in California's workers' compensation cases, particularly after the California Supreme Court case of *LeBoeuf v. WCAB* (1983). In this case, the California Supreme Court ruled that it is reasonable to consider an injured worker's inability to benefit from vocational rehabilitation services in determining the most accurate permanent disability rating. Richard LeBoeuf was found to be unable to benefit from vocational rehabilitation, which was confirmed by the Rehabilitation Bureau for the California Division of Workers' Compensation. As such, he no longer qualified for mandatory vocational rehabilitation services and related benefits through the workers' compensation system. His scheduled permanent disability rating was 60%. He requested a higher permanent disability rating based on his inability to benefit from vocational rehabilitation. Eventually, his case was settled at 75% permanent disability (Gearheart, 2015).

For over 30 years, the *LeBoeuf* (1983) decision has been used as the basis for combining medical and vocational factors to argue a workers' compensation claim for permanent total disability. This has been and continues to be the most common use of the *LeBoeuf* decision. At the same time, applicants' attorneys (attorneys representing injured workers) have used the *LeBoeuf* decision as the basis for arguing an increased rating in permanent partial disability cases. The most common reason is to attempt to increase a permanent partial disability rating from below 70% to above 70%, the threshold for a life pension. By coincidence, this is what occurred in *LeBoeuf*, with a scheduled rating of 60% that was increased to 75% with vocational evidence.

The California Supreme Court concluded in the *LeBoeuf* (1983) decision:

> A permanent disability rating should reflect as accurately as possible an injured employee's diminished ability 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)

The above holding in *LeBoeuf* (1983) is consistent with regulatory language in Labor Code section 4660 (Moffat, et al., 2003) prior to January 1, 2005, which states:

> (a) In determining the percentage of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.
> (b) The administrative director may prepare, adopt, and from time to time amend, a schedule for the determination of the percentage of permanent disabilities in accordance with this section. Such schedule shall be available for public inspection, and without formal introduction in evidence shall be prima facie evidence of the permanent disability to be attributed to each injury covered by the schedule. (p. 298)

The above language in Labor Code section 4660 (Moffat, et al., 2003) is part of the 1997 *Schedule for Rating Permanent Disabilities* (California Division of Workers' Compensation). The language in *LeBoeuf* (1983) and Labor Code section 4660 (Moffat, et al., 2003) continues to be used by applicants' attorneys as the legal basis for relying on vocational expert opinions to attempt to rebut a scheduled permanent disability rating for applicants who were injured on or before December 31, 2004. Additionally, the statement in paragraph (b) above that the schedule is "prima facie evidence" means the schedule is rebuttable. Vocational experts still conduct individualized vocational rehabilitation evaluations to develop opinions regarding an injured worker's ability to benefit from rehabilitation and to compete in an open labor market for claims involving permanent partial disability with injury dates on or before December 31, 2004. The employability evaluation methodologies described by Van de Bittner, Wallace, Cottle, and Simon (2012a & b), and by Van de Bittner (2015) can be used for this type of analysis.

When California Senate Bill 899 was signed into law on April 19, 2004 by California Governor Arnold Schwarzenegger (California Workers' Compensation Institute, 2004, April 20), the focus of a vocational rehabilitation evaluation changed from an evaluation of an injured worker's diminished ability to compete in an open labor market (employability) to diminished future earning capacity. This was reflected in a change in the language in Labor Code section 4660 (Melchoir, 2016) for work injuries occurring between January 1, 2005 and December 31, 2012, as follows:

> (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.
> (b)(1) For purposes of this section, the "nature of the physical

injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).

(2) For purposes of this section, 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. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.

