WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DOREEN DAHL, *Applicant,* **vs.** **CONTRA COSTA COUNTY, Permissibly Self-Insured,** *Defendant.*	**Case Nos. ADJ1310387 (OAK 0333577)** **OPINION AND DECISION AFTER RECONSIDERATION**

We earlier granted defendant's petition for reconsideration of the February 4, 2013 Findings And Orders of the workers' compensation administrative law judge (WCJ) who found that applicant incurred industrial injury to her neck and right shoulder while employed as a medical records technician by defendant during the cumulative period ending March 14, 2005, causing a need for future medical treatment and 79% permanent disability.

In his accompanying Opinion on Decision, the WCJ explains that applicant's permanent disability was re-determined pursuant to our earlier May 18, 2012 Opinion and Decision After Reconsideration (May 18, 2012 Decision) wherein we rescinded the WCJ's earlier September 10, 2011 decision in this case and held that the decision of the Court of Appeal in *Ogilvie v. City and County of San Francisco* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie III*) allowed an injured worker to rebut the Diminished Future Earning Capacity (DFEC) adjustment factor contained in the 2005 Permanent Disability Rating Schedule (PDRS) by expert testimony pursuant to the analysis of the Supreme Court in the case of *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587] (*LeBoeuf*), even if the injury did not cause a total loss of future earning capacity and 100% permanent disability.[1]

[1] See also *Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 248 (Appeals Board en banc) (*Ogilvie I*) and *Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 1127 (Appeals Board en banc) (*Ogilvie II*), which was reversed in *Ogilvie III*.

Defendant contends that the WCJ's decision is deficient because there is no specific finding that the PDRS rating was rebutted, that the analysis described in *Ogilvie III* should not apply unless the injury caused a total loss of future earning capacity and 100% permanent disability, and that the *Ogilvie* analysis placed into evidence by applicant impermissibly relied upon non-industrial vocational factors.

Applicant requested to file an untimely answer to the petition, but that request is denied. (Cal. Code Regs., tit. 8, § 10848.) The WCJ provided a Report and Recommendation on Petition for Reconsideration (Report), recommending that reconsideration be denied.

The WCJ's February 4, 2013 decision is affirmed as our Decision After Reconsideration for the reasons set forth in the WCJ's Report, which is incorporated by this reference, and for the reasons below.

BACKGROUND

The facts and procedural background are described in our earlier May 18, 2012 Decision, which is incorporated by this reference, and they are not repeated in detail herein. In essence, there is no dispute that applicant incurred cumulative trauma industrial injury to her neck and right shoulder while working for defendant during the period ending March 14, 2005. The parties' Agreed Medical Examiner (AME) Mechel Henry, M.D., found no basis for apportionment of permanent disability. No party disputes Dr. Henry's evaluation of the whole person impairment (WPI) caused by applicant's injury pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, which are incorporated into the PDRS, and no party disputes that under the PDRS the WPI found by Dr. Henry results in a rating of 59% permanent disability. However, applicant contends that her permanent disability is higher than the PDRS rating because she has more DFEC than reflected in the PDRS.

In our May 18, 2012 Decision, we agreed with the WCJ that the record in this case does not support the use of the first or third method of rebutting the PDRS described in *Ogilvie III*, but found that the second *Ogilvie III* method is available to applicant because a *LeBoeuf* type of analysis may be properly applied in a case involving less than 100% permanent disability when the injury impairs the worker's amenability to rehabilitation and the DFEC factor in the PDRS is rebutted.

Following return to the trial level, further proceedings were conducted on January 14, 2013. The WCJ received into evidence an additional report by Dr. Henry along with reports by applicant's

vocational expert Jeff Malmuth, and defendant's vocational expert Ira Cohen. Testimony was also received at trial from Mr. Malmuth, Mr. Cohen, applicant, the employer's employee rehabilitation counselor Jean Haskell, and a representative from the Employment Development Department. Following the trial, the WCJ issued his February 4, 2013 decision as described above.

