WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RONALD GERTON, ***Applicant,*** **vs.** **CITY OF PLEASANTON, permissibly self-insured,** ***Defendant.***	**Case No. ADJ6993381** **(San Jose District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We earlier granted defendant's petition for reconsideration of the June 7, 2012 Findings and Award of the workers' compensation administrative law judge who found that applicant, while employed by defendant as a firefighter during the cumulative period ending June 16, 2009, incurred industrial injury to his low back causing 62% permanent partial disability and a need for future medical treatment.

In his Opinion on Decision, the WCJ explained that the Diminished Future Earning Capacity (DFEC) adjustment factor contained in the 2005 Permanent Disability Rating Schedule (2005 PDRS) was rebutted at trial by the testimony and reporting of applicant's vocational expert Eugene Van de Bittner, Ph.D., who opined that applicant's work preclusions resulted in a 65% DFEC, and the WCJ used that 65% figure to find applicant's 62% permanent disability after applying apportionment pursuant to the opinion of the parties' Agreed Medical Examiner (AME) Michael Post, M.D. The WCJ cited the Appeals Board panel decision in *Dahl v. Contra Costa County* (ADJ1310387, May 18, 2012) (*Dahl*) in support of his decision to use the DFEC percentage opined by Dr. Van de Bittner as applicant's permanent disability percentage.

Defendant contends that Dr. Van de Bittner's reporting is not substantial evidence in support of the WCJ's finding of 62% permanent disability, and that *Dahl* was incorrectly