(c) The Administrative Director shall amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years. This schedule shall be available for public inspection and, without formal introduction in evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule. (pp. 277-278)

The above language in Labor Code section 4660 (Melchoir, 2016) was included at page 1 of the 2005 *Schedule for Rating Permanent Disabilities* (2005 *Schedule*) (California Division of Workers' Compensation). This language has been used by applicants' attorneys and occasionally by defense attorneys to argue for an increase or decrease in a scheduled rating in claims for permanent partial disability and permanent total disability. The language in paragraph (b)(1) was determined by the California Court of Appeal in *Guzman* (2010) to permit "reliance on the entire *Guides*, including the instructions on the use of clinical judgment, in deriving an impairment rating in a particular case" (p. 1). Additionally, paragraph (c) above confirms that the rating schedule continues to be prima facie evidence, which means that the rating schedule is rebuttable.

Ogilvie v. City and County of San Francisco (Ogilvie I) (2009, February 3), *Ogilvie v. City and County of San Francisco (Ogilvie II)* (2009, September 3), and *Ogilvie III* (2011) addressed a specific numeric formula developed by the WCAB for evaluating diminished future earning capacity. *Ogilvie I* (2009, February 3) involved a claim for permanent partial disability where a workers' compensation judge (WCJ) determined that permanent disability was 40%, after 10% medical apportionment, based on a combination of medical and vocational factors, including the reports of 2 vocational experts. In *Ogilvie III* (2011), the California Court of Appeal rejected the specific formula for calculating earning capacity that was developed by the WCAB, but did not reject an injured worker's ability to attempt to rebut a scheduled rating.

According to *Ogilvie III* (2011), an applicant can attempt to rebut the 2005 *Schedule* (California Division of Workers' Compensation) 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. 9-14)

The specific numeric formula developed by the WCAB in *Ogilvie I* (2009, February 3) for calculating diminished future earning capacity was rejected by the Court of Appeal in *Ogilvie III* (2011). However, an alternative method for evaluating earning capacity that was proposed by Commissioner Ronnie Caplane (later Chair of the WCAB) in her dissenting opinion in *Ogilvie I* (2009, February 3) was not addressed by the Court of Appeal in *Ogilvie III* (2011). WCAB Chair Caplane's alternative method is as follows:

> The method that I propose is comprehensive, analytically sound, and operationally simple. It would require vocational or other experts to estimate the injured employee's post-injury earning capacity based upon medical opinions evaluating her permanent impairments and earning capacity had she not suffered the industrial injury, both to be determined from the permanent and stationary date through her projected years in the work force.[3] Such expert testimony is common in marriage dissolution cases, [4] and employment cases. [5] Indeed, the vocational experts in this case provided expert opinions that were remarkably consistent with each other, a fact that indicates that their methodologies are well enough understood to provide reliable evidence.

3 Thus, in this case the fact that applicant has not returned to work after her injury was found not to preclude a finding that she has residual earning capacity after her injury.

4 See Family Code section 4331.

5 See, e.g., Bonner v. Workers Comp. Appeals Bd. (1990) 225 Cal.App.3d 1023, 1037 [55 Cal.Com.Cases 470, 478-479]: "In a personal injury matter, compensatory damages ... include ... the value of ... loss of impairment of future earning capacity." (p. 44)

> The majority fears that this exception to the 2005 Schedule will swallow the rule and this result was not intended by the Legislature. But there is no reason to believe that parties would attempt to rebut the schedule in every case. Indeed, the vast majority of cases decided between *LeBoeuf* and SB899 were based upon the schedule then in use, not vocational rehabilitation evidence, despite the fact that vocational rehabilitation evidence was authorized by the Supreme Court. In any case, this objection is not a reason to fail to determine permanent disability efficiently and fairly.

The type of analysis of earning capacity recommended by WCAB Chair Caplane has been used by many vocational experts in California workers' compensation cases for injured workers who were injured from January 1, 2005 to December 31, 2012. This type of earning capacity analysis continues to be performed by vocational experts in California for injured workers with claims for permanent partial disability and permanent total disability. In some cases, the percentage of diminished future earning capacity identified by a vocational expert is used as a substitute for a scheduled rating since it is based on the underlying medical impairment and the adjustment factors of age, occupation, and earning capacity. In some cases, the percentage of diminished future earning capacity identified by a vocational expert is used as a substitute for the future earning capacity modifier in a scheduled rating.