In his Report, the WCJ explains how he reached his decision in pertinent part as follows:

> "[I] found that applicant had successfully rebutted the PDRS in the one respect supported by Mr. Malmuth, which was the permanent disability involving the right shoulder. There, his overall DFEC figure was substituted for the adjusted shoulder rating, consistent with the instructions provided by the appeals board in this case. That was then combined with the three other ratable impairments reported by Dr. Henry, for the cervical spine, the post-surgical scar and pain...
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> "In essence, defendant contends that facts affecting applicant's earning capacity that are peculiar to her ought to adjust the rating downward. First, Ms. Dahl had a felony conviction prior to her employment with the County, and that would limit her access to some jobs, as both vocational experts confirmed. Second, she obtained a college degree during that employment, and that might enhance her access to some jobs. Third, both experts concluded that she stood to benefit from vocational rehabilitation, which would put her in a better position to seek employment. None of these facts found its way into Mr. Malmuth's formulation of her earning capacity, for reasons he explained at trial: They do not affect the earning capacity, either before or after an injury like Ms. Dahl's, of *similarly situated employees.* This is his method of eliminating the impact of the '*Montana* factors' [*Argonaut Ins. Co. v. Industrial Acc. Com.* (*Montana*) (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130] (*Montana*)] that defendant alternatively argues must be excised from the calculations. He does not put them into the hopper, so there is no need to remove them from the hopper. That is, by focusing on similarly situated employees, Mr. Malmuth does not consider DFEC factors not stemming from the injury, so he has no need to back them out of the formula. Thus, because applicant's felony conviction had no apparent impact on her ability to obtain and retain her employment with Contra Costa County, she was properly grouped with similarly situated employees in that occupation. Because a college degree was not necessary for that position, those similarly situated include employees without such a degree. Finally, vocational rehabilitation was a benefit of the California workers' compensation system available to employees unable to return to their usual and customary jobs *until its repeal,* and since that repeal is a non-factor, for this employee just as for others.
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> "Generally, and repeatedly, defendant urges an individualized approach to analyzing Doreen Dahl's unique future earning capacity. If she has assets that enhance her ability to earn a living, such as a bachelor's degree, that should be reflected in her DFEC for permanent disability purposes, and if she has liabilities to that ability, such as a criminal conviction, they too ought to be factored in. By Mr. Malmuth's method, which I found persuasive, such elements are eliminated from the outset. I continue to

> believe that that method hews closer to the statutory mandate that DFEC consider the capacities of similarly situated employees, and to the case law requiring the exclusion of nonindustrial influences on earning capacity...
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> "I remain persuaded that neither the statute nor the PDRS supports the elimination of otherwise compensable factors of impairment or disability on the basis that another such factor produces DFEC in excess of, and in rebuttal to, that provided in the schedule." (Emphasis in original, footnote omitted.)

DISCUSSION

As discussed in our May 18, 2012 Decision, a *LeBoeuf* analysis may be applied even if the injured employee's DFEC (or inability to compete in the open labor market) is not total. As the Court wrote in *Ogilvie III*:

The Court further wrote in *Ogilvie*, as follows:

> "[T]he terms 'diminished future earning capacity' and 'ability to compete in an open labor market' suggest to us no meaningful difference, and nothing in Senate Bill No. 899 suggests that the Legislature intended to alter the purpose of an award of permanent disability through this change of phrase. Nor does its use suggest that a party seeking to rebut a permanent disability rating must make any particular showing...
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> "Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee *impairs* his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is *greater than reflected in the employee's scheduled rating*...In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, *he could not be retrained* for suitable meaningful employment. Our Supreme Court concluded that it was error to preclude LeBoeuf from making such a showing, and held that '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 disability rating.' " (*Ogilvie III, supra*, italics added, citations deleted.)

