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Laws, Regulations, and Court Decisions Related to Diminished Future Earning Capacity (DFEC) and *Ogilvie*

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An understanding of the underlying laws, regulations, and court decisions related to diminished future earning capacity is important both in conducting a vocational evaluation and in reviewing the analysis and opinions presented by a vocational expert. This article provides the reader excerpts of key laws, regulations, and court decisions regarding diminished future earning capacity in the California workers' compensation system. The purpose of this article is to provide the reader a single resource that includes pertinent laws, regulations, and court decisions regarding diminished future earning capacity (DFEC) related to the California workers' compensation system. Excerpts of the actual language in the laws, regulations and court decisions from the source documents are provided. While this article focuses on the California workers' compensation system, the information presented regarding laws, regulations, and court decisions has potential application to other states as well.

Senate Bill 899

Senate Bill 899, a comprehensive workers' compensation bill, was signed into law on April 19, 2004 by California Governor Schwarzenegger (California Workers' Compensation Institute, 2004, April 20). As required by Senate Bill 899, Labor Code section 4660 (Bae, 2012) was modified and reads as follows:

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

(b)(1) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th ed.).

(2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.

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

(d) The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent dis-

abilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.

(e) On or before January 1, 2005, the administrative director shall adopt regulations to implement the changes made to this section by the act that added this subdivision. Leg.H. 1993 ch. 121, effective July 16, 1993, 2004 ch. 34 (SB 899), effective April 19, 2004. (pp. 345–346)

Of significance, paragraph (a) notes that determining the percentage of permanent disability shall consider "an employee's diminished future earning capacity." Paragraph (b)(2) defines diminished future earning capacity as "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."

Finally, paragraph (c) confirms that the rating schedule developed by the administrative director "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." This means that the rating schedule is rebuttable.

Labor Code section 4662 addresses the presumption of permanent and total disability related to certain medical conditions and was unchanged in SB 899. Labor Code section 4662 states:

Any of the following permanent disabilities shall 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 mental capacity or insanity.

In all other cases, permanent total disability shall be determined in accordance with the fact. Leg.H. 2007 ch. 31 (AB 1640) §2. (pp. 346–347)

The last paragraph in Labor Code section 4662 is relevant to an evaluation of employability and earning capacity regarding a claim for permanent and total disability. Workers' compensation judges can consider all of the medical and vocational facts of a case in rendering a decision regarding a claim for permanent and total disability.

2003 RAND Report

In its *Evaluation of California's Permanent Disability Rating Schedule, Interim Report* (Reville, Seabury, & Neuhauser, 2003), the RAND Institute for Civil Justice studied over 300,000 cases that were rated prior to the 2005 *Schedule for Rating Permanent Disabilities* (California Division of Workers' Compensation, 2005), as follows:

In this study, we use data on over 300,000 PPD ratings in California; all cases rated by the Disability Evaluation Unit (DEU) with an injury date between January 1, 1991, and April 1, 1997. Since several years of post-injury earnings must be observed to estimate earnings losses, injuries occurring after April 1, 1997, are not used. We are able to match most (over 69%) of the injured workers in this sample to both (1) similar workers and (2) to administrative data on wages from the Employment Development Department (EDD) to estimate the impact on earnings experienced by these workers. Thus, we are able to create a database that includes the type of impairment, disability rating, and the estimated earnings losses for 241,685 PPD claimants in California injured from January 1, 1991, to April 1, 1997.

Using these data, we can compare the disability ratings produced by the DEU to the observed earnings outcomes. In the past, disability rating systems lacked an empirical basis to support the ranking of impairments. In this study, earnings loss estimates provide a direct measure of how a permanent disability affects an individual's ability to compete in the labor market. (p. 18)

The 2003 RAND report described the control group of workers in the study as follows:

Our procedure for estimating wage loss involves linking injured workers to a control group of workers at the same firm with similar pre-injury earnings. We then compare the earnings of the injured workers after the date of injury to the earnings of their (uninjured) control workers. The difference between the earnings of the control workers and the earnings of the injured worker is the estimated earnings losses. Dividing losses by the control group's earnings (representing what the injured worker would have received if he or she had never been injured) we obtain an estimate of proportional earnings losses. (p. 19)

The 2003 RAND report also addressed only single-impairment cases for the reasons outlined below:

If the system performs adequately, then we would expect higher ratings to be associated with higher average earnings losses. As a first step in our analysis, we compare the three-year proportional earnings losses for all single-impairment, summary-rated injuries to the disability rating. Summary ratings are ratings based on medical reports by impartial, randomly assigned physicians and Agreed Medical Evaluators (AME). The figure matches proportional earnings losses to what we call the standard rating, which is essentially the measure of impairment, and the final rating, which includes all modifiers for age

and occupation and all subjective add-ons. We focus only on single-impairment cases because cases involving multiple impairments have multiple standard and intermediate ratings (the final rating is computed for multiple impairment cases by applying a complicated formula to the different ratings). Finally, we estimate earnings losses for impairments with ratings in ranges of ten percentage points (i.e., 1 to 10, 11 to 20, etc.). Because of missing data, we have slightly different sample sizes for each rating. We have 70,895 observations with a standard rating; 68,192 with an intermediate rating; and 68,295 observations with a final rating. (p. 21)

The 2003 RAND report considered only a 3-year timeframe of proportional earnings losses by noting:

Targeting higher benefits to more severe impairments is only one objective of the rating schedule; another is to ensure that the ratings are distributed equitably between different types of impairments. From the results of Reville et al. (2002b), we know that there are substantial inequities between the ratings assigned to different upper extremity impairments. Here, we conduct a similar analysis using four major impairment categories: shoulder impairments (the largest specific upper-extremity impairment), knee impairments (the largest specific lower-extremity impairment), loss of grasping power (GP) and back impairments (specifically, impairments to the neck, spine or pelvis). Again, we limit the analysis to single-impairment, summary-rated cases and consider three-year proportional earnings losses. Here, we group impairments with final ratings from 1 to 5, 6 to 10, 11 to 15, and so on up to 35; all ratings over 35 are grouped together (over 85 percent of single-impairment claims have final ratings of 35 or below). (p. 23)

2005 *Schedule*

On January 1, 2005, a new *Schedule for Rating Permanent Disabilities (Schedule)* (California Division of Workers' Compensation, 2005) became effective. The *Schedule* included an adjustment factor for diminished earning capacity that is to be applied to the whole person impairment rating by injury category. The application of the adjustment factor for future earning capacity (FEC) is described in Chapter 1 of the *Schedule* as follows:

3. Adjustment for Diminished Future Earning Capacity

The adjustment for diminished future earning capacity (FEC) is applied to the impairment standard in accordance with procedures outlined in section 2 of the Schedule. An impairment must be expressed using the whole person impairment scale before applying the FEC adjustment.

The methodology and FEC Adjustment table is premised on a numerical 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 empirical data was obtained from the interim report, "Evaluation of California's Permanent Disability Rating Schedule (December 2003), prepared by the RAND Institute for Justice. The result is that the injury categories are placed into different ranges (based on the ratio of standard ratings to proportional wage losses). Each of these ranges will generate a FEC adjustment between 10% and 40% for each injury category.

(a) Summary of Methodology:

1. *RAND data was used to establish the ratio of average California standard ratings to proportional wage losses for each of 22 injury categories. (Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899, December 2004, RAND Institute for Civil Justice, Seabury, Reville, Neuhauser.) These ratios are listed in Table B below.*
2. *The range of the ratios for all injury categories is .45 to 1.81. This numeric range was divided into eight evenly spaced ranges. (See the Range of Ratios columns in Table A below.) Each injury category will fall within one of these eight ranges, based on its rating/wage loss ratio.*
3. *A series of FEC adjustment factors were established to correspond to the eight ranges described above. (See column 4 of Table A below.) The smallest adjustment factor is 1.1000 which will result in a 10% increase when applied to the AMA whole person impairment rating. The largest is 1.4000 which will result in a 40% increase. The six intermediate adjustment factors are determined by dividing the difference between 1.1 and 1.4 into seven equal amounts.*
4. *The formula for calculating the maximum and minimum adjustment factors is* ***([1.81/a] x .1) +1*** *where a equals the minimum or maximum rating/loss ratio from Table B below. AMA whole person impairment ratings for injury categories that correspond to a greater relative loss of earning capacity will receive a higher FEC adjustment. For example, a psychiatric impairment receives a higher FEC adjustment because RAND data shows that a relatively high wage loss corresponds to the average psychiatric standard permanent disability rating. A hand impairment would receive a lower FEC adjustment because RAND data shows a relatively low wage loss relative to the average*

Table A
Range of Ratios

Low	*High*	*FEC Rank*	*Adjustment Factor*
1.647	*1.810*	*One*	*1.1000*
1.476	*1.646*	*Two*	*1.1429*
1.305	*1.475*	*Three*	*1.1857*
1.134	*1.304*	*Four*	*1.2286*
0.963	*1.133*	*Five*	*1.2714*
0.792	*0.962*	*Six*	*1.3143*
0.621	*0.791*	*Seven*	*1.3571*
0.450	*0.620*	*Eight*	*1.4000*