The third rebuttal method in *Ogilvie III* (2011) can be used as the basis for conducting an individualized earning capacity analysis to determine the most accurate opinion regarding diminished future earning capacity. The earning capacity evaluation methodologies described by Van de Bittner, Wallace, Cottle, and Simon (2012a & b), and by Van de Bittner (2015) can be used for this type of analysis.

Regarding the third rebuttal method in *Ogilvie III* (2011), RAND studied only injured workers with a single impairment (Reville, Seabury, & Neuhauser, 2003, December, pp. 21-22). Having injuries to more than one body part often has an increased negative effect on an individual's employability and earning capacity. Some injured workers experience medical complications caused by the interactive or synergistic effect of multiple injuries on their medical recovery and any attempt to return to work. 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 injured workers with injuries to multiple body parts. Therefore, the FEC adjustment factor in the 2005 *Schedule* (California Division of Workers' Compensation) does not apply to injured workers with injuries to more than one body part. 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 for such injured workers.

The Court of Appeal in *Ogilvie III* (2011) provided an example of the third rebuttal method 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.). (pp. 12-13)

Contra Costa County v. WCAB and Doreen Dahl (Dahl) (2015)

In *Dahl* (2015), the California Court of Appeal rejected the applicant's vocational expert's opinion that the applicant,

Doreen Dahl, was not amenable to rehabilitation because she could not be expected to obtain new employment at her pre-injury wage following vocational rehabilitation. Ms. Dahl's claim was for permanent partial disability. The Court of Appeal concluded in *Dahl* (2015), "We agree that Dahl failed to rebut her scheduled rating by showing her injury precluded vocational rehabilitation" (p. 9). The Court of Appeal explained that there was "no evidence that the injury even limited her rehabilitation prospects" (p. 15). The ability to benefit from vocational rehabilitation was the primary issue that was addressed by the Court of Appeal. Additionally, the Court of Appeal explained that, "*Ogilvie* signaled that it would be a rare case in which an applicant or employer could rebut a scheduled rating" (p. 11).

Ms. Dahl had attempted to rebut her scheduled rating based on the second rebuttal method cited in *Ogilvie III* (2011). The second rebuttal method was summarized above. The second rebuttal method is often referred to as a *LeBoeuf* approach. The Court of Appeal stated:

> The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach. (p. 12)

The Court of Appeal in *Dahl* (2015) considered but did not rule on the issue of whether an injured worker has the legal ability to attempt to rebut a scheduled rating for permanent partial disability by stating:

> 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 100-percent permanent disability. However, we need not decide this issue since the County did not seek a writ from the WCAB decision adopting the partial impairment rule... (pp. 14-15)

Rebuttal of a Scheduled Rating after *Dahl* (2015)

When considering the findings of *Dahl* (2015) in relation to *Ogilvie III* (2011), an injured worker retains the ability to attempt to rebut a scheduled rating in a permanent partial disability claim. The three rebuttal methods described in *Ogilvie III* (2011) continue to be available to an injured worker. The third method would be the most appropriate method for an injured worker with injuries to more than one body part. Among other things, as explained above, such injured workers were not studied by RAND. Therefore, the FEC adjustment factor in the 2005 *Schedule* (California Division of Workers' Compensation) does not include such injured workers. Additionally, any attempt to use the second method in *Ogilvie III* (2011) after *Dahl* (2015) must demonstrate through an individualized vocational analysis that an injured workers' ability to benefit from vocational rehabilitation has at least been impaired.

