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Court Decisions under California's 2005 *Schedule for Rating Permanent Disabilities:* Impact of Expert Testimony on Diminished Future Earning Capacity

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Abstract

Attorneys representing employees with a work injury have lodged numerous attacks against California's new *Schedule for Rating Permanent Disabilities (Schedule)* (California Division of Workers' Compensation, 2005), often regarding the future earning capacity (FEC) adjustment factor. Court decisions are summarized regarding the use of diminished future earning capacity (DFEC) expert testimony in rendering decisions. This article discusses payment of DFEC expert fees in relation to various court decisions for DFEC cases and related cases as well as several issues that require further research and clarification in evaluating DFEC

Introduction

Various parties to the workers' compensation community in California have begun to apply the new *Schedule for Rating Permanent Disabilities (Schedule)* (California Division of Workers' Compensation, 2005). The *Schedule* was developed as required by Labor Code section 4660 (Grant, Mawyer, Solomon, Hoover, Dougherty, Shifflett, Woo, Sofinski, Dempsey, & Kirby, 2007), as amended on April 19, 2004. Among other things, Labor Code section 4660(b)(2) states that, '_n 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" (p. 320).

The *Schedule* (California Division of Workers' Compensation, 2005) states:

> A permanent disability rating can range from 0% to 100%. Zero percent signifies no reduction of earning capacity, while 100% represents permanent total disability. A rating between 0% and 100% represents permanent partial disability. Permanent total disability represents a level of disability at which an employee has sustained a total loss of earning capacity. Some impairments are conclusively presumed to be totally disabling (Labor Code section 4662, pp. 1-2,1-3).

The *Schedule* uses a future earning capacity (FEC) adjustment to reflect diminished future earning capacity caused by the work injury, but the methodology used to determine the DEC adjustment has been challenged. (See discussion of *Boughner* following.) The FEC adjustment factor varies from 1.1 to 1.4 according to injury category, with the lowest adjustment factor being applied to hand, finger, and vision injuries, and the highest adjustment factor being applied to hearing and psychiatric impairments (Califor nia Division of Workers' Compensation, 2005, pp. 1-6, 1-7).

In reviewing all of the preceding court decisions in combination, one can see that there is no consensus among the WCJs and the WCAB regarding various issues affecting the use ofDFEC experts to calculate DFEc. At the same time, several observations can be made from these decisions.

There are also adjustment factors for age and occupation. The disability rating process under the *Schedule* begins with the AMA *Guides* Whole Person Impairment (WPI) rating that is determined by a physician. The WPI rating is then adjusted for age, occupation, and FEC to arrive at a final permanent disability rating. This final rating then results in an established amount of permanent disability benefits. (In this article, Labor Code section, LC, and Section all refer to Labor Code section.)

Background of the Problem

In its 2003 study, RAND Corporation (RAND) described the results of research regarding the adequacy and equity of permanent disability benefits awarded to injured workers under the 1997 *Schedule* (California Division of Workers' Compensation, 1997; Reville, Seabury, & Neu hauser). Adequacy addressed the level of permanent disability benefits awarded in relation to lost earnings. Equity addressed the degree to which injuries of similar severity to different body parts were awarded comparable benefits.

In terms of adequacy, permanent disability benefits as a proportion of lost earnings were approximately 37% under the 1997 *Schedule* (Reville, Seabury, & Neuhauser, 2003). In addition, several resea_c:hers (Baker, 2006; Bringham, 2005; Leigh & McCurdy, 2005; Sweet, 2005;) have established that permanent disability benefits under the 2005 *Schedule* are approximately half of the benefits paid to applicants under the 1997 *Schedule.*

In terms of equity, RAND (Reville, Seabury, & Neuhauser, 2003) learned that there was a certain amount of inequity in benefits for impairments to different body parts. However, RAND learned that the 1997 *Schedule* performed quite well at insuring that more severe disabilities receive higher awards than lesser disabilities. In its 2004 study, RAND (Seabury, Reville, & Neuhauser) created a series of ratios that compared disability ratings to earnings losses, and proposed a methodology under which these ratios could be used to develop adjustment factors that could be used to adjust those disability

ratings to improve equity.

Interestingly, while the former Administrative Director (AD) of the California Division of Workers' Compensation, Andrea Hoch, imported verbatim the RAND ratios into the 2005 *Schedule* as Table B, that is the only real connection between those ratios and the FEC adjustments; both are printed in the *Schedule.* The true basis for FEC adjustments was the former AD's policy decision to select the starting 1.1 adjustment. That 1.1 figure has no relationship to the RAND ratios; consequently none of the other FEC adjustments have any relationship to the ratios either.

The AD lacked sufficient data on which to base the FEC adjustment factors since all of the RAND data on both ratings and earnings losses was based on disability ratings assigned under the 1997 *Sche;dule.* No data existed regarding earnings losses on disability ratings under the AMA *Guides,* the mandated basis of the 2005 *Schedule.* Further the AD discontinued a research project by RAND to create a crosswalk for disability ratings under the
1997 *Schedule* to AMA *Guides* ratings under the 2005 *Schedule.* Instead, the AD testified at the Senate Labor and Industrial Relations Hearing (2004) that she chose the FEC adjustment factor of 1.1 to 1.4 as a policy decision after brainstorming the issue with her staff and following a telephone call by her staff to someone in the State of Colorado. Further, the AD testified that she used 1.1 as the starting point so the FEC adjustment factor wou.ld be a positive number.

Reville (2005) later provided deposition testimony that RAND did not select 1.1 as the starting point for the FEC adjustment factor, and that he was unaware of any empirical data that the AD relied on in establishing the FEC adjustment factors. He was never consulted by the AD regarding 1.1 as the baseline of the adjustment factor. He did not recommend the 1.1 to 1.4 factors. Without a crosswalk study there is no way to know if the 1.1 to 1.4 factors correctly adjust the ratings to reflect wage loss data. His degree of confidence was relatively low that the ratings under the
2005 *Schedule* will predict the DFEC of applicants as measured by RAND's wage loss data, because they are not based on a crosswalk.

Further, Gerlach *(Boughner,* 2007) testified as a statistical expert that the 2005 *Schedule* "is not based upon data and findings from the RAND Interim Report or upon data from additional empirical studies" (p.14), which is mandated in Labor Code section 4660. Gerlach testified further that the ratios in the 2003 RAND report, "are meaningless" (p.19) without a crosswalk between ratings under the 1997 *Schedule* and the AMA *Guides.* He also testified "the FEC adjustment factor does not even improve the equity of ratings among body parts" (p. 20).

While the net effect of the FEC adjustments as they were adopted by the AD results in an increase in the PD rating, this is not what they were required to do under Labor Code section 4660. The FEC adjustments, if they had been correctly based on empirical data as required by Labor Code section 4660, were supposed to link the final disability rating to empirical data on wage losses of disabled workers in California. As will be shown below, attorneys for applicants have retained DFEC experts to provide rebuttal testimony to create the necessary linkage. Regarding this, it is important to note that the Labor Code does not mandate any particular method for giving consideration to diminished future earning capacity.

All of the above set the stage for numerous challenges to the 2005 *Schedule* that ensued. Issues under contention include the validity of the 2005 *Schedule,* the adequacy of permanent disability benefits issuing to employees, the relationship between the FEC adjustment factor in the 2005 *Schedule* and an employee's actual DFEc, and others. Attorneys representing employees have retained DFEC experts to perform evaluations and provide testimony to bolster their arguments regarding the above issues. In turn, attorneys for defendants have retained DFEC experts to defend the use of the 2005 *Schedule* and to critique the results of applicants' DFEC experts.

The Labor Code and the 2005 *Schedule* do not provide any guidance on the use of DFEC experts over disputes regarding DFEc. At the same time, Labor Code section 4660(c) notes that the 2005 *Schedule* "shall be prima facie evidence" (Grant, et aI., 2007, p. 320). In *Costa* v. *Hardy Diagnostic and State Compensation Insurance Fund* (2006, 2007), the Workers' Compensation Appeals Board (WCAB) concluded that the California Legislature intended to allow rebuttal evidence regarding ratings and that the effect of such evidence will likely be decided on a case by case basis.

Court Decisions Regarding DFEC

Summaries of court decisions regarding DFEC will be presented in chronological order, as outlined in Table 1. As a note of caution, the court decisions are analyzed as of this writing. Many of the decisions are under appeal. While many of the decisions have no precedential value since they are trial level decisions, they are nevertheless instructive in that they identify the methodology and analysis of DFEC experts, as well as the evidentiary value of the opinions of the various cases to date. All references below are to the 2005 *Schedule* unless otherwise noted.