Table B

Part of the Body	*Ratio of Rating Over Losses*	*FEC Rank*
Hand/fingers	*1.810*	*One*
Vision	*1.810*	*One*
Knee	*1.570*	*Two*
Other	*1.530*	*Two*
Ankle	*1.520*	*Two*
Elbow	*1.510*	*Two*
Loss of grasping power	*1.280*	*Four*
Wrist	*1.210*	*Four*
Toe(s)	*1.110*	*Five*
Spine Thoracic	*1.100*	*Five*
General lower extremity	*1.100*	*Five*
Spine Lumbar	*1.080*	*Five*
Spine Cervical	*1.060*	*Five*
Hip	*1.030*	*Five*
General upper extremity	*1.000*	*Five*
Heart disease	*0.970*	*Five*
General Abdominal	*0.950*	*Six*
PT head syndrome	*0.930*	*Six*
Lung disease	*0.790*	*Seven*
Shoulder	*0.740*	*Seven*
Hearing	*0.610*	*Eight*
Psychiatric	*0.450*	*Eight*

psychiatric standard permanent disability rating.

The FEC rank and adjustment factors that correspond to relative earnings for the eight evenly-divided ranges are listed below in Table A. The ratio of earnings to losses and the corresponding rank for each injury category are listed below in Table B. To adjust an impairment standard for earning capacity, multiply it by the appropriate adjustment factor from Table B and round to the nearest whole number percentage. Alternatively, a table is provided at the end of Section 2 of the Schedule which provides the earning capacity adjustment for all impairment and FEC ranks.

The FEC Rank for the "Other" category is based on average ratings and proportional earning losses for the following impairments:

Impaired rib cage
Cosmetic disfigurement
General chest impairment
Facial disfigurement or impairment
Impaired mouth or jaw
Speech impairment
Impaired nose
Impaired nervous system
Vertigo
Impaired smell
Paralysis
Mental Deterioration
Epilepsy
Skull aperture (pp. 1-6 – 1-8)

Ogilvie I

In *Ogilvie* (2009, February 3), a decision that is commonly referred to as *Ogilvie I,* an en banc decision (including the opinions of all 7 commissioners), the Workers' Compensation Appeals Board (WCAB) concluded:

For the reasons below, we hold in summary that: (1) the DFEC portion of the 2005 Schedule is rebuttable; (2) the DFEC portion of the 2005 Schedule ordinarily is not rebutted by establishing the percentage to which an injured employee's future earning capacity has been diminished; (3) the DFEC portion of the 2005 Schedule is not rebutted by taking two-thirds of the injured employee's estimated diminished future earnings, and then comparing the resulting sum to the permanent disability money chart to approximate a corresponding permanent disability rating; and (4) the DFEC portion of the 2005 Schedule may be rebutted in a manner consistent with Labor Code

section 4660 — including section 4660(b)(2) and the RAND data to which section 4660(b)(2) refers.[3] Further, the DFEC rebuttal approach that is consonant with section 4660 and the RAND data to which it refers consists, in essence, of: (1) obtaining two sets of wage data (one for the injured employee and one for similarly situated employees), generally through the Employment Development Department (EDD); (2) doing some simple mathematical calculations with that wage data to determine the injured employee's individualized proportional earnings loss; (3) dividing the employee's whole person impairment by the proportional earnings loss to obtain a ratio; and (4) seeing if the ratio falls within certain ranges of ratios in Table A of the 2005 Schedule. If it does, the determination of the employee's DFEC adjustment factor is simple and relates back to the Schedule. If it does not, then a non-complex formula is used to perform a few additional calculations to determine an individualized DFEC adjustment factor. (pp. 1-2)

Ogilvie I provides the method for determining an injured employee's post-injury earnings, as follows:

In determining an individual employee's proportional earnings loss, the first step ordinarily will be to establish the employee's actual earnings in the three years following his or her injury (as did the RAND studies), using the employee's EDD wage data or other empirical wage information. Generally, this will be accomplished by having the employee obtain his or her wage information from EDD (Unemp. Ins. Code, § 1094(e)), either voluntarily or through an order compelling. However, other empirical earnings information also may be used, including earnings records from the Social Security Administration. . . (p. 22)