Senate Bill 863

SB 863 (2012) applies to individuals who were injured on or after January 1, 2013 (Melchoir, 2016). SB 863 created a new Labor Code section 4660.1 to replace Labor Code section 4660 for individuals who were injured on or after January 1, 2013. Labor Code 4660.1 (Melchoir, 2016) states in part:

> This section shall apply, to injuries occurring on or after January, 1, 2013.
>
> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of injury.
> (b) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.
> (d) The administrative director may formulate a schedule of age and occupational modifiers and may amend the schedule for the determination of the age and occupational modifiers in accordance with this section. The Schedule for Rating Permanent Disabilities pursuant to the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) and the schedule of age and occupational modifiers shall be available for public inspection and, without formal introduction in evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule. Until the schedule of age and occupational modifiers is amended, for injuries occurring on or after January 1 2013, permanent disabilities shall be rated using the age and occupational modifiers in the permanent disability rating schedule adopted as of January 1, 2005.
> (h) In enacting the act adding this section, it is not the intent of the Legislature to overrule the holding in Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman) (2010) 187 Cal.App.4th 808.

(i) The Commission on Health and Safety and Workers' Compensation shall conduct a study to compare average loss of earnings for employees who sustained work-related injuries with permanent disability ratings under the schedule, and shall report the results of the study to the appropriate policy and fiscal committees of the Legislature no later than January 1, 2016. Leg.H. 2012 ch.363 (SB 863) §60. (p. 278)

While consideration of an injured workers' diminished ability to compete in an open labor market and consideration of diminished future earning capacity do not appear in the new Labor Code section 4660.1 (Melchoir, 2016), a scheduled rating continues to be rebuttable as indicated in paragraph (d). In addition, paragraph (b) above states that the fifth edition of the AMA *Guides* (Cocchiarella & Andersson, 2001) continues to be the underlying basis for determining the percentage of permanent partial disability or permanent total disability. Paragraph (h) indicates that *Guzman* (2010) will continue to be followed. As noted above, *Guzman* (2010) concluded "that the language of Section 4660 permits reliance on the entire *Guides*, including the instructions on the use of clinical judgment, in deriving an impairment rating in a particular case" (p. 1). In particular, Chapters 1 and 2 of the AMA *Guides* (Cocchiarella & Andersson, 2001) provide guidance regarding the use of vocational specialists when making employability determinations. Specifically, Chapter 1 of the AMA *Guides* (Cocchiarella & Andersson, 2001) states:

> More complicated are the cases in which the physician is requested to make a broad judgment regarding an individual's ability to return to any job in his or her field. A decision of this scope usually requires input from medical and nonmedical experts, such as vocational specialists, and the evaluation of both stable and changing factors, such as the person's education, skills, and motivation, the state of the job market, and local economic considerations. (p. 14)

Paragraph (b) states that the employee's whole person impairment, as provided by the AMA *Guides* (Cocchiarella & Andersson, 2001), will be "multiplied by an adjustment factor of 1.4." The adjustment factor of 1.4 is not defined in Labor Code section 4660.1 (Melchoir, 2016). However, according to a recent study by the RAND Center for Health and Safety in the Workplace (Dworsky, Seabury, Neuhauser, Kharel, & Euller, 2016), "Technically, SB 863 did not eliminate the FEC, it simply fixed it at 1.4 for all workers, whereas before the range was 1.1-1.4 with an average of 1.22 among single-impairment cases" (p. 2). Additionally, paragraph (i) above ordered "a study to compare average loss of earnings for employees who sustained work-related injuries with permanent disability ratings under the schedule," which indicated a continuing interest in the diminished future earning capacity of injured workers. The recommended study was completed by the RAND Center for Health and Safety in the Workplace (Dworsky, Seabury, Neuhauser, Kharel, & Euller, 2016).

