



Ogilvie v. City and County of San Francisco (2009 En Banc) 37 CWCR 35

This decision held that the diminished future earning capacity (DFEC) adjustment portion of the rating calculation is rebuttable, using a mathematical formula for re-calculating the DFEC adjustment which takes into account the worker's actual lost earnings.

In this case, the injured worker sought to rebut the permanent disability rating by presenting evidence from vocational rehabilitation counselors that she actually had much greater estimated diminished future earnings than were reflected in the rating. The Board found that it was possible to rebut the DFEC portion of the rating, but that the judge had not used the correct method to determine whether the DFEC had been rebutted.

The Board explained that the DFEC adjustment was developed by using empirical data generated in a 2003 RAND study and 2004 RAND study which calculated the ratio of the average permanent disability ratings to the average proportional earnings losses for employees who suffered industrial injuries to various body parts. The RAND studies calculated average proportional earnings losses by comparing three years of post injury earnings of injured workers to the earnings of similarly situated uninjured workers. Using this as its basis, the Board held that the DFEC could be rebutted by evidence which showed that an injured worker's actual lost earnings, when compared to earnings of other similarly situated non-injured workers, produced a ratio outside the range reflected in the standard DFEC adjustment.

While this sounds like a fairly straightforward calculation, and the Board presented it in that light, it is not that simple. For one thing, the Board acknowledged that wage information regarding similarly situated employees is not always easily available. Also, there is room for dispute in determining (1) what other employees are similarly situated, and (2) the appropriate period of time for which to compare earnings. As to the second calculation, the Board proposed using the first three years of post-injury earnings, consistent with the RAND studies, but acknowledged that this may not be possible where an injured worker is totally temporarily disabled for a period after the injury. The Board stated that it might be necessary to use vocational rehabilitation experts to obtain the necessary information and calculations.

Where The Additional Work Will Arise. The Ogilvie and recent Almaraz/Guzman decisions do not abandon the 2005 Permanent Disability Rating Schedule based on the AMA Guides. To the contrary, they confirm that the AMA Guides based calculation of whole person impairment with the standard DFEC adjustment is correct unless it is rebutted. We do not expect these decisions to generate prolonged litigation in every case. We do anticipate that, where the rating under the 2005 schedule is significantly lower than under the old PDRS, or the worker has work restrictions that appear disproportionate to the rating, applicant's lawyers will seek to rebut the rating through whichever method they find most useful, thus providing more work for doctors, vocational rehabilitation counselors, and themselves.

We also anticipate that, since rebuttal of the rating is focused primarily on assessing an injured worker's ability to work, employers may be more strongly motivated to provide work for these employees to counter their claims of reduced earning capacity.

More Work Defending Claims. As a result of these decisions, evaluation of claims now requires paying increased attention to a worker's claimed inability to perform work tasks. As one commentator has suggested, there may be an increase in the need to use surveillance video to evaluate claims. Obtaining accurate job descriptions from employers also becomes more important. Closer review of medical reports finding permanent disability will also be necessary, particularly when the doctor relies on criteria other than the AMA Guides to calculate the worker's

impairment.

These decisions call for a return to basics. Taking an applicant's deposition will be much more critical, where we want to thoroughly question a worker about their activities of daily living (ADLs) instead of simply allowing the QME/AME to determine a large percentage of permanent disability based purely on an applicant's self-reported and unsupported ADLs. Further, obtaining a worker's past medical records may be very helpful, not simply for apportionment but to show substantial pre-existing limitations in ADLs due to non-industrial conditions (the old schedule concept of overlapping disability is back). We will need to also depose QME/AMEs more often when they do not adequately explain their non-AMA Guides opinions on permanent disability.