Yet, although the 2003 and 2004 RAND Studies used three years of post-injury earnings as the basis for their proportional earnings loss calculations, there is nothing magical about a three-year period. This is because the 2003 and 2004 RAND Studies used three-year proportional earnings losses only "because these data provide the best balance between representing long-term outcomes and a sufficient number of observations with which to conduct [an] analysis" for a large scale study. (See 2004 RAND Study, at p. 3.) In cases of individual injured employees, however, a longer or shorter period of post-injury earnings may be appropriate. For example, if an employee's injury results in a long period of temporary disability, then it might be appropriate to use a longer period than three years — or a three-year period with a starting date later than the date of injury, such as the injured employee's permanent and stationary date — for assessing the injured employee's "long-term loss of income." (Lab. Code, § 4660(b)(2).) As another example, where an injured employee becomes permanent and stationary (i.e., reaches maximum medical improvement) shortly after the date of his or her industrial injury, then an attempt to rebut the DFEC portion of the 2005 Schedule need not be delayed until three years of post-injury wage data becomes available. In such a case, it might be appropriate to use a shorter period of wage data or to make projections that estimate three years of post-injury earnings.[16] (pp. 22-23)

Footnote 16 reads, "We deem it unnecessary, at this point, to determine how any such projections might be made. If, on remand, the WCJ concludes that earnings estimates must be projected, he may decide this question in the first instance." (p. 23).

Ogilvie I goes on to provide a numeric formula to calculate DFEC, as follows:

We conclude that if the employee's individualized rating to loss does <u>not</u> fall within any of the range of ratios for any of the eight FEC Ranks, then the employee's DFEC adjustment factor shall be determined by applying the formula of ***([1.81/a] x .1) + 1****, where* ***"a"*** *is the employee's individualized rating to loss ratio. This approach is appropriate because it is consistent with section 4660(b)(2)'s requirement that a "numeric formula" be used and because the Schedule used this very same numeric formula for determining its minimum and maximum DFEC adjustment factors. (2005 Schedule, at p. 1-6 [paragraph (a)-4].) (p. 30)*

Ogilvie I also provided possible exceptions to using the foregoing method, and noted:

The foregoing method for determining whether the DFEC portion of the 2005 Schedule has been rebutted – and, if so, for determining an individualized DFEC adjustment factor – may be used in most cases. Nevertheless, there may be exceptions where the foregoing method should not be used. (p. 32)

. . . Therefore, in cases where the injured employee's actual post-injury earnings are significantly higher than the earnings of his or her control group during the same period, some alternative method may have to be utilized to determine whether the Schedule has been rebutted and, if so, how the employee's overall permanent disability rating should be calculated. We need not resolve this question now, however.[30]

Also, there may be instances where it is not proper to use the injured employee's actual post-injury earnings in determining his or her proportional earnings loss. In establishing their average proportional earnings loss figures, the 2003 and 2004 RAND Studies followed three years of post-injury earnings for 241,685 employees who had sustained industrial injuries over a more than

six-year period between January 1, 1991 and April 1, 1997. Given the large number of employees and the broad period of time involved in the RAND Studies, those Studies had no need to consider (and, as a practical matter, probably could not consider) factors that may have skewed the post-injury earnings of particular employees. Yet, when a proportional earnings loss calculation is made for a particular employee in a DFEC rebuttal case, the employee's post-injury earnings portion of that calculation may not accurately reflect his or her true earning capacity. As the Supreme Court stated years ago in Argonaut Ins. Co. v. Industrial Acc. Com. (Montana) (1962) 57 Cal.2d 589 [27 Cal.Comp.Cases 130, 133] (Montana):

"An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured. …

[A] prediction [of earning capacity for purposes of permanent disability] is . . . complex because the compensation is for loss of earning power over a long span of time. … In making a permanent award, [reliance on an injured employee's] earning history alone may be misleading. … [A]ll 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." (Montana, supra, 57 Cal.2d at pp. 594-595 [27 Cal.Comp.Cases at p. 133] (internal citations omitted).)

Certainly, an individual employee should not be able to manipulate the proportional earnings loss calculation through malingering or otherwise deliberately minimizing his or her post-injury earnings. Similarly, motivational or other factors may play a role in determining whether a particular employee's post-injury earnings accurately reflect his or her true post-injury earning capacity. Further, an employee may voluntarily retire or partially retire for reasons unrelated to the industrial injury. (Pham v. Workers' Comp. Appeals Bd. (2000) 78 Cal.App.4th 626, 637-638 [65 Cal.Comp.Cases 139]; Gonzalez v. Workers' Comp. Appeals Bd. (1998) 68 Cal.App.4th 843, 847-848 [63 Cal.Comp.Cases 1477, 1478-1479].) Temporary economic downturns or other factors may also come into play. Accordingly, the trier-of-fact may need to take a variety of factors into consideration.