All of the above information indicates a continued need for an individualized vocational rehabilitation evaluation for claimants who were injured on or after January 1, 2013. The need for vocational expert opinions will likely be needed in rare cases that involve complex or unusual circumstances that may not be addressed by a scheduled rating. For example, there may be selected cases with unusual circumstances where the adjustment factor for the occupation in a scheduled rating does not adequately address an injured worker's circumstances. In some cases, the adjustment factor for age in a scheduled rating may not be adequately addressed in a scheduled rating. In other cases, the adjustment factor of 1.4, apparently relating to diminished earning capacity, may not be accurately addressed in a scheduled rating for injured workers with high pre-injury earnings or for injured workers who are so disabled that they are relegated to unskilled or part-time post-injury occupations. These are examples of rare cases that indicate the need for an individualized vocational rehabilitation evaluation by a vocational expert to assist the parties or the court in determining the most accurate permanent partial disability rating for an injured worker. Rebuttal methods that can be used to analyze the unique circumstances of rare cases will be described in the next section.

Additionally, SB 863 (2012) created Labor Code section 5703(j) (Melchior, 2016), which describes requirements for reports by vocational experts. This new section applies prospectively and was not limited to the reports of vocational experts for claimants who were injured before January 1, 2013. This suggests that the authors of SB 863 (2012) anticipated the ongoing use of vocational experts and the reports that they prepare.

Rebuttal Methods After SB 863

Attempting to rebut a scheduled rating with vocational evidence continues to be appropriate for rare cases following SB 863 (2012). Four examples of rebuttal methods are described in this section that involve the use of the opinions of a vocational expert for an individualized, comprehensive vocational evaluation to determine the most accurate rating in a permanent partial disability case.

I. Adding Whole Person Impairments

In the typical case of an injured worker with injuries to multiple body parts, the Combined Values Chart (CVC) at Section 8 of the 2005 *Schedule* (California Division of

Workers' Compensation) is used to combine the whole person impairments (WPIs) for each body part to determine a combined whole person impairment rating. The mathematical effect of combining WPIs through the CVC is to compress them. For example, the combined WPI for an injured worker with a WPI of 15% for a knee injury and a WPI of 15% for a hand injury is 28%.

In many cases, the vocational effects of injuries to multiple body parts are likely to be overlapping. For example, in general, the work restrictions for a cervical spine injury may overlap with the work restrictions for a lumbar spine injury. In such cases, the CVC would likely result in an accurate disability rating. However, in other cases, such as the example involving a knee injury and a hand injury, the use of the CVC may not result in the most accurate rating. If the work restrictions for the knee injury include a limitation to sedentary work and the work restrictions for the hand injury include a limitation to occasional handling, fingering, keyboarding, and writing, compressing the WPI for the knee injury with the WPI for the hand injury through the CVC will probably not result in the most accurate disability rating. The opinions of a vocational expert based on the results of an individualized, comprehensive vocational evaluation can be used to clarify whether this is true for a specific injured worker.

This is addressed in Chapter 1 of the AMA *Guides* (Cocchiarella & Andersson, 2001), as follows:

> A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability inherent in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment ratings for the separate impairments (eg, blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. States also use different techniques when combining impairments. Many **workers' compensation statutes** contain provisions that combine impairments to produce a summary rating that is more than additive. Other options are to combine (add, subtract, or multiply) multiple impairments based upon the extent to which they affect an individual's ability to perform activities of daily living. The current edition has retained the same combined values chart, since it has become the standard of practice in many jurisdictions. Other approaches, when published in scientific peer-reviewed literature, will be evaluated for future editions. (p. 9)

Adding rather than compressing WPIs for injured workers with injuries to multiple body parts has been addressed in recent court decisions. In *Kite* (2013), a petition for writ of review denied decision, the WCAB held that it was appropriate to add the WPIs for a forklift operator with injuries to both hips, rather than use the CVC, because of the synergistic effect of injuries to the right hip and left hip. Additionally, the court referred to information in the 2005 *Schedule* (California Division of Workers' Compensation), which states that WPIs are generally combined through a reduction formula. An example is provided at page 1-10 of the *Schedule* where WPIs of 15% and 25% are combined to provide an overall WPI of 36%.