Costa

Costa v. Hardy Media (2006) was the first DFEC case that was decided by a workers' compensation judge (WCT). This case represents an unsuccessful attack on the validity of the *Schedule* based on an incomplete record, while supporting the argument that the *Schedule* is only *prima facie* evidence subject to rebuttal. Joey Costa sustained an injury to his back on 8/18/04 while working as a shipping and receiving clerk for Hardy Media, Ine. This resulted in a disability in which he was precluded from heavy lifting and repeated bending and stooping under the 1997 *Schedule.* The wq awarded a 6% permanent disability rating, after apportionment of 50% to a pre-existing, nonindustrial condition. The report from the applicant's DFEC expert was not admitted by the WCJ. Likewise, the DFEC expert's testimony was not admitted. The WCJ concluded that the DFEC expert's opinion did not rebut the permanent disability rating. The WCJ disagreed with the DFEC expert's methodology, analysis, and conclusions. Neither the defendant nor the applicant was found liable to pay the cost of the DFEC expert's report or testimony. The applicant appealed the decision.

Table 1

Cal_fornia Diminished Future Earning Capacity Court Summaries

Court Ruling *Costa,* Findings & Award, 1/20/2006	Admissibility		Report Testimony to Rebut PD Rating		Expert Opinion Used		If Yes, How?	Expert Fees Ordered	
	Yes	No	Yes	No	Yes	No	DFEC;::PD Variation	Yes	No
	x		x		x			x	
Costa, Opinion & Decision after Reconsideration (En Bane), 12/7/06	x		x			x		x	
Costa, Opinion & Decision after Reconsideration (En Bane), 11/13/07								x	
Fan, Findings & Award; Opinion on Decision, 3/10/2006			x			x		x	
Navarro, Findings & Award, 3/17/2006			x		x		x	x	
Bojorquez, Findings & Award, 7/5/2006	x		x		x		x	x	
Alvernaz, Findings & Award, Opinion on Decision, 8/9/06	x		x		x		x	x	
Mendoza, Findings & Orders, Opinion on Decision, 11/13/06								x (in advance)	
Mendoza, Report & Recommendation on Petition for Reconsideration (Defendant), 12/27/06								x (in advance)	
Mendoza, Opinion & Decision after Reconsideration, 10/11/07								x (in advance)	

Table 1 (continued)

Cal;fornia Diminished Future Earning Capacity Court Summaries

	Admissibility						Expert Fees
	Report Testimony		Expert Opinion Used to Rebut PD Rating		If Yes, How?		Ordered
Court Ruling	Yes No	Yes No	Yes	No	DFEC=PD VariatiQn		Yes No
Felix, Report & Recommendations; Petition for Reconsideration, 4/3/2007		x	x		x		x
Boughner, Findings & Award and Opinion on Decision, 5/9/07		x	x				x
Boughner, Acting Administrative Director Carrie Nevans' Memorandum of Points and Authorities in Support of Defendant's Petition for Reconsideration, 9/27/07 -,;							
Gonzales, Findings of Fact, Award & Order, Opinion on Decision, 6/14/07	x	x		x			x
Magana, Findings & Award, 1/19/07				x			
Magana, Opinion & Decision after Reconsideration, 7/9/07				x			
Benko, Findings & Award, Opinion on Decision, 8/13/07	x		x			x	AVE
Wirick, Findings & Award, Opinion on Decision, 8/14/07		x	x			x	
Lyngso (Ruiz), Court of Appeal Decision 8/20/07							x

Table 1 (continued)

California Diminished Future Earning Capacity Court Summaries

Court Ruling	Admissibility Report Testimony		Expert Opinion Used to Rebut PD Rating		If Yes, How?	Expert Fees Ordered	
Campos, Findings, Award & Orders, Opinion on Decision, 8/22/07	Yes No x	Yes No x	Yes 	No x	DFEC=PD Variation	Yes No	
Turner, Findings, Award & Order, Opinion on Decision, 9/5/07	x	x	x		x		
Lopez, Report & Recommendation on Petitions for Reconsideration, 9/18/07				x			
Lopez, Order Denying Reconsideration, 10/12/07				x			
Cordon, Findings & Award Opinion on Decision, 9/25/07	x	x	x		x	x	
Mercado, Findings, Order & Award, Opinion on Decision, 10/23/07	x	x	x		x		deferred
McGinnes, Findings & Award, Opinion on Decision, 11/05/07	x	x	x		x	x	
Favor, Joint Findings, Award & Order, Opinion on Decision, 12/10/07	x	x	x		x	x	

The appeal resulted in *Costa v. Hardy Diagnostic* (2006), an *en banc* decision (by a panel of all 7 commissioners) at the appeals level of the WCAB. The appeals panel upheld the WCJ's rating of 6%, after apportionment of 50% to a pre-existing, non-industrial condition. The DFEC expert's report was not admitted since it was not filed timely and was cumulative, meaning the same opinions were provided through trial testimony. In contrast to the wq, the appeals panel accepted the D FEC expert's testimony and ordered that the DFEC expert's fees be paid by the defendant. However, again it was concluded that the DFEC expert's opinion did not rebut the permanent disability rating in the *Schedule.* In addition, the applicant failed to prove that the *Schedule* was invalid.

The appeals panel also issued a finding that has considerable significance regq,rding the use of DFEC expert testimony. While the appeals panel found the *Schedule* to be valid, it concluded that rebuttal testimony on a case-by-case basis is appropriate, as follows:

It appears that in choosing to retain the language that the PDRS "shall be *prima facie* evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule" in section 4660 (while changing almost everything else in that section), the Legislature intended to continue to allow the parties the opportunity to present rebuttal evidence to ratings under the new PDRS. The effect, if any, of the changes to section 4660 as to what evidence may actually re; but a rating under the new PDRS will be decided, at least initially, on a case by case basis (p. 26).

The defendants filed a motion for re-consideration of the *en banc* decision regarding the award of the DFEC expert's fees. After reconsideration, in a subsequent en banc decision *(Costa,* Opinion and Decision after Reconsideration en banc), 2007, November 13) the WCAB concluded "that section 4660 continues to allow the parties to present evidence on and/or in rebuttal to a permanent disability rating under the new PDRS, and that the costs of such evidence may be allowable" (p. 2). The matter was returned to the WCJ to determine the issue of DFEC expert costs according to the same standard as medical-legal costs. Finally, the WCAB concluded that DFEC costs are allowable under section 5811 and that vocational rehabilitation counselors such as the DFEC expert in *Costa* "may be appropriate expert witnesses to present evidence on and/or in rebuttal to a permanent disability rating under the new PDRS" (p. 8).

Fan

The next court decision regarding DFEC was *Fan v. Gaming Fund Group* (2006).

Angela Fan was born on 6/4/72 and employed on 4/10/02 as a funded card player when she sustained an injury to her neck. Her earnings were maximum, meaning high enough to qualify for the disability payments at the highest level. The wq concluded that her injury caused permanent disability of 19%. DFEC testimony was presented to rebut the *Schedule.* The DFEC expert's testimony was admitted. However, the wq concluded that the DFEC expert's opinion did not rebut the permanent disability rating. Among other things, the wq concluded that the testimony presented by the DFEC expert was not convincing regarding pre-injury earning capacity and post-injury job options. Still, the wq ordered that the defendant pay the DFEC expert's fees: Also, the WCJ observed that the DFEC expert was not an economist, but did not explain how an economist would assist the expert or wq in establishing the proper level of permanent disability (PD).

Navarro

The next case in which DFEC expert testimony was used in an effort to rebut the *Schedule* was *Navarro v. Arbor View Retirement Community* (2006). Veronica Navarro was born on 11/12/81 and was employed as a caregiver on 7/2/04 when she sustained an injury to her back. Her earnings on 7/2/04 were $246.32 per week. Her injury resulted in a whole person impairment of 0% under the American Medical Associations *Guides to the Evaluation of Permanent Impairment (Guides)* (Cocchiarella & Andersson, 2001). Ms. Navarro's restrictions under the 1997 *Schedule* resulted in a disability in which she was precluded from very heavy work. The agreed medical evaluator concluded that Ms. Navarro was unable to return to her usual and customary occupation because of her work injury. In this case, the WCJ admitted the testimony of the DFEC expert and ordered that the defendant pay the DFEC expert's fees. In addition, the wq noted that PD should be measured on a case-by-case basis and relied upon the DFEC expert's opinion to increase the permanent disability rating from 0% to 15%, which was within the range of 15% to 18% determined by the DFEC expert. The WCJ clearly concluded that the PD awarded under the *Schedule* was not reflective of a just result in this case.

Bojorquez

The next case is that of *Bojorquez v. Rosendin Electric, Inc.* (2006). Robert Bojorquez was born on 7/10/62 and employed on 8/27/04 as a construction laborer when he sustained an injury to his back. His earnings on 8/27/04 were $895.60 per week. His medical condition
resulted in a whole person impairment of 6% and a recommended *Schedule* rating of 13%. His medical restrictions included no lifting greater than 20-25 lbs., limited bending, stooping, pushing or pulling with such weight, no standing greater than 2 hours at anyone time, and no continuous sitting for more than 1 hour without the ability to change positions. The wq admitted the testimony of DFEC experts for the applicant and defendant. The wq ordered that the defendant pay the fees of the applicant's DFEC expert under Labor Code section 5811. The defendant moved that the wq be disqualified since he was previously familiar with the applicant's DFEC expert. The wq granted that motion. A subsequent wq then relied on the testimony of the applicant's DFEC expert and awarded permanent disability of 27%. Averaging the *Schedule* rating of 13% with the DFEC of 41 % resulted in the figure of 27%.