The foregoing examples, however, are merely illustrative of some instances where it might be inappropriate to use the method set out above. These examples are neither all-inclusive nor absolute. The question of whether the DFEC rebuttal method discussed above should or should not be used in any particular case must be determined on a case-by-case basis. Moreover, when the foregoing method is not appropriate, it initially will be up to the assigned WCJ to decide what alternative method might be used. (pp. 33-34)

Footnote 30 reads, "We do observe, though, that conceivable alternatives might be to throw out certain earnings periods for the control group (e.g., if their low earnings are due to some unusual time-limited circumstances) or to use a broader control group." (p. 33).

It is also significant to know that *Ogilvie I* did not address claims for permanent and total disability (100%) as indicated in footnote 11:

We recognize, however, that there may be some circumstances where an injured employee's DFEC might be the sole or dominant factor in determining permanent disability, such as where the employee's injury causes a total loss of earning capacity or something approaching a total loss of earning capacity (see, Lab. Code, § 4662). This question, though, is not before us now. (p. 14)

Ogilvie II

In *Ogilvie II* (2009, September 3), another en banc decision, the WCAB concluded:

In this decision, we hold: (1) the language of section 4660(c), which provides that "the schedule ... shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," unambiguously means that a permanent disability rating established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating; and (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's DFEC adjustment factor, which may be accomplished by establishing that an individualized adjustment factor most accurately reflects the injured employee's DFEC. However, any individualized DFEC adjustment factor must be consistent with section 4660(b)(2), the RAND data to which section 4660(b)(2) refers, and the numeric formula adopted by the Administrative Director (AD) in the 2005 Schedule. Any evidence presented to support a proposed individualized DFEC adjustment factor must constitute substantial evidence upon which the Workers' Compensation Appeals Board (WCAB) may rely. Moreover, even if this rebuttal evidence is legally substantial, the WCAB as the trier-of-fact may still determine that the evidence does not overcome the DFEC adjustment factor component of the scheduled permanent disability rating. Otherwise, we affirm our prior decision. (p. 2)

Another important section of *Ogilvie II* states:

> *Although not expressed, an important principle underlying our February 3, 2009 opinion is that any valid method of challenging the DFEC adjustment factor component of a scheduled permanent disability rating should be consistent with the constitutional mandate that "the administration of [workers' compensation] legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [sic] of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government." (Cal. Const., art. XIV, § 4.) This constitutional mandate underlies all of the workers' compensation provisions of the Labor Code (Lab. Code, § 3201), including section 4660. (p. 23)*

Ogilvie II also noted:

> *Second, even if a party elects to challenge the DFEC component of a scheduled permanent disability rating, nothing in our February 3, 2009 opinion requires that the first three years of post-injury earnings be used. Although we stated that this period "ordinarily" would be used (Ogilvie I, supra, 74 Cal.Comp.Cases at p. 266), we went on to state:*
>
> *"Yet, although the 2003 and 2004 RAND Studies used three years of post-injury earnings as the basis for their proportional earnings loss calculations, there is nothing magical about a three-year period. This is because the 2003 and 2004 RAND Studies used three-year proportional earnings losses only 'because these data provide the best balance between representing long-term outcomes and a sufficient number of observations with which to conduct [an] analysis' for a large-scale study. (See 2004 RAND Study, at p. 3.) In cases of individual injured employees, however, a longer or shorter period of post-injury earnings may be appropriate." (Ogilvie I, supra, 74 Cal.Comp.Cases at p. 266.)*
>
> *Third, we recognize that, by definition, when an employee is receiving temporary disability indemnity he or she is unable to work or is unable to work for full wages. Indeed, "[t]he primary element of temporary disability is wage loss." (Granado v. Workers' Comp. Appeals Bd. (1968) 69 Ca1.2d 399, 403 [33 Cal.Comp.Cases 647, 650]; see also Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa) (2006) 142 Cal.App.4th 790, 801 [71 Cal.Comp.Cases 1044, 1052-1053].) Accordingly, where an injured employee has been off work (or partially off work) and receiving temporary disability indemnity for a period of two years, it may be difficult to assess the employee's actual earning capacity for a three-year period. In such a circumstance, however, the scheduled DFEC adjustment factor may be used to initially rate the employee's permanent disability. Then, if within five years of the date of injury it later becomes clear that the employee's individualized proportional earnings loss is significantly higher or lower than anticipated, a party may seek to reopen the issue of permanent disability by challenging the originally used DFEC adjustment factor. (Lab. Code, §§ 5410, 5803, 5804; see LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Ca1.3d 234, 242-243 [48 Cal.Comp.Cases 587, 594] (original 60% permanent disability rating reopened and increased to 100% after it was later determined that the injured employee could not be vocationally retrained for suitable gainful employment) (LeBoeuf) (pp. 31-32)*