In *Sweetman* (2014), the applicant was a mortgage loan officer who slipped and fell and sustained injuries to her back and wrists. She also developed a sleep disorder. The court determined that the most accurate rating would result from adding the WPIs for the back and wrist and combining that WPI with the WPI for the sleep disorder. The court agreed with the panel qualified medical evaluator's reasoning that:

> ...one who is hampered by, say, a back injury must depend to a greater extent on his or her hands or mind in order to make a living, and an added impairment involving one of those aspects of physiology would *more* greatly reduce the ability to work, not *less* so, than in one not already impaired. (p. 231)

Kite (2013) and *Sweetman* (2014) involve claims for permanent partial disability. *La Count* (2015) relates to a claim for permanent total disability in which the court determined that it was appropriate to add WPIs rather than use the CVC because of the synergistic effect of the applicant's orthopedic injuries. The orthopedic agreed medical evaluator concluded that there was a synergistic effect between the left shoulder, right hip, and lower back injuries. The court also explained that the CVC is used as a guide in rating impairments. However, the use of the CVC is not mandatory.

As noted in Labor Code section 4661.1(d) (Melchoir, 2016), a rating schedule is rebuttable. Vocational opinions can be used with medical opinions to attempt to rebut a scheduled rating. Specifically, for this first rebuttal method involving adding rather than combining WPIs, the opinions of a vocational expert regarding the impact of injuries to separate body parts on return to work opportunities can be used by a medical evaluator in determining whether adding WPIs or using the CVC will result in the most accurate disability rating. Through this method, a physician may be asked to review the vocational expert's report and provide a supplemental medical opinion.

In conducting an individualized, comprehensive vocational evaluation, a vocational expert can complete an analysis of transferable skills and an analysis of labor market access based on the work restrictions for each body part. The vocational expert can compare the results of that analysis with the results of an analysis of transferable skills and labor market access for the combined work restrictions for all body parts. This is one example of how the results of an individualized, comprehensive evaluation by a vocational expert can assist an agreed or panel qualified medical evaluator in determining whether adding or combining WPIs for separate body parts will result in the most accurate permanent partial disability rating.

II. Rebutting the Occupation and Age Adjustment Factors

Labor Code section 4661.1(2) (Melchoir, 2016) states that the occupation of the injured worker and his or her age at the time of injury shall be considered in determining the percentage of disability. Occupation and age modifiers are provided in the 2005 *Schedule* (California Division of Workers' Compensation). Since the occupation and age modifiers are rebuttable, vocational opinions can be useful in rare cases to determine the most accurate permanent partial disability rating.

The effects of occupation and age can interact significantly for certain injured workers. For example, a 55-year-old unskilled construction laborer with a work injury who has worked in the same occupation since high school graduation would have fewer return to work options than a 55-year-old high school graduate who worked at 2 or 3 skilled occupations, and developed a separate set of skills for each occupation, prior to a work injury. For the first injured worker, long-term pre-injury employment would be an impediment to returning to work while long-term pre-injury employment for the second injured worker would be an asset to returning to work. The labor market effects of the relationship between occupation and age in this example are probably not reflected in the occupation and age modifiers in the 2005 *Schedule* (California Division of Workers' Compensation). These issues can be addressed by a vocational expert through an individualized, comprehensive vocational evaluation, which would include, among other things, a transferable skills analysis and an employability or labor market access analysis. The results of the employability or labor market access analysis can be compared with the permanent partial disability rating that has been adjusted for occupation and age to clarify whether the scheduled rating has been rebutted.