In *LeBoeuf*, the Supreme Court was confronted with an injured employee who was not amenable to any vocational retraining as determined by the Rehabilitation Bureau. As the Court described the worker in that case, he "does not qualify," "is unqualified," "has [been] determined to be unqualified, " and "was not qualified" to receive rehabilitation benefits. (*LeBoeuf, supra,* 34 Cal.3d at pp. 240-241, 242, 245, 246.) However, we do not find that complete lack of amenability to vocational rehabilitation is necessary before a *LeBoeuf* analysis may be properly applied. Instead, we rely upon the holding in *LeBoeuf* that, "A permanent disability rating should reflect as accurately as possible an injured

employee's diminished ability to compete in the open labor market." (*LeBoeuf, supra,* 34 Cal.3d at pp. 245-246.) A Court's opinion must be read in light of the facts of the case that were before it. (*Esquivel v. Workers' Comp. Appeals Bd.* (2009) 178 Cal.App.4th 330, 339 [74 Cal.Comp.Cases 1213]; *In re Chavez* (2003) 30 Cal.4th 643, 656; see also *Styne v. Stevens* (2001) 26 Cal.4th 42, 57; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2].) Thus, although the applicant in *LeBoeuf* was not amenable to any vocational retraining, the Court implicitly recognized that an employee need not be entirely precluded from gainful employment before being entitled to an increased permanent disability rating because of diminished future earning capacity.

When undertaking a *LeBoeuf* analysis pursuant to the holding in *Ogilvie III* it is not clear from the *Ogilvie III* decision whether: (1) any individualized factors may be used to determine DFEC; or (2) if DFEC must be analyzed without consideration of individualized factors and instead should only be analyzed based upon the effects of an injury on the earning capacity of similarly situated workers. The uncertainty flows, in part, from the Supreme Court's earlier decision in *Montana* wherein the Court concluded that individual factors should be considered in determining an injured worker's diminished future earning capacity when the worker is not amenable to vocational rehabilitation, writing as follows:

> "An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. Earning capacity, for the purposes of a temporary award, however, may differ from earning capacity for the purposes of a permanent award. In the former case the prediction of earnings need only be made for the duration of the temporary disability. In the latter the prediction is more complex because the compensation is for loss of earning power over a long span of time. Thus an applicant's earning capacity could be maximum for a temporary award and minimum for a permanent award or the reverse. Evidence sufficient to sustain a maximum temporary award might not sustain a maximum permanent award. In making an award for temporary disability, the commission will ordinarily be concerned with whether an applicant would have continued working at a given wage for the duration of the disability. In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading. With regard to both awards all 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.* In weighing such facts, the commission may make use of 'its general knowledge as a basis of reasonable forecast.' In weighing the evidence relevant to earning capacity the commission has the same range of discretion that it has in apportioning injuries between industrial and

> nonindustrial causes. It must, however, 'have evidence that will at least demonstrate the reasonableness of the determination made.' (*Montana, supra,* 57 Cal.2d at 594-595, citations omitted, emphasis added.)

By contrast, the Court of Appeal wrote in *Ogilvie III*, as follows:

> "While some...suggest that under *LeBoeuf* a disability award may be affected when an employee is not amenable to vocational rehabilitation for any reason, the most widely accepted view of its holding, and that which appears to be most frequently applied by the WCAB, is to *limit its application to cases where the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors* such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education...
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> "This application of *LeBoeuf* hews most closely to an employer's responsibility under sections 3208 and 3600 to 'compensate *only* for such disability or need for treatment as is occupationally related.' (*Livitsanos v. Superior Court, supra*, 2 Cal.4th at p. 753.) 'Employers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors.' (*Brodie v. Workers' Comp. Appeals Bd., supra*, 40 Cal.4th at p. 1321 [discussing apportionment].) An employee effectively rebuts the scheduled rating when the employee 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.
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> "An employee effectively rebuts the scheduled rating when the employee *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...*
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> "The application of the rating schedule is *not rebutted by evidence that an employee's loss of future earnings is greater than the earning capacity adjustment that would apply to his or her scheduled rating due to nonindustrial factors...* [A]n employee may rebut a scheduled rating by showing that the rating was incorrectly applied or *the disability reflected in the rating schedule is inadequate in light of the effect of the employee's industrial injury.* We cannot conclude on this record whether Ogilvie can make any such showing." (*Ogilvie III, supra,* 197 Cal.App.4th at 1274-1278, emphasis in original and added.)