Two panel decisions (involving 3 of the 7 commissioners) followed *Ogilvie II*. The first was *Shini* (2010), which reiterated the importance of applying the *Montana* factors (*Argonaut Insurance Company v. Industrial Accident Commission*, 1962), as described in *Ogilvie I* above, in the calculation of DFEC (p. 7).

Shini

The commissioners concluded in *Shini* (2010), as follows:

> *In this case, the WCJ did not give the reasoning behind any weighing of the scheduled rating and the adjusted rating. In fact, the WCJ does not even state in his Opinion on Decision or Report what the schedule DFEC adjustment is for either of the injuries. In the further proceedings, the WCJ must do a complete Ogilvie analysis explaining, among other things, the evidence which was relied upon to find the applicant's earning loss and explaining the earning loss period decided upon. The WCJ should discuss whether this adjusted DFEC factor is a true reflection of the applicant's lost earning capacity, including a discussion of whether the applicant was malingering, and a discussion of the Montana factors enumerated above. Finally, the adjusted DFEC factor must be weighed against the scheduled factor to determine which better reflects the applicant's diminished earning capacity. We emphasize again that the party challenging the scheduled rating, in this case the applicant, has the burden of proof on the issue. The WCJ may develop the record at his discretion on these or any other issues before rendering a decision complying with Labor Code § 5313 and our decision in Hamilton v. Lockheed Corp. (2001) 66 Cal.Comp. Cases 473, 476 (Appeals Bd. en banc). (pp. 9-10)*

Noriega Garcia

In *Noriega Garcia* (2010), another panel decision, the commissioners again concluded that it is most impor-

tant to consider the *Montana* factors (*Argonaut Insurance Company v. Industrial Accident Commission* , 1962) in calculating DFEC. The commissioners concluded:

> *We believe that an analysis regarding the above factors was mandated in this case. Although there was evidence that applicant could not return to her previous employment, there was no evidence presented that the applicant could not work at all. Although we do not wish to minimize the severity of the applicant's injuries, and we make no findings on the issue, the qualified medical evaluator found the applicant to suffer from only slight to occasionally moderate pain. Given that applicant claimed almost no earnings, and her individualized DFEC adjustment was so divergent from the scheduled adjustment factor, an analysis of the above factors is required in this ease. Given this set of facts, we believe that the WCJ's analysis was incomplete regarding the proper alternative DFEC adjustment and whether any alternative DFEC adjustment is better reflection of the applicant's earning capacity than the scheduled adjustment. (pp. 6-7)*

The commissioners continued by stating:

> *In this case, the WCJ did not give the reasoning behind any weighing of the scheduled rating and the adjusted rating. In fact, the WCJ does not even state in his Opinion on Decision or Report what the scheduled DFEC adjustment is for either of the injuries. In the further proceedings, the WCJ must do a complete Ogilvie analysis explaining, among other things, the evidence which was relied upon to find the applicant's earning loss and explaining the earning loss period decided upon. The WCJ should discuss whether this adjusted DFEC factor is a true reflection of the applicant's lost earning capacity, including a discussion of the Montana factors enumerated above. Finally, the adjusted DFEC factor must be weighed against the scheduled factor to determine which better reflects the applicant's diminished earning capacity. We emphasize again that the party challenging the scheduled rating, in this case the applicant, has the burden of proof on the issue. The WCJ may develop the record at his discretion on these or any other issues before rendering a decision complying with Labor Code § 5313 and our decision in Hamilton v. Lockheed Corp. (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc). (p. 7)*

Montana

In *Argonaut Insurance Company v. Industrial Accident Commission (Montana)* (1962), the California Supreme Court ruled:

> *The more difficult question is whether the commission correctly determined Montana's earning capacity under subdivision (d) of section 4453 of the Labor Code[1] in computing *594 temporary and permanent disability compensation. Other subdivisions of that section (Lab. Code, § 4453, subd. (a), (b), (c)) set forth formulae for computing average weekly earnings that in turn are made the basis for the two types of award. (Lab. Code, §§ 4653-4655; 4658-4662.) [3] When an employee is steadily employed at a full-time job his earning capacity is determined by an appropriate formula (see West v. Industrial Acc. Com., 79 Cal. App.2d 711, 722 [180 P.2d 972]). When the employment is for less than 30 hours a week or when a formula "cannot reasonably and fairly be applied" the commission must make its own estimate of weekly earning capacity at the time of the injury. (Lab. Code, § 4453, subd. (d).) The purpose of this provision is to equalize for compensation purposes the position of the full-time, regularly employed worker whose earning capacity is merely a multiple of his daily wage and that of the worker whose wage at the time of injury may be aberrant or otherwise a distorted basis for estimating true earning power. [4] It would hardly be consistent with that purpose to foreclose a worker from a maximum temporary or permanent award simply because a brief recession had forced him to work sporadically or at a low wage. Nor in making a permanent disability award would it be consistent with the purpose of the statute to base a finding of maximum earning capacity solely on a high wage, ignoring irregular employment and low income over a long period of time.*
>
> *[5] 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 *595 for a permanent award or the reverse. [6] 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. [7] With regard to both awards all facts relevant and helpful to making the estimate must be considered. (Colonial Mut. Comp. Ins. Co. v. Indus-*

trial Acc. Com., 47 Cal. App.2d 487, 490-492 [118 P.2d 361]; Aetna Life Ins. Co. v. Industrial Acc. Com., 130 Cal. App. 488, 491-492 [20 P.2d 372]; see Southern Bell Tel. & Tel. Co. v. Bell (Fla.) 116 So.2d 617, 620-621; Vanney v. Alaska Packers Assn., 12 Alaska 284, 290-291; Larson, The Law of Workmen's Compensation, § 57.21 at pp. 4-7.) 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. (See West v. Industrial Acc. Com., supra at p. 722; Aetna Life Ins. Co. v. Industrial Acc. Com., supra at pp. 491-492.) In weighing such facts, the commission may make use of "'its general knowledge as a basis of reasonable forecast. '" (Latour v. Producers Dairy, Inc., 102 N.H. 5 [148 A.2d 655, 657]; compare Russell v. Southeastern Util. Service Co., 230 Miss. 272 [92 So.2d 544, 547].) [8] 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. (See e.g., Aetna Life Ins. Co. v. Industrial Acc. Com., supra at p. 493.) It must, however, "have evidence that will at least demonstrate the reasonableness of the determination made." (Davis v. Industrial Com. of Arizona, 82 Ariz. 173 [309 P.2d 793, 795].) (pp. 2-3)

Ogilvie III

In *Ogilvie v. WCAB* and *City and County of San Francisco v. WCAB* (2011), commonly referred to as *Ogilvie III,* the California Court of Appeal ruled that:

Labor Code section 4660, subdivision (c)[1] provides that the California Permanent Disability Rating Schedule (rating schedule) is "prima facie evidence" of the percentage of permanent disability to be attributed to an employee's work-related injury in a workers' compensation case. The core issue presented here is: What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating? Because we cannot conclude on this record whether Ogilvie effectively rebutted application of the rating schedule, we reverse the decision of the Workers' Compensation Appeals Board (WCAB), annul the award of benefits to Ogilvie, and remand for further proceedings consistent with our opinion. (p. 1-2)

Ogilvie III provides 3 methods for rebutting the schedule, as follows:

Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. (p. 14)

Regarding the method for showing a factual error in the calculation of a factor in the rating formula or application of the formula, *Ogilvie III* states:

The possibility an employee can demonstrate such an error in the earning capacity adjustment factor is more than theoretical, particularly in cases like this one involving a back injury. The RAND Institute for Civil Justice released a working paper in 2004 that describes the methodology employed to arrive at empirical adjustments to disability ratings due to diminished future earning capacity. (RAND Institute for Civil Justice, Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899 (2004) (Working Paper).) The working paper places several caveats on the use of the empirical data relied upon by the RAND Institute in reaching the earning capacity adjustments. For example, one of the challenges faced by the RAND group was that the data previously assembled to consider earnings loss attributable to certain injuries was categorized by descriptions used by the California Permanent Disability Rating System, while Senate Bill No. 899 requires injury descriptions based on the American Medical Association Guides. (Working Paper at p. 7.) The descriptions are quite different in practice, and at the time the future earning capacity adjustments were established, there was no direct link between the data used by RAND and the American Medical Association Guides. (Ibid.) An ideal system would combine information on earnings losses with actual American Medical Association Guide ratings. (Id. at p. 14.) The working paper also makes certain assumptions that are critical when the diminished earning capacity ratings are applied to back injuries. (Id. at pp. 10-12.) If any of the assumptions are incorrect, the estimated ratings could be biased. (Ibid.) A challenge to the ratings schedule on the basis that there was a factual error in the calculation of one of its component factors, or it was incorrectly applied in a particular case does not undermine the schedule's "consistency, uniformity, and objectivity." (§ 4660, subd. (d).) It merely serves to correct it or ensure its accurate application. (pp. 10-11)

Regarding the second rebuttal method concerning "the omission of medical complications aggravating

the employee's disability in preparation of the rating schedule (p. 14), *Ogilvie III* states:

> *The briefs and arguments of the parties and amici also point out a third basis for rebuttal of a scheduled rating that is consistent with the statutory scheme. In certain rare cases, it appears the amalgamation of data used to arrive at a diminished future earning capacity adjustment may not capture the severity or all of the medical complications of an employee's work-related injury. After all, the adjustment is a calculation based upon a summary of data that projects earning losses based upon wage information obtained from the California Employment Development Department for a finite period and comparing the earnings losses of certain disabled workers to the actual earnings of a control group of uninjured workers. (Working Paper at p. 3.) A scheduled rating may be rebutted when a claimant can demonstrate that the nature or severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor. For example, a claimant who sustains a compensable foot fracture with complications resulting from nerve damage may have greater permanent effects of the injury and thereby disprove the scheduled rating if the sampling used to arrive at the rating did not include any workers with similar complications. In such cases, the scheduled rating should be recalculated taking into account the extent to which the claimant's disability has been aggravated by complications not considered within the sampling used to compute the adjustment factor. In this way, the employee's permanent disability rating gives "consideration" to an employee's diminished earning capacity that remains based upon "a numeric formula based upon empirical data and findings . . . prepared by the RAND Institute." (§ 4660, subds. (a) & (b)(2).) We leave it to the WCAB in the first instance to prescribe the exact method for such a recalculation that factors the employee's anticipated diminished earning capacity into the data used by the RAND Institute. (See § 300.) (pp. 12-13)*

Regarding the third rebuttal method, "by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating" (p. 14), *Ogilvie III* notes:

> *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. This is the rule expressed in LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Ca1.3d 234. . . (p. 11)*

Ogilvie III states further regarding this rebuttal method concerning not being amenable to rehabilitation:

> *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 Ca1.4th 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 Ca1.4th 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. (p. 12)*

Ogilvie III also states clearly that certain non-industrial vocational factors are impermissible in developing an opinion regarding diminished future earning capacity by noting:

> *. . . While some of the briefing provided to the court may be read to 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 to speak English, or an employee's lack of education. . . (p. 11)*

The California Court of Appeal concluded in *Ogilvie III:*

> *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. Rather, to rebut the application of the rating schedule on the basis that the scheduled earning capacity adjustment is incorrect, the employee must demonstrate an error in the earning capacity formula, the data or the result derived from the data in formulating the earning capacity adjustment. Alternatively, an 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. (p. 15)*

LeBoeuf

In *LeBoeuf* (1983), the California Supreme Court ruled:

> *Similarly, the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating. Just as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating. (p. 594)*

In addition, the California Supreme Court concluded in *LeBoeuf* (1983), that:

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

Assembly Bill 1168

California Assembly Bill 1168 (AB 1168) was signed into law by Governor Jerry Brown on October 5, 2011. AB 1168 added Section 5307.7 to the California Labor Code. Section 5307.7 (Bae, 2012) states:

> *(a) On or before January 1, 2013, the administrative director shall adopt, after public hearings, a fee schedule that shall establish reasonable hourly fees paid for services provided by vocational experts, including, but not limited to, vocational evaluations and expert testimony determined to be reasonable, actual, and necessary by the appeals board.*
>
> *(b) A vocational expert shall not be paid, and the appeals board shall not allow, vocational expert fees in excess of those that are reasonable, actual, and necessary. Leg.H. 2011 ch. 555 (AB 1168) §1. (p. 386)*

Summary

In summary, this article has provided excerpts of the actual law, regulations, and court decisions pertaining to a determination of diminished future earning capacity in California workers' compensation cases. Significant regulations and court decisions following Senate Bill 899 were provided regarding the determination and calculation of diminished future earning capacity. Excerpts from *Montana* (1962), *LeBoeuf* (1983), *Ogilvie I* (2009, February 3), *Ogilvie II* (2009, September 3), *Shini* (2010), *Noriega Garcia* (2010), and *Ogilvie III* (2011) were provided.

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