III. Rebutting a Scheduled Rating Based on Diminished Future Earning Capacity

Labor Code section 4661.1(a) (Melchoir, et al., 2016) states that permanent partial disability shall consider the nature of the physical injury or disfigurement, occupation, and age. Paragraph (b) states that the injured worker's WPI shall be multiplied by an adjustment factor of 1.4, which replaced the prior FEC adjustment factor of 1.1 to 1.4 (Dworsky, Seabury, Neuhauser, Kharel, & Euller, 2016). Paragraph (d) indicates that a scheduled rating is rebuttable. Paragraph (i) required the Commission on Health and Safety and Workers' Compensation to conduct a study to compare average lost earnings with permanent disability ratings. The required study was completed by the RAND Center for Health and Safety in the Workplace (Dworsky, Seabury, Neuhauser, Kharel, & Euller, 2016). All of this information in Labor Code 4661.1 (Melchoir, 2016), which relates to work injuries on or after January 1, 2013, suggests that diminished future earning capacity continues to be an important consideration in determining a permanent partial disability rating. Additionally, in *Brodie* (2007), the California Supreme Court stated, "Thus, permanent disability payments are intended to compensate for both physical loss and the loss of some or all of their future earning capacity" (p. 7). All of this information provides the basis for the third rebuttal method, one related to diminished future earning capacity.

Additionally, according to the RAND Center for Health and Safety in the Workplace (Dworsky, Seabury, Neuhauser, Kharel, & Euller, 2016):

> The elimination of the Future Earning Capacity (FEC) adjustment had little impact on the overall equity of disability benefits across workers with different types of injuries. This is largely due to the fact that the FEC as implemented was based on the old California PDRS and did little to address discrepancies in the relationship between earnings losses and disability ratings under the *AMA Guides*. (p. 107)

The results of this recent study provide further support for a diminished future earning capacity evaluation for appropriate cases to clarify the most accurate permanent partial disability rating. One of the primary purposes of the range of FEC adjustment factors from 1.1 to 1.4 in the 2005 *Schedule* (California Division of Workers' Compensation) was to correct inequities in permanent disability benefits by body part injured. That correction was eliminated by SB 863 (2012). This in turn provides a basis for attempting to rebut a scheduled rating for injured workers whose permanent disability benefits are inequitable because of the part of their body that was injured.

When analyzing shoulder impairments, knee impairments, loss of grasping power, and back impairments, RAND (Reville, Seabury, & Neuhauser, 2003) found "clear disparities between the observed proportional earnings losses of different impairments that are given similar ratings" (pp. 23-24). These are the disparities that the range of FEC adjustment factors from 1.1 to 1.4 was designed to correct through the 2005 *Schedule* (California Division of Workers' Compensation). However, this correction was removed as a result of SB 863 (2012). This provides further support for the third rebuttal method involving a diminished future earning capacity evaluation.

SB 863 (2012) created Labor Code section 139.48 to make "supplemental payments to workers whose permanent disability benefits are disproportionately low in comparison to their earnings loss" (p. 11). As a result, all injured workers who were injured after January 1, 2013 and were found to be medically unable to perform their usual and customary occupation qualified for an increased permanent disability benefit of $5,000.00. This one-time $5,000.00 benefit combined with the fixed FEC adjustment factor of 1.4 will not adequately compensate many injured workers with high pre-injury earnings who are relegated to low paying post-injury occupations. This clarifies further the need for a diminished future earning capacity evaluation for injured workers with unusual or unique earnings loss circumstances, who were injured on or after January 1, 2013.

For the third rebuttal method, a vocational expert would conduct an individualized, comprehensive diminished future earning capacity evaluation. Such an evaluation would consider the underlying medical impairment as well as the occupation and age of the injured worker. Therefore, the percentage of the diminished future earning capacity can be compared with a scheduled rating, after adjustment for occupation and age. Doing so will clarify whether a scheduled rating has been rebutted.