Both parties petitioned for reconsideration to the WCAB. In responding to the significant points made by both parties, the wq noted that it was his duty to calculate the level of PD for the specific applicant who appeared before him, when considering all the evidence, suggesting again that DFEC needs to be evaluated on a case-by-case basis.

Alvernaz

The next case is that of *Alvernaz* v. *United Parcel Service* (2006). Elizabeth Alvernaz was born on 10/9/80 and employed on 4/16/03 as a customer service clerk when she sustained an injury to her bilateral upper extremities. Her earnings were $380.30 per week. Her medical condition resulted in a whole person impairment of 0%. No information was provided regarding medical restrictions. The WCJ admitted the testimony of both DFEC experts and found their testimony persuasive and compelling. The WeT found PD of 20%, apparently based on a range of evidence between the DFEC experts. The costs of the applicant's DFEC expert were allowed. The WCJ also noted that the *Schedule* is *prima facie* evidence and can be challenged by applicant's evidence. Finally, the WeT referred to Labor Code section 4662 with reference to the applicant's limited use of her hands.

Mendoza

The case of *Mendoza* v. *Chevys Restaurant* (2007) involves prospective DFEC expert testimony in which the applicant requested and obtained an order from the WCJ that DFEC expert fees be paid in advance by the defendant, with the understanding that if later found unreasonable, they could be deducted from the applicant's PD award. The defendant filed a Petition for Reconsideration. In the Report and Recommendation on Petition for Reconsideration *(Mendoza* v. *Chevys Restaurant,* 2006) by the defendant, the WeT concluded:

> In sum, the WCT's decision herein merely leveled the playing field and allowed applicant a reasonable opportunity to provide rebuttal to advance these costs, due to the relative economic disparity between the parties. When the "compensation bargain" was struck in the early portion of the 20th Century, employers chose to advance those types of costs, in exchange *(inter alia)* for the protections of a limited system of compensation (pp. 9-10).

However, a 3-commissioner panel of the WCAB in its Opinion and Decision after Reconsideration rescinded the WCT's order for payment of DFEC expert fees in advance by the defendant. The panel concluded that DFEC expert testimony is not a medical-legal expense under Labor Code section 4620(a), where expenses are mandatory. However, such costs may be allowed under section 5811 following testimony to rebut the *Schedule,* where expenses are permissible. The panel also concluded that a physician is not required to use information about DFEC since it is unrelated to medical expertise.

Felix

The next DFEC case involving DFEC expert testimony was *Felix v. Crescent Truck Lines* (2007). Anthony Felix was employed on 2/8/05 as a truck driver/ loader/unloader when he sustained an injury to his low back. His condition resulted in a *Schedule* rating of 21 %. The WCJ admitted the testimony of the DFEC expert. The WCJ relied on the DFEC expert's opinion to rebut the *Schedule.* Specifically, the WCJ ruled that the DFEC expert's opinion of DFEC of 52% was equal to the permanent disability rating. The WeT concluded that it was reasonable to award PD benefits at 52% under the Labor Code rather than the actual loss of income caused by the injury, which would have been much greater. The WCJ also concluded that in attempting to rebut the *Schedule,* Labor Code section 4660 does not indicate that only those factors set forth in Labor Code section 4660 and/or the method and data mentioned in Labor Code section 4660 may be used in determining permanent disability. Finally, the WCJ ordered payment of the DFEC expert's fees by the defendant under Labor Code section 5811. The defendant appealed the decision of the WCJ.

Boughner

The case of *Boughner v. Camp USA* (2007) involved an attack on the validity of the *Schedule* regarding DFEC alone. The WeT admitted testimony by a statistical expert, pursuant to Labor Code section 5703(g). There was no testimony by a DFEC expert. Scott Boughner was born on 12/20/49 and employed on 5/6/05 as a sales associate when he sustained an injury to his right knee. His earnings on 5/6/05 were $410.00 per week. His condition resulted in a whole person impairment of 8 %. His medical condition resulted in a disability under the 1997 *Schedule* halfway between no heavy lifting, prolonged weight bearing, climbing, walking over uneven ground, squatting, kneeling, crouching, crawling, pivoting, and other activities involving comparable physical effort and a limitation to semi-sedentary work. The WeT concluded in a 51-page decision that the DFEC adjustment factors in the *Schedule* are inconsistent with the authorizing statute, Labor Code section4660(b)(2), and are therefore invalid. Among other things, the WeT concluded that the Administrative Director failed to base the adjusted rating schedule on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (Reville, Seabury, & Neuhauser, 2003), prepared by the RAND Institute for Civil Justice as required by Labor Code section 4660(b)(2). The WeT also noted that the Administrative Director failed to base the adjusted rating schedule on data from additional empirical studies, as required by Labor Code section 4660(b)(2). Based on these findings, the WeT concluded that the applicant had rebutted the presumptive validity of the *Schedule.* Finally, the WeT admitted the testimony of the statistical expert and ordered that the defendant pay the statistical expert's fees.

Boughner has been appealed. In the *Acting Administrative Director Carrie Nevans' Memorandum of Points and Au thorities in Support of Defendants Petition for Reconsideration, (Boughner,* 2007), the AD argued that the WCT's decision should be. rescinded since *Costa* (2006) in an en baric decision found the *Schedule* to be valid and since the WeT admitted inappropriate evidence that she then used to conclude that the *Schedule* is invalid.

Gonzales

The next court decision regarding DFEC is *Gonzales v. Fresno Roofing, Inc.* (2007). Daniel Gonzales was born on 10/16/51 and employed as a roofer on 9/22/03 when he sustained an injury to his right elbow, right upper extremity, clavicle, and spine. His earnings on 9/22/03 were $978.00 per week. Interestingly, the WeT noted in the Opinion on Decision that, "As defined elsewhere in the Labor Code, earnings are generally thought of as performance of work for the payment of wages" (p. 6).

This statement was made in the context of a discussion about whether Mr. Gonzales'

pension benefits (which were higher than his wages) should be considered when calculating DFEc. Among other things, this suggests that DFEC experts should consider wages alone, and not in combination with benefits, when calculating DFEC, except in those cases where there is a solid basis for considering benefits.

The WCJ admitted the testimony of the applicant's DFEC expert and ordered that the defendant pay the DFEC expert's fees under Labor Code section 5811. However, the WCJ concluded that the DFEC expert's opinion had not rebutted the *Schedule.* The WCJ expressed some concerns regarding issues such as the applicant's motivation to seek the highest paying job and similarly situated employees in attempting to calculate DFEc. At this point, the DFEC expert could have explained the concept of imputed earni{1gs and that DFEC experts address questions of motivation by assuming that an applicant will pursue the highest paying job post-injury to which he or she has access. Also, the DFEC expert could have explained how the issue of similarly situated employees is addressed by comparing an injured worker to non-injured workers with similar skills.

Magana

In *Magana v. Essey International, Inc.* (2007), a three-commissioner WCAB panel in its Opinion and Decision after Reconsideration affirmed the WCJ's decision to award a 12% permanent disability rating under the *Schedule,* including th_ FEC adjustment factor of 2 in the *Schedule.* Bonifacio Magana sustained an injuryon 2/7/05 to his left ankle and foot. The applicant's DFEC expert testified that the applicant had a DFEC of 18.5% to 27% while the defense DFEC expert testified that the applicant had no DFEc. Among other things, the panel concluded:

> Accordingly, it is clear that a rating based upon rebuttal testimony which arrives at a PD rating established solely on DFEC, without more, is not a valid rating. To simply convert a DFEC percentage to the overall percentage of PD, as suggested in applicant's petition herein, is invalid under Labor Code section 4660(d) and is insufficient to rebut a rating thereunder (p.3).

The panel concluded that neither DFEC expert "explained why the DFEC adjustment factor contained in the 2005 PDRS is somehow inadequate, or why a different DFEC should apply" (p. 5). In this regard, the DFEC experts could have cited Andrea Hoch's Senate hearing testimony of December 7, 2004, in which she testified that her FEC adjustment factors came from her policy decision and were not from the 2003 RAND study or from additional empirical studies. In addition, proportional earnings losses were based on impairment ratings from the 1997 *Schedule,* which suggests that extrapolating FEC adjustment factors to the 2005 *Schedule* would be speculative, absent additional empirical data and findings. In this regard, the DFEC experts also could have made reference to the 2005 RAND report (Reville, Seabury, Neubauser, Burton, & Greenbert), which states:

> One of the key implementation challenges with the new disability rating schedule is that the earnings-loss estimates reported here and in the interim report, which are the data to be used to generate the adjustments in the new schedule, are based entirely on injury descriptions used by the old California rating schedule. The new legislation requires the rating adjustments to be applied to the ratings from the AMA *Guides,* but the injury descriptions in the two systems are very different. At the time of this writing, there is no crosswalk that can be used to link the earnings-loss estimates in our data to the AMA *Guides* injury descriptions (p.93).