As can be seen, the Court in *Ogilvie III* concluded that a party may rebut a PDRS rating by establishing that the *employee* is not amenable to rehabilitation and, for that reason, the *employee's* DFEC is greater than reflected in the scheduled rating. This suggests that certain individual factors may be considered. However, the Court in *Ogilvie III* also placed the burden on the employee to demonstrate that the *employee's* DFEC is directly attributable to *the employee's* work-related injury and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English,

and lack of education. Although the Court in *Ogilvie III* concluded that certain nonindustrial factors cannot be considered in determining an individual's DFEC, it appears that a *LeBoeuf* analysis that addresses how the injury affects the individual employee may be acceptable. Indeed, prior to Senate Bill 899 (SB 899), a *LeBoeuf* analyses did *not* take into consideration the effect upon similarly situated employees.

The language in *Ogilvie III* that an employee's non-amenability to vocational rehabilitation cannot be due to "nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education" may be viewed as merely an outgrowth of the Court's recognition that an employer is liable only for the permanent disability caused by direct result of the industrial injury as set forth in section 4664(a), and not as a statement that individualized factors can never be considered in a DFEC analysis. This view finds some support in the *Ogilvie III* Court's further statement, as follows:

> "Here, vocational experts determined that Ogilvie's anticipated loss of future earnings will be greater than reflected in a permanent disability award based on the rating schedule. Because we cannot determine on this record the degree to which the experts may have taken *impermissible factors* into account in reaching their conclusions, we remand for further proceedings." (197 Cal.App.4th at p. 1277, emphasis added.)

Thus, the Court in *Ogilvie III* sent the case back to the WCAB for development of the record only because it was unclear whether the vocational experts had considered "impermissible factors" such as general economic conditions, illiteracy, proficiency in speaking English, and lack of education in determining DFEC, and not because the vocational experts did not consider the effect the injury would have on similarly situated employees. This construction is supported by the record that was before the Appeals Board in *Ogilvie I* and *II* because there is no indication that either vocational expert in the case considered the effect the injury would have on similarly situated employees. Instead, the vocational experts in *Ogilvie I* and *II* determined DFEC by dividing the amount the injured worker would likely earn over her remaining expected work life after the injury, by the amount she likely would have earned over her remaining expected work life had the injury not occurred.

Moreover, section 4660(b)(2) provides that the effect on an injury on "similarly situated employees" is to be considered as part of the PDRS rating, as follows:

> "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." (Emphasis added.)

Notwithstanding the uncertainty in the *Ogilvie III* holding regarding the consideration of individualized factors in determining DFEC as part of a *LeBoeuf* analysis as discussed above, we find that the approach taken by applicant's expert Mr. Malmuth in this case is not contrary to *Ogilvie III* because it does not consider the DFEC impact of applicant's shoulder injury based upon any "impermissible factors" identified in *Ogilvie III*, but instead looks at the effect such an injury would have upon the DFEC of similarly situated workers. In that way the analysis provided by Mr. Malmuth reconciles the apparent contradiction between the *Ogilvie III* statement that individual factors that do not arise from the industrial injury are *not* to be considered in a DFEC analysis post-SB 899, with the view of the Supreme Court in *Montana* that an individual's willingness and ability to work, age, health, skill, and education along with the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant in considering the individual's future earning capacity.

Mr. Malmuth demonstrated his familiarity and understanding of the post-SB 899 apportionment law in his December 11, 2012 report (Applicant's Exhibit 16) by discussing and quoting extensively from *Ogilvie III*. The analysis he performed only considered factors relevant to similarly-situated workers and did not consider applicant's individualized factors like her educational attainment and prior criminal conviction. As Mr. Malmuth testified during the January 14, 2013 trial as shown by the Minutes of Hearing:

> "There is a conundrum among vocational evaluators regarding the use of two scales, i.e., the DFEC and the permanent disability rating schedule. In [an Appeals Board panel] case, the witness and the WCJ established a diminished earning capacity figure, as well as impairments involving 'non-QIW body parts' adjusted for DFEC, age and occupation, using the rating

schedule, and they added those things together using the combined values chart or CVC. He did that in this case. (3:8-16.)

"Section 4660(b)(2) 'directs him to look at similarly-situated employees, in this case medical records technicians.' (3:16-18.)

"His conclusion was that she lost 64 percent of earning capacity. That figure does not consider all of her injuries, only the shoulder injury, based on his assumption that this is what took her out of the labor market. (4:10-13.)

"The first conclusion is how the shoulder injury which caused QIW status reduced the applicant's future earning capacity. The result was a 64 percent loss of future earning capacity. Then the cervical spine adjusted to 26 percent using the Schedule and the scar to 18 percent and those were added using the CVC arriving at 78 percent. (4:18-24.)

"The witness did not consider *Montana* factors in this case, because that would require an individualized analysis which would conflict with Section 4660(b)(2) which requires analysis of similarly-situated employees. (4:31-35.)

"The witness assumes that because the cervical injury did not cause QIW status that there would be no reduced earning capacity from that injury. (5:10-12.)

"Referred to the summary of his own testimony, at page 5 on August 10, 2010, indicating that if the agreed medical examiner or AME has not broken out DFEC one impairment from another, the witness can't either, he now has no reason to change that opinion. (5:16-20.)

"Applicant's college education could increase her earning capacity. The witness considered it. However, he was studying similarly-situated employees, rather than doing an individual assessment. (6:17-20.)

"Similarly-situated employees are those with the same job. There are no other similarities to be considered, including education, age or disability. *Ogilvie III* requires and remanded the case to determine an analysis of the factors described as *Montana* factors which are discussed at page 26 of the witness' report." (6:37-42.)

Mr. Malmuth's analysis did not consider any individualized factors that might be considered impermissible under *Ogilvie III*. Instead, he considered the effect of the injury and resulting permanent disability upon the earning capacity of similarly-situated workers. Having determined that the DFEC factor in the PDRS did not accurately reflect the actual DFEC for similarly-situated workers, Mr. Malmuth then determined what the DFEC is for similarly-situated workers and applied that revised DFEC to calculate applicant's permanent disability by appropriately combining the effect of the right shoulder injury with the disabling effects of the injury to other body parts.

Applicant rebutted the DFEC factor in the PDRS with regard to her right shoulder injury by showing through substantial expert testimony that the effect of such an injury on the earning capacity of similarly-situated workers is greater than the DFEC factor in the PDRS. No impermissible factors identified by the Court in *Ogilvie III* were considered in that analysis, and the WCJ properly combined Mr. Malmuth's revised rating for applicant's right shoulder injury with the scheduled rating for applicant's other injured body parts because the other injured body parts did not limit applicant's amenability to vocational rehabilitation and the DFEC expressed in the PDRS for those other body parts was not rebutted.

The February 4, 2013 decision of the WCJ is affirmed.

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For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Appeals Board that the February 4, 2013 Findings And Orders of the workers' compensation administrative law judge is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

FRANK M. BRASS

PARTICIPATING, BUT NOT SIGNING
ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 16 2014

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

DOREEN DAHL
BOXER & GERSON
THOMAS, LYDING ET. AL.

JFS/abs