IV. Rebutting a Scheduled Rating Based on Diminished Employability or Labor Market Access

In *Guzman* (2010), the California Court of Appeal stated, "We conclude that the language in section 4660 permits reliance on the entire *Guides*, including the instructions on the use of clinical judgment, in deriving an impairment rating in a particular case" (p. 1). The percentage of impairment in the AMA *Guides* (Cocchiarella & Andersson, 2001) estimates an individual's ability to perform activities of daily living, excluding work. The AMA *Guides* (Cocchiarella & Andersson, 2001) state that "impairment ratings are not intended for use as direct determinants of work disability" (p. 5). Additionally, the AMA *Guides* (Cocchiarella & Andersson, 2001) state that a non-medical expert is needed when a physician is asked to provide an opinion about an individual's ability to return to work, as follows:

> ... A decision of this scope usually requires input from medical and nonmedical experts, such as vocational specialists, and the evaluation of both stable and changing factors, such as the person's education, skills, and motivation, the state of the job market, and local economic considerations. (p. 14)

Labor Code section 4661.1(d) (Melchoir, 2016), indicates that a scheduled rating is rebuttable. All of this information suggests that the opinions of a vocational expert based on an individualized, comprehensive vocational evaluation can be beneficial in determining the most accurate permanent partial disability rating for an injured worker.

Under this fourth method for rebutting a scheduled rating, a vocational expert would conduct an individualized, comprehensive vocational evaluation to determine the injured worker's diminished employability or labor market access. The results of the evaluation can be used to clarify whether an injured worker has rebutted a scheduled rating in a claim for permanent partial disability since the evaluation would consider the underlying medical impairment as well as the occupation and age of the injured worker.

Summary and Implications for Practice and Further Research

This article has discussed the use of vocational expert opinions in California workers' compensation cases involving a claim for permanent partial disability. The history of court decisions and governmental regulations was provided regarding the use of vocational opinions in permanent partial disability cases. Specific components of *Dahl* (2015) were discussed regarding the ongoing need for vocational expert opinions to assist the parties and the court in determining the most accurate rating for determining permanent partial disability. The three rebuttal methods in *Ogilvie III* (2011) were described regarding their application to a claim for permanent partial disability after *Dahl* (2015).

Four methods were described for use in attempting to rebut a scheduled rating after SB 863 (2012). The four rebuttal methods can be used by vocational experts in conducting an individualized, comprehensive vocational evaluation to assist the parties and the court in clarifying whether a scheduled rating has been rebutted after SB 863. The four rebuttal methods can be applied to published, peer-reviewed methodologies for evaluating employability and earning capacity to assist the parties and the court in determining the most accurate permanent partial disability rating, such as

those described by Van de Bittner, Wallace, Cottle, and Simon (2012a & b), and by Van de Bittner (2015).

The rebuttal methods presented in this article apply to the California workers' compensation system. The rebuttal methods probably apply to workers' compensation systems in other states and in other venues as well. For example, the earning capacity rebuttal method may apply to the Arizona workers' compensation system. According to Bakkenson, "Vocational experts involved in the litigation of Arizona Workers' Compensation claims assist with the determination of an employee's loss of earning capacity (LEC) during periods of permanent partial disability and temporary partial disability" (2003, p. 99). Additionally, Hultine (2003) described how vocational opinions in the form of a Loss of Earning Capacity (LOEC) evaluation can be used to modify a scheduled permanent partial disability rating in Nebraska. The employability or labor market access rebuttal method may apply to the Florida workers' compensation system. According to Spitznagel (2003), vocational experts in Florida assess an injured worker's ability to return to work for claims involving permanent partial disability. Therefore, one or more of the four rebuttal methods presented in this article may have immediate application to cases in Arizona, Nebraska, and Florida. Further research regarding the application of the four rebuttal methods to other states would be helpful.

In terms of determining the underlying medical impairment, California started to use the AMA *Guides* (Cocchiarella & Andersson, 2001) in 2005. This system is used by most states. In 1999, 40 states and the District of Columbia used the AMA *Guides* (Cocchiarella & Andersson, 2001). The rebuttal method regarding adding WPIs may apply to permanent partial disability claims for states that use the AMA *Guides* (Cocchiarella & Andersson, 2001). Further research in this regard would be beneficial.

Additionally, Johnson and Cary (in press) provided a response to the present article in relation to the workers' compensation system in Washington. They identified two potential applications of the SB 863 rebuttal methods.

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