Regarding this challenge, a DFEC expert could explain to the court that he or she asks the physician to provide an opinion regarding permanent disability or medical restrictions for the client that is being evaluated, which is consistent with the WPI rating. In this way, DFEC experts develop an opinion on DFEC that is consistent with the whole person impairment rating under the AMA *Guides,* which complies with the requirements of Labor Code section 4660.

The panel appeared to consider the percentage of DFEC suggested by the DFEC experts as a possible replacement for the FEC adjustment factor in the *Schedule* rather than a replacement for the overall permanent disability rating. Among oth er things, this suggests that the applicant's DFEC expert did not clarify how a DFEC analysis considers the nature of the physical injury of the applicant, as well as age and occupation. Finally, the panel stated that testimony of the applicant's DFEC expert should occur after a recommended rating.

Benko

The next court decision regarding DFEC is *Benko v. EMCOR/Marelich Mechanical* (2007). Michael Benko was born on 8/28/60 and employed as a plumber on 8/12/04 when he sustained an injury to his lower back. His pre-injury earnings were $31.61 per hour according to the calculations of the agreed DFEC expert, in consultation with an economist. He had returned to work as a meter reader and was paid $21.58 per hour. He had union benefits both pre- and post-injury.

The WCJ relied on the applicant's qualified medical evaluator's report. The physician's WPI rating was 16% and the application of the FEC adjustment increased the rating to 19%. Work restrictions included no lifting over 25 pounds routinely, no single lifts over 40 to 45 pounds more than one to two times per workday, no repetitive or prolonged bending and stooping, no prolonged standing, and no repetitive forceful twisting of the trunk or lower back. The parties had stipulated to the DFEC report of the agreed DFEC expert, who found DFEC of 25%. The WCJ made reference to the *Magana* case in her Opinion on Decision. She noted that:

> The Board stated that the DFEC analysis was to be considered along "with the nature of the physical injury and disfigurement, the occupation of the injured employee, and his or her age at the time of injury. Furthermore, the 'nature of the physical injury and disfigurement' must incorporate the descriptions and measurements of physical impairments and corresponding percentages of impairments published in the AMA *Guides"* (p. 3).
>
> Basedon the language in the *Magana* case, in the very least, the DFEC factor that is built into the 2005 PDRS should actually be applied after the adjustment for age and occupation. Taking it one step further, as I did in this case, when there is such a clear find

ing by an agreed DFEC expert of loss of earning capacity, it should be considered as a separate injury/insult to the injured worker and the combined tables should be applied. This would then allow the DFEC percentage to be converted, validly, into permanent disability, point for point. (p. 3)

Therefore, the We] added the physical injury rating of 16% to the DFEC of 25% to reach a combined disability of 37% final permanent disability, apparently using the combined values table. The record is not clear as to whether the We] was aware that a DFEC evaluation necessar
ily includes consideration of the nature of the physical injury, occupational factors, and the age of the applicant. This case was submitted on the record. There was no live testimony from the applicant or the agreed DFEC expert. The agreed DFEC expert's fees were not an issue before the court. The claims administrator paid the DFEC expert's fees prior to the evaluation. This case is currently under appeal.

Wirick

The next case in which DFEC expert testimony was used in an effort to rebut the *Schedule* was *Wirick* v. *State of Cali fornia* (2007). Jamie Wirick was born on 9/25/51 and was employed as employment program representative for the California Employment Development Department when she sustained an injury on 7/1/05 to her bilateral arms, hands, wrists, and neck. Her condition became permanent and stationary on 2/5/07. She had a whole person impairment, which resulted in a permanent disability rating of 6% under the *Schedule,* before considering the FEC adjustment factor. Her only work restriction was to work four days per week in-stead of five days per week at her regular occupation.

The We] admitted the incontroverted testimony of the applicant's DFEC expert. The DFEC expert concluded that the applicant sustained DFEC of 25%, 20% for her limited work life expectancy and an additional 5% for diminished retirement benefits for total DFEC of25%. Regarding retirement benefits, the WCJ stated:

> It is noted that since applicant is a State employee, the nature of her retirement benefits makes it a valid factor to consider whereas generally, such a factor may be too speculative for non-governmental or non-defined retirement benefit entitled employees (Opinion on Decision, p. 3).

The We] described various ways in which he could apply the finding of the DFEC expert of DFEC of 25%. The We] concluded that it would be most reasonable to increase by 25% the monetary value of the applicant's 6% permanent disability of $3,960.00. A 25% increase would result in $4,950.00, which is what the WCJ ordered, noting, "This approach is in keeping with the letter and the spirit of Legislature, while accounting for applicant's rebuttal evidence concerning her specific diminished future earnings" (Opinion on Decision, pp. 4, 5). Finally, the WCJ's decision was silent regarding the issue of payment of the DFEC expert's fee.

Interestingly, while the WCJ acknowledged that the DFEC expert considered the applicant's injury, age, and occupa
tion, the We] rejected awarding PD of 25% in rebuttal to the *Schedule* because "in other situations, applicant's diminished future earnings capacity may not be as delineated as it is in this situation resulting in inconsistent results and exceptions" (Opinion on Decision, p. 4). But, the wq did not explain how the results would be different if the factual record was the same, and did not note in the decision that the defendant did not offer any expert testimony to that effect, or at all. In this regard, California courts have commonly held that, generally, uncontradicted and unimpeached evidence is accepted as true *(Garza* v. *Workmen's Compo App. Bd.,* 1970; *Le Vesque* v. *Workmen's Compo App. Bd.,* 1970).

Lyngso

The next case is that of *Lyngso Garden Materials, Inc. (Ruiz)* v. *Workers' Compen-sation Appeals Board, et al.* (2007). In this decision, the Court of Appeal ruled that the wq and the WCAB incorrectly applied the 1997 *Schedule.* The matter was returned to the lower court for a new
trial on the issue of DFEc. The Court of Appeal upheld the WCJ's assessment of DFEC expert fees as an item of costs.

Campos

The next case involving DFEC expert testimony was *Campos* V. *Coca-Cola En-terprises* (2007). Hector Campos was born on 11/8/79 and was employed as a merchandiser for Coca-Cola Enterprises when he sustained an injury to his right upper extremity on 3/9/05. His condition became permanent and stationary on 6/16/06. His work limitations precluded overhead activities with the right arm,
heavy or repetitive pushing or pulling of greater than 30 pounds, and lifting more than 15 pounds. He was found to have a final rating of 5% under the *Schedule.* The PD benefit was increased by 15% since the employer did not offer modified or alternative work within 60 days.

The We] rejected the opinions of the applicant's DFEC expert because they were premised on work restrictions while npting that Labor Code section 4660 relies on impairment descriptions in the AMA *Guides.* In this instance, the DFEC expert could have explained that the *Guides* (Cocchiarella & Andersson, 2001) note that:

> When a physician is asked to evaluate work related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, given the permanent impairment (p. 5).

The *Guides* (Cocchiarella & Andersson, 2001) also require the physician to take a detailed work history (p. 21) and, "explain any conclusions about the need for restri,ctions or accommodations for standard activities of daily living or *complex activities such as work"* (p. 22). Finally, the
Sample Report for Permanent Medical Impairment includes a section for "work ability, work restrictions" (p. 24). Also, the DFEC expert could explain that the DFEC adjustment factor in the *Schedule* is not based on the RAND Interim Report or other empirical studies *(Boughner;* Reville; Hoch), and that the dual rating in this case of WPI and work restrictions represents a sufficient crosswalk to demonstrate that the DFEC determined by the
expert complies with the requirements of Labor Code section 4660.

Turner

The next case involving DFEC expert testimony was *Turner* v. *Expo Design Center* (2007). This case is different from

the preceding cases in that the applicant claimed permanent and total disability, or 100% permanent disability. Michael Turner was born on 6/2/56 and was employed as a store manager on 6/3/03 when he sustained an injury to his right wrist, right hand, left wrist, bilateral upper extremities, bilateral lower extremities, and neck. His average weekly wage was $1,293.45. His condition became permanent and stationary on 10/31/05. The AME diagnosed complex regional pain syndrome in both upper extremities.

The AME initially found a WPI of 99%, which was reduced to 84% after reviewing sub rosa videos. The reports of both DFEC experts were admitted into evidence. The wq found 100% permanent total disability based on the applicant's testimony, the opinions of the AME and the treating physician, and the opinions of the applicant's DFEC expert, whose testimony was found to be especially compelling. The AME concluded that the applicant could work only in a sheltered workshop. However, the applicant's DFEC expert testified that the applicant was not suited for a sheltered workshop because of his "lack of stamina, persistent pain and barely functioning upper extremities" (Opinion on Decision, p. 7). The wq also considered the testimony of the applicant and then concluded, "I am convinced that applicant's inability to maintain a sustained work pace, his cognitive deficits, his functional restrictions, his lack of stamina and his pervasive level of pain synergistically render him unemployable" (Opinion qn Decision, p. 8). The applicant was found to be 100% permanently totally disabled under the new *Schedule.* The reports and testimony of the applicant's DFEC expert rebutted the new *Schedule.*

Lopez

The next case involving DFEC expert testimony was *Lopez v. Dermatology Surgical and Medical Group* (2007). Aurora Lopez was employed as a file clerk when she sustained an injury to her right knee and right (dominant) wrist. Her condition resulted in a WPI of 10%. One AME reported that Ms. Lopez could do clerical work that did not require greater than occasional squatting and occasional climbing. A second AME found work restrictions including: no lifting, gripping, grasping, or pulling over 5 pounds with right hand and upper extremity; typing and repetitive motion; activity of computer keyboarding limited to 20 minutes per hour; preclusion from forceful repetitive use of the right hand and upper extremity. (Report and Recommendation on Petitions for Reconsideration, p. 4)

The applicant's DFEC expert used the SEDEC Method as his numerical formula, and found an average DFEC of 26.5%. However, on cross-examination he testified that he did not know of any empirical research supporting the validity or correctness of SEDEc. The expert could have made reference to *Methods and Protocols* (Field, Johnson, Schmidt, & Van de Bittner, 2006), which describes several loss of earning capacity methodologies as published in peer-reviewed, professional journals.

The DFEC expert's answer to a question about similarly situated employees was not persuasive. He could have referenced RAND's analysis of similarly situated employees as a control group of workers in the same occupation with an employer and how this is consistent with the concept of similarly situated employees being those with similar skills.

The wq accepted that the DFEC expert had successfully argued that "the FEC adjustment does not provide an accurate representation of an injured worker's loss of earning capacity which is a result of the impairment caused by the injury at issue" (Report and Recommendation on Petitions for Reconsideration, p. 10). But, the wq stated that the primary issue is whether the DFEC expert "adequately and appropriately rebutted the provisions of the 2005 PDRS/ AMA Guides" (p. 10). The wq concluded that the DFEC expert had not done so since he relied on work preclusions rather than descriptions and measurements of physical impairments and the corresponding percentage of impairments from the AMA *Guides.* Therefore, the wq concluded that "work preclusions are not a proper consideration in establishing percentages of permanent disability resulting from an injury where the AMA Guides must be utilized" (p. 10). Here, the DFEC expert could have pointed out the numerous references to work restrictions and preclusions in Chapters 1 and 2 of the AMA *Guides* and made reference to *Disability Evaluation,* a publication of the AMA, in which Williams (2003) describes the role of a vocational rehabilitationist.

The wq goes on to state:

> It is also noted that Applicant's arguments failed to address what appears to be a threshold issue: Assuming that the expert's testimony is correct, what should be done with the findings that Applicant has lost between 18 and 35% of her earning capacity? Should the loss of the earning capacity be converted directly to a percentage of disability? Should it be used in some other way to adjust Applicant's level of disability? Had Applicant proven that the FEC adjustments, as contained in the 2005 PDRS, were improperly calculated and therefore do not provide the results intended by the legislature, such evidence may successfully have rebutted the provisions of the rating schedule. Had Applicant's expert identified an FEC adjustment factor which would more accurately reflect Applicant's reduced earning capacity, that number may have been substituted for the FEC adjustment contained in the PDRS. However, the expert testimony did not address the actual FEC adjustment. Instead, the expert relied on factors not in the AMA Guides to establish an overall loss of future earning capacity. Such evidence is more sufficient to rebut the provisions of said rating schedule (Report and Recommendation on Petitions for Reconsideration, p. 11).

The above comments from the wq suggest that DFEC experts need to be prepared to testify regarding the problems with the FEC adjustment factors in the *Schedule* (see *Boughner,* Reville, & Hoch). The DFEC expert needs to be prepared to explain how an applicant's actual DFEC is equal to PD since the assessment of DFEC considers the applicant's injury, age, occupation, and earning capacity. As an alternative, the DFEC expert can offer a replacement FEC adjustment factor for the one contained in the *Schedule,* as illustrated by the wq in *Cordon* (2007).

Cordon

The next case in which DFEC expert

testimony was used in an effort to rebut the *Schedule* was *Cordon* v. *Gael Force Construction* (2007). Gustavo Cordon was born on 5/13/77 and was employed as a construction worker on 2/17/05 when he sustained an injury to his right ankle and right foot. His actual earnings were $500.00 per week. His condition reached maximum medical improvement on 3/14/06.

Mr. Cordon's final rating under the new *Schedule* was 8%. The 5% standard rating was adjusted to 6% using a FEC modifier of 2, and adjusted to a final rating of 8% when considering age and occupation. His rating under the 1997 *Schedule* was 40%. Cordon chose not to challenge the validity of the *Schedule.* Therefore, the WCT determined it was necessary to use the RAND methodology and he calculated the ratio of the applicant's impairment rating over his percentage of losses. Mr. Cordon's standard rating of 5% divided by the earnings loss percentage from the DFEC expert of 61.6% results in a ratio of 0.081. According to the WCJ, this ratio is 6 times lower than the lowest ratio in Table A of the *Schedule,* which is 0.450 for FEC Rank 8. The WCJ next determined that Mr. Cordon's adjusted rating using FEC Rank 8 would be 7%. In order to reflect the fact that Mr. Cordon's ratio of impairment over earnings was 6 times lower than the ratio for FEC Rank 8, the WCT then multiplied the adjusted rating of 7% times 6 to arrive at a 42% final disability rating. In reference to *Magana,* the WCJ also determined that requiring the applicant to present rebuttal testimony to the Disability Evaluation Unit's rater would be duplicative.

Mercado

The next case is that of *Mercado* v. *Target Stores* (2007). Aurelio Mercado was employed as a stocker by Target Stores and sustained an injury to his back on 9/30/05. The agreed medical evaluator (AME) concluded that Mr. Mercado was limited to semi-sedentary work and had a whole person impairment of 34%. The AME noted that subjective symptoms included constant moderate pain, becoming severe on activity. The WCT determined that it was appropriate for the applicant's DFEC expert to rely primarily on the applicant's subjective complaints in concluding that he was permanently totally disabled and had no future earning capacity.

The WCJ determined that the applicant was permanently disabled. The case notes and testimony of both DFEC experts were admitted into evidence. The applicant successfully rebutted the *Schedule.* The lien of the applicant's DFEC expert was deferred, pending adjustment. The WCJ also concluded that it would be speculative to determine future earning capacity contingent on educational benefits, including tuition and living expenses that are no longer available to the applicant. Also, the applicant's permanent total disability was the result of the physical effects of the industrial injury, despite the applicant having a pre-injury preclusion from at least 75% of the labor market due to his lack of education and English language skill.

McGinnes

The next case is that of *McGinnes* v. D. C. *Taylor Company* (2007). Harry McGinnes was born on 5/6/51. He was employed as a roofer and sustained a cumulative trauma injury ending 2/28/01, his last day of employment. Injuries were to his spine, left elbow, and left knee. He received treatment in Delaware and in California. His earnings were $660.00 per week. The agreed medical evaluator (AME) found a WPI of 53% under the AMA *Guides.* Under the 1997 *Schedule,* the AME determined that Mr. McGinnes was limited to very sedentary work with a need to change positions at will, and a need for a break of at least one hour in the morning and in the afternoon.

The WCJ admitted the reports and testimony of the DFEC experts for both parties. The WCJ determined that Mr. McGinnes was unemployable and that his DFEC was total, citing Labor Code section 4662 in his reasoning.

The WCJ awarded payment or reimbursement of medical-legal costs, including costs of the applicant's DFEC expert, to be determined by a WCT, absent adjustment by the parties. Interestingly, regarding payments for Delaware physicians, the WCJ noted, "With respect to the payments made to doctors, it is not surprising that physicians not operating within, or receiving payment under, the California workers' compensation system would demand payment in advance for producing a narrative report" (Opinion on Decision, p. 7). This is apropos to the requirement of some DFEC experts that they receive payment in advance for an evaluation or testimony.

Favor

The next and final case is that of *Favor* v. *Petaluma City School District* (2007). Karen Favor was born on 8/2/49 and employed on 9/14/04 as a custodian when she sustained an injury to her low back. She was paid $785.37 per week at the time of injury. Her condition became permanent and stationary on 7/19/06. An AME found a 10% WPI.

The applicant's DFEC expert did not appear at trial. As a result the WCJ relied on the testimony of the defense DFEC expert who had found DFEC of 33.5% to 39%. The WCJ used the range of evidence and concluded that the applicant had PD of 37%, less 25% apportionment found by the AME for a 28% PD award. Finally, the WCJ found the applicant's DFEC experts lien to be reasonable although he did not find her report to be credible and substantial. Payment of her fee was ordered at a reduced rate.

In reviewing all of the preceding court decisions in combination, one can see that there is no consensus among the WCTs and the WCAB regarding various issues affecting the use of DFEC experts to calculate DFEc. At the same time, several 6bservations can be made from these decisions. One is that courts commonly accept the testimony of DFEC experts. Another is that they commonly order defendants to pay the applicant's DFEC expert's fees as an expense under Labor Code section 5811. In addition, some courts have relied on the testimony of the DFEC expert to rebut the *Schedule* and replace the *Schedule* rating with the actual DFEC identified by the DFEC expert, or some related figure. At the same time,
other courts have rejected the opinions of the DFEC expert and have concluded that the *Schedule* rating is appropriate. Also, in one decision the WCJ and a WCAB panel accepted the DFEC expert's opinion that the applicant had a higher DFEC than the FEC adjustment factor in the *Sched*
ule, but found that the DFEC expert had

not rebutted the *Schedule* since he relied on work preclusions rather than impairments from the AMA *Guides* in calculating DFEc. Overall, the use of DFEC expert testimony in an attempt to rebut the *Schedule* appears to be consistent with the conclusions of the Workers' Compensation Appeals Board in *Costa* v. *Hardy Diagnostic* (2006) that, "The effect, if any of the changes to section 4660 as to what evidence may actually rebut a rating under the new PDRS will be decided, at least initially, on a case by case basis" (p. 26).

Labor Code Section 4662

All of the discussion to this point has been related to Labor Code section 4660. However, any review of permanent disability also needs to consider Labor Code section 4662, which was not repealed, changed, or modified by Senate Bill;899. While Labor Code section 4660 deals with "percentage of permanent disability; schedule" (Grant, et aI., 2007, p. 320), Labor Code section 4662 deals with "permanent disability; presumption of total disability" (Grant, et aI., 2007, p. 321).

In its entirety, Labor Code section 4662 (Grant, et aI., 2007) states:

> Any of the following permanent disabilities should be conclusively presumed to be total in character:
>
> (a) Loss of both eyes or the sight thereof.
>
> (b) Loss of both hands or the use thereof.
>
> (c) An injury resulting in a practically total paralysis
>
> (d) An injury to the brain resulting in incurable imbecility or insanity.
>
> In all other cases, permanent total disability shall be determined in accordance with the fact (p. 321).

In *Turner,* although not stated, the wq may have considered Labor Code section 4662 given his reliance on several "facts" not typically addressed in Labor Code section 4660. Among other things, these facts included subjective complaints and actual work limitations including chronic pain, inability to maintain a sustained work pace, cognitive deficits, functional restrictions, lack of stamina, and perceived pain level. These factors were found to synergistically render the applicant unemployable. Another fact considered was the applicant's DFEC expert's opinion that the applicant would not be suitable for sheltered employment.

Labor Code section 4660 focuses on permanent partial disability primarily while Labor Code section 4662 focuses entirely on permanent total disability, with no mention of age, occupation, or FEC adjustment factors. When considering the *Turner* decision, it is important for DFEC experts, attorneys, and other interested parties to consider the impact of a claim for permanent total disability level in relation to Labor Code section 4662.

Related to this is the outcome of *City of San Buenaventura* v. *WCAB (Schulte)* (2006), in which the Court of Appeal upheld the decision of the WCAB that the defendant was not entitled to a credit against the permanent total disability award for permanent partial disability paid to the applicant for a prior award. Permanent partial disability interestingly was determined to be a distinctly different benefit from the permanent total disability award. Therefore, the applicant received the full benefit of each award.

Moreover, in *Alvernaz* v. *United Parcel Services* (2006), the wq referred to Labor Code section 4662 for a case with a whole person impairment of 0%. Here, the wq appeared to be concerned about the facts of the case, which included an applicant with limited use of her hands and resultant DFEC as confirmed by both DFEC experts.

Finally, in *McGinnes* v. D. C. *Taylor Company* (2007), the wq specifically refers to Labor Code section 4662 in this case involving a claim for permanent and total disability. Regarding such a claim, the wq concluded that Labor Code section 4662 means "that the facts of the case govern the issue" (Opinion on Decision, p.5).

Court Decisions Regarding Vocational Expert Costs in Non-DFEC Cases *Rodriguez*

Several non-DFEC court decisions are included next since they address the issue of payment of vocational expert fees, and have repercussions for DFEC cases as well, as outlined in Table 2. In *Rodriguez* v. *Walker Communications* (2006), the wq ruled on the is_ue of reimbursement of vocational expert fees. In this case, defendants argued that fees should not be allowed per Code of Civil Procedure 1033.5. However, the wq noted that in the workers' compensation arena, it has always been recognized that injured workers do not have the resources to combat those of the insurance carrier as witnessed by the existence of section 3202, reimbursement of medical-legal reports, and the right to copies of depositions at the carrier's expense. The WCJ noted that sections 5811 and 3202 allow the injured worker to present its case. The wq ordered reimbursement of the vocational expert's fees.

Table 2

Court Decisions Regarding Vocational Expert Fees in Non-DFEC Cases

Court Ruling	Admissibility Report Testimony Yes	Admissibility Report Testimony No	VE Opinion Used to Rebut PD Rating Yes	VE Opinion Used to Rebut PD Rating No	VE Fees Ordered On Related Cases Yes	VE Fees Ordered On Related Cases No	Recon. or Writ Denied* Yes	Recon. or Writ Denied* No
Rodriguez, Order Denying Reconsideration, 4/5/2006	x				x		x	
Nunes, Opinion & Order Granting Reconsideration and Decision after Reconsideration, 6/16/2006		x	x		x			
Nunes, Writ of Review Denied, 3/1/07							x	
Dabanian, Order Awarding Costs, 9/18/2006					x			
Dabanian, Order Denying Reconsideration, 11/13/06							x	
Dabanian, Petition for Writ of Review, 3/29/07							x	
Dias, Joint Findings & Award, 10/11/06					x			
Dias, Order Denying Reconsideration, 12/6/2006							x	
Dias, Petition for Writ of Review, 3/29/07							x	
Wixom, Opinion & Decision after Reconsideration, 5/22/07					x			
Rasmussen 6/7/07	x							

* Petition for Reconsideration or Petition for Writ of Review Denied

Augustine Rodriguez was born on 5/5/43 and employed on 3/13/00 as a telephone installer by Walker Communications in Palo

Alto, California. He sustained injuries to the heart and cardio-pulmonary systems. In the Report and Recommendation on Petition for Consideration (2006), the WCT noted that the vocational expert helped establish permanent disability by measuring the injured worker's ability to compete in an open labor market. Further, the WCT noted that the vocational expert did not testify in the present case but his report and opinion provided the basis for the defense to stipulate to a 100% award. A WCAB panel denied the defendant's Petition for Reconsideration regarding the WCT's award for reimbursement of vocational expert fees.

Nunes

The next non-DFEC case involving vocational expert testimony was *Zurich American Insurance (Nunes) v. Jforkers' Compensation Appeals Board* (2bo7). Amanda Nunes sustained an injury to her low back on 2/9/04 while she was employed as a photo lead technician. The WeT admitted the vocational expert's testimony regarding DFEC and ordered payment of the vocational expert's fees under Labor Code section 5811. The WCAB panel concurred, but ruled that the WeT should have used the 1997 *Schedule* rather than the 2005 *Schedule.* The defendant filed a Petition for Writ of Review, contending that the 2005 *Schedule* should apply in this case. The Court of Appeal denied the Petition for Writ of Review.

Dabanian

In *Dabanian v. City of San Jose and Subsequent Injuries Fund* (2007), the defendant, Subsequent Injuries Fund, argued that vocational expert fees are not a cost under Labor Code section 5811. The WCT disagreed and ordered that the Subsequent Injuries Fund pay the vocational expert's fees. A subsequent Petition for Reconsideration was denied by the WCAB. The Court of Appeal later denied a Petition for Writ of Review.

Dias

Similar to the above case, in *Dias v. Waste Management of San Jose and Subsequent Injury Benefit Trust Fund* (2007), the defendant, again Subsequent Injuries Fund, argued that vocational expert fees are not a cost under Labor Code section 5811. The WeT again ordered the Subsequent Injuries Fund to pay the vocational expert's fees. Further, in his Opinion on Decision, the WeT concluded that:

> An injured worker should not have to forego obtaining an appropriate rating just because he does not have the financial resources available to finance the evidence required in his workers' compensation case. Section 5811 and 3202 allow the injured worker to present his case (p. 3).

A Petition for Reconsideration was denied by the WCAB. The Court of Ap
peal then denied a Petition for Writ of Review.

Wixom

In *Wixom v. City of Concord* (2007), a WCAB panel in its Opinion and Decision after Reconsideration ordered the defendant to pay the applicant's vocational expert's fees under Labor Code section 5811. Further, the panel noted that "it was virtually a professional duty for the applicant's attorney" (p. 4) to call the vocational expert as a witness given his and a vocational evaluator's prior opinion that the applicant was not employable.

Rasmussen

Finally, in *Rea v. Workers' Compensation Appeals Board (Rasmussen)* (2007), the WCAB found that the Subsequent Injuries Benefits Trust Fund was liable for the vocational expert's fees under Labor Code section 5811. The Court of Appeal denied a Petition for Writ of Review.

In summary, in these related cases, WCTs, the WCAB, and the Court of Ap
peal have ruled on the issue of payment of vocational expert fees. In all of the above cases, the court concluded that the defendant was responsible for payment of the applicant's vocational expert's fees. Frequently, the court cited Labor Code section 5811, and occasionally section 3202, as the basis for its opinion on the payment of vocational expert fees.

Issues Requiring Clarification Under Labor Code Section 4660(b)(2)

Issues such as earning capacity and similarly situated employees mentioned in Labor Code section 4660(b)(2) would benefit from further clarification. The greatest economic asset most people pos
sess is their earning capacity (Shahnasarian, 2004). In acknowledging that one of
the major losses resulting from an industrial injury is an individual's loss of income and future earning capacity, Labor Code section 4660(b)(2) mandates that an employee's diminished future earning capacity (DFEC) be considered in determining permanent disability.

Earning Capacity

As DFEC experts it is important when considering the percentage of an applicant's diminished future earning capacity, to distinguish between *earnings* and *earning capacity. Earnings,* (Shahnasarian, 2004) refers to an individual's demonstrated, historical record of generating compensation through employment. *Earning capacity* refers to an individual's ability to optimize her or his employment efforts and maximize earnings.

Blacks Law Dictionary (Garner, 1999) defines earning capacity as, "A persons ability or power to earn money, given the person's talents, skills, training and experience:' (pp. 547-548). Lost earning capacity is defined as "a persons diminished earning power resulting from an injury" (Garner, 1999, p. 956). Earning capacity has also been defined as "(t)he ability of the individual to obtain and hold the highest paying job to which he/ she would have access" (Weed & Field, 2001, p. V-7). Finally, economists Horner and Slesnick in *The Valuation of Earning Capacity Definition, Measurement and Evidence* (1999) state, "Earning capacity is the expected earnings of a worker who chooses to maximize the expectation of actual earnings" (p.15).

In analyzing earning capacity it is important to recognize individuals do not always achieve their earning capacity, and sometimes one's earnings history may understate or even overstate earning capacity. Assessing earning capacity involves a complex, systematic process to determine the maximum amount of employment income an individual is capable of generating, given for example, his or her educational and vocational profile, transferable skills, age at which an individual entered the labor market, worklife expectancy, and other factors. To accomplish this may involve reviewing employment and medical records, interviewing the individual,

administering standardized tests to the individual, conducting labor market research, and evaluating market data resources for collateral information.

To evaluate diminished future earning capacity in accordance with Labor Code section 4660, a DFEC expert, with or without the assistance of an economist, needs to properly establish the applicant's pre-injury earning capacity as well as post-injury earning capacity. The difference is applied to a numeric formula in order to express diminished future earning capacity as a percentage.

The DFEC expert authors have evaluated the diminished future earning capacity of dozens of applicants over the past two years. The first step in calculating diminished future earning capacity is to establish the basis of pre-injury earning capacity. In carefully evaluating the circumstances of a particular applicant, the most likely bases of pre- injury earning capacity have been found to be as follows:

1. Actual earnings at the date of injury, which is often synonymous with the average weekly wage of the applicant.
2. The average of the wages for several years of employment prior to the date of injury.
3. The highest wage in the applicant's work history.
4. The expected future wage of an injured worker in the early stages of a career at the time of injury.

Additional considerations affecting earning capacity may be undeveloped or in some cases underdeveloped abilities, such as in the case of a college student, an entry level professional who has not yet achieved his or her career potential, or someone who has not fully pursued his or her career development. In some cases an individual's earnings history may not be an accurate benchmark of his or her earning capacity, such as one who may forgo employment to pursue a minimally compensated avocation or stop working to pursue a higher level of education.

What, for example, is the future earning capacity of an individual injured while working as a Certified Nurses Aide earning $10.57 an hour to generate income and work experience while attending nursing school to earn an RN license? Similarly, what is the future earning capacity of a second quarter union carpenter apprentice? Is this individual's earning capacity actually that of a journey level carpenter? The difference in this individual's percentage of diminished future earning capacity can be 25% as a young apprentice and 66% as an experienced union carpenter depending upon age, occupation, and work life expectancy.

In determining whether an employee has sustained a loss in earning capacity, an analysis of the employee's demonstrated earnings history (for all jobs and occupations) is helpful in determining a baseline for an earning capacity. In our conversations with economists and from our work in assessing DFEC under Labor Code section 4660 it is the experience of the authors that there are more factors affecting earning capacity than we might initially expect. For example Shahnasarian (2004) has suggested that in addition to earnings history, factors of age, gender, education, occupational history, geographic location, economic trends, and related factors are worth considering in determining earning capacity. Additional factors include stability and phase of career development, motivation, ability to apply prior skills, future career development prospects, cognition, prognosis, need and capacity for retraining, preexisting vocational limitations, acquired vocational limitations, and vocational adjustment issues.

Another criterion in determining an individual's DFEC under Labor Code section 4660(b)(2) is an analysis oflong-term loss of income *resulting from each type of injury for similarly situated employees.* Yet, alluded to in *Navarro, Bojorquez, Alvernaz, Mendoza, Gonzales, Wirick, Mercado* and other decisions is the need to evaluate an applicant as an individual or on a caseby-case basis. In *Mercado* in particular, the WeT accepted the applicant's DFEC expert's argument that "we are required to take the injured workers as they are at the time of the DFEC evaluation" (Report and Recommendation on Petition for Re-consideration, p. 5). This is a significant comment in that it indicates that DFEC experts should analyze the applicant with all of his or her pre-existing educational, language, and other circumstances, and compare the actual pre-injury earning capacity with actual post-injury earning capacity on an individualized basis. As rehabilitation counselors and experts we have always treated applicants as individuals and must continue to do so when determining an applicant's diminished future earning capacity.

This suggests that the DFEC expert should complete a comprehensive vocational rehabilitation evaluation of the applicant as an individual for a variety of reasons. First, this is the best way to determine the applicant's actual pre-and post-injury earning capacity. It offers the best way to aggregate the average percentage oflong-term loss of income related to the applicant's injury for similarly situated employees.

Furthermore, evaluating the applicant as an individual provides the best basis for, comparing the applicant's actual diminished future earning capacity with the adjustment factor for FEC in the *Schedule,* and comparing the applicant's actual diminished future earning capacity with the recommended rating for permanent disability. In addition, evaluating the applicant as an individual is necessary to calculate the applicant's average percentage of long-term loss of income related to the work injury that the applicant has sustained.

The WeT in *Gonzales* suggested a need for clarification for terms such as "average percentage of long-term loss of income:' Martin wrote in *Determining Economic Damages* (2005) that wages increase over time both for the individual and the occupation. Factors affecting wages include inflation, increased productivity and the measure of the value of a worker's output, and in many jobs there are step increases. Additional considerations may include promotions, incentive bonuses, and an increased demand for a limited supply of persons with some unique skill. State of California and u.s. Government data regarding wages and occupations can assist the DFEC expert in calculating DFEc. The Economic Research Institute (ERr) also provides data for wages byoccupation for narrowly defined geographic areas.

Incorporating such wage data into a numeric formula such as the Stepwise Estimate of Diminished Earning Capacity (SEDEC) developed by Robert Hall, Ph.D. (Hall, 2007) or the Workers' Compensa

tion Earning Capacity Formula (WCEC) developed by Eugene E. Van de Bittner, Ph.D. (Van de Bittner, 2006) enables the DFEC expert to analyze the average percentage of long-term loss of income for the type of injury sustained by the applicant when compared with similarly situated employees.

Similarly Situated Employees

The *Gonzales* decision raises the question: What is a similarly situated employee? For DFEC experts, identifying similarly situated employees begins with an analysis of the type of injury, which results in an impairment under the AMA *Guides* and the permanent work restrictions that result from that impairment. To the DFEC expert, similarly situated employees are those with the same or similar physical and psychological capacities, en)iironmental tolerances, skills (from education and work history), test scores, age at date of injury, and work life expectancy. Addressing these factors as part of the evaluation allows the DFEC expert to comply with the requirements of Labor Code section 4660(b)(2) regarding similarly situated employees.

Viewing similarly situated employees as those with the same or similar transferable skills is consistent with the comparison of injured employees with non-injured co-workers with the same employer, occupation, and wages described in the 2003 RAND report (Reville, Seabury, & Neuhauser). Rather than using pre-injury earnings for an injured worker, RA_D (2005) estimated post-injury earnings from a control group of workers "who were similar to the injured workers with respect to demographic and economic characteristics, but who did not experience a workplace injury during the time period under examination" (pp. 42-43). RAND's comparison group included "up to five workers at the same firm who had earnings that were closest to the injured worker's over the year prior to the injury;' (p. 43) who also had similar tenure. Calculating "the difference between the injured worker's earnings and the average earnings of the worker's comparison group" (p. 43) provided the estimate of earnings loss. RAND noted that "(p)re-injurywage is not a satisfactory proxy for future earnings" (2005, p. 52). But, the reasons for doing so are unclear and unconvincing.

However, in the vast database of injured workers studied in the 2005 RAND study, the researchers were able to identify cohorts for less than 70% of injured workers (p. 45). This indicates a continuing need for an analysis through another empirical study, such as DFEC evaluations, to evaluate the DFEC of those applicants for which no other source of data exists.

It has been suggested by some that the grouping of *similarly situated employees* should be limited only to employees of similar age and occupation. This is because an individual's earning capacity, in most cases, already encompasses an individual's pre-injury level of education, language skills, achievement levels, aptitudes to perform the job, etc. Therefore the only pertinent remaining variables would be long-term loss of income based upon age (worklife) and occupation.

As DFEC experts we have access to the individual's medical diagnoses, physical and mental impairment, and work limitations, as well as earnings. Through such empirical data we are able to "similarly situate" individuals as we consider vocational alternatives and earnings. For example, the earnings of an individual with a right dominant rotator cuff tear with work preclusions of no reaching at or above shoulder level can be compared with the earnings of other workers with comparable skills not requiring use of one's dominant upper extremity when performing work functions at or above shoulder level.

Another empirical data source when determining earning capacity for similarly situated employees following physical and/or psychiatric impairment includes historical and current intellectual function (as indicated by testing, academic records, academic performance or related objective data). Such data can be compared with similarly situated individuals by applying government and private data reported by education level, gender, intelligence, achievement, and aptitude levels, and the like. Through use of peer reviewed published normative data based upon age, gender, occupation, and other factors, we can determine an individual's diminished future earning capacity for similarly situated employees.

As vocational rehabilitation evaluators we perform transfe_able skills analyses while considering functional limitations, education, age, and acquired skills (based on the materials, products, subject matter, services, machines, tools, equipment, and work aids associated with past relevant work and the job tasks and setting associated with a specific work field) and use this data to determine what work exists in the labor market that an individual has the capacity to perform. Through such an analysis the effect oflimitations on the existence of jobs and the degree to which the limitations impact the individual's available labor market and earnings before and after the injury can be determined.

Motivation

Often raised during litigation is the issue of motivation and its impact on applicant's DFEc. In *Gonzales,* the WCJ expressed concern about the motivation of the applicant to pursue a job post-injury that paid the highest expected wage. In fact, the testimony of the applicant suggests he returned to work at a job that paid wages lower than what he could have earned elsewhere, in part because of generous disability retirement benefits. It is important to keep **in** mind that DFEC experts are evaluating applicants for their post-injury earning capacity, which may be greater than actual return to work earnings such as in *Gonzales* and *Navarro.* The role of the DFEC expert is to develop an opinion and testify regarding the most likely post-injury earning capacity based on the results of a comprehensive evaluation. In many venues, particularly family law, the judge or jury will use imputed earnings as the basis of post-injury earning capacity rather than actual return to work earnings, which in some cases are readily seen as lower than the individual's earning capacity. This also occurs while evaluating the future earning capacity for federal employees and longshore workers for the Office of Workers' Compensation Programs for the US. Department of Labor. In evaluating diminished future earning capacity, DFEC experts will typically assume that the applicant is fully committed to returning to work at the highest paying occupation. This is consistent with the way economists evaluate earning capacity (Horner & Slesnick, 1999). As such, issues like motivation and personal interests of the applicant are usually insignificant.

The WCJ in *Gonzales* also commented on the applicant's generous disability retirement benefits in relation to earning capacity. At the same time, the WCJ noted that, "As defined elsewhere in the Labor
Code, earnings are generally thought of as performance of work for the payment of wages:' (Opinion on Decision, p. 6). In civil cases, there are established rules that state collateral sources of income, such as workers' compensation benefits, Social Security Disability benefits, retirement benefits, etc. are to be excluded from any analysis of earning capacity.

Labor Market

An additional issue for consideration by the DFEC expert is the labor market of the applicant. Typically, the DFEC expert will determine the labor market that is most appropriate for the circumstances of the applicant or plaintiff being evaluated. In most cases the DFEC expert will use the local labor market where the applicant lived and worked at the time of injury. In some cases, the circumstances of the applicant require that a broader labor market be used. In cases where relocation has occurred, the DFEC expert will develop opinions regarding post-injury earning capacity for the geographic location where the applicant resided or is anticipated to relocate post-injury. In the current expanding labor market through the Internet, there are numerous "new and emerging" labor markets which may also be considered, with occupations such as home-based customer service representative.

Age

Age is another issue considered by DFEC experts in evaluating DFEC, usually through worklife tables. When considering age, issues such as the age of the applicant when he or she entered the work force, age at the date of injury, age at the point of maximum medical improvement, the stability of his or her work history and work propensity, education, motivation, interests, and related issues provide insight into the impact of age on worklife.

The age adjustment factor under the 2005 *Schedule* increases the final PD rating for older workers. However, in general, RAND (Reville, Seabury, & Neuhauser, 2005) found "slightly higher earnings losses for younger workers" (p. 63), ages 18-20, and "much higher losses for older workers" (pp. 63-64), ages 50-65. In addition, when comparing severity of disability, age, and earnings losses, RAND found "no linear relationship between earnings losses and age" (p. 65). Therefore, RAND concluded, "These results cast doubt on the effectiveness of the age modifiers used in the California system at least with regard to targeting benefits toward the most disabled workers" (p. 65). These RAND findings suggest another reason to evaluate an applicant's DFEC on an individual basis, until the matter is resolved satisfactorily in a revision of the *Schedule.*

Issues related to Labor Code section 4660, such as similarly situated employees and long-term loss of income will be clarified further in future court decisions. Meanwhile, it is incumbent upon the DFEC expert to be familiar with the complex issues impacting earning capacity in relation to the unique variables of each injured worker being evaluated.

Summary **and** Conclusions

Since the new *Schedule* took effect on January 1, 2005, numerous court decisions have been rendered regarding the use of DFEC expert testimony to attempt to rebut the permanent disability rating recommended by the *Schedule.* Many WeTs in California have admitted the report and testimony of a DFEC expert. Some WeTs have concluded that the DFEC expert's testimony was sufficient to rebut the *Schedule* rating while other WeTs were not favorably persuaded.

There have been five appeals decisions. The first is the decision by the WCAB in an en banc decision in *Costa* v. *Hardy Diagnostic* (2006) in which an appeals panel admitted the testimony of the DFEC expert regarding DFEC, ordered that the DFEC expert's fees be paid by the defendant, and concluded that the DFEC expert's opinion did not rebut the *Schedule.* Further, the appeals panel concluded that the *Schedule* is valid and that it represents prima facie evidence that can be rebutted on a case. by-case basis by DFEC expert testimony. In a subsequent *en banc* appeals decision in the same case in 2007, the WCAB up
held its 2006 decision that DFEC expert fees are allowable costs. In *Magana* v. *Essey International, Inc.* (2007), the WCJ and the appeals panel ruled that the *Schedule* was not rebutted. In *Mendoza* v. *Chevy's Restaurant* (2007), the appeals panel ruled that DFEC expert fees are allowable, but that a defendant is not required to pay them in advance. In *Lopez* v. *Dermatology Surgical and Medical Group* (2007), the appeals panel agreed with the WCJ that while the DFEC expert demonstrated that the applicant's earning capacity had been diminished, he had not rebutted the *Schedule* since he relied on work preclusions and not impairments from the AMA *Guides.* In addition, *Boughner* v. *Comp*
USA (2007) is currently under appeaL

Labor Code section 4662 was discussed as an alternative approach to using vocational expert or DFEC expert testimony to arrive at a proper determination of PD, when considering all of the facts of a given cas_. This section applies to permanent and total disability cases.

Several additional court decisions unrelated to DFEC were also summarized because of their significance in terms of the
payment of vocational expert fees. In all of these cases, the WCJ, the WCAB, and the Court of Appeal ruled that the defendant should pay the fees of the vocational expert.

Specific issues from Labor Code section 4660(b)(2) were also discussed in an effort to clarify how DFEC experts address the issues in their evaluations and testimony. The issues described include earning capacity, similarly situated employees, motivation, average percentage oflong-term loss of earnings, benefits, age of the applicant, and labor market. It is expected that the courts will clarify these issues further as DFEC experts evaluate more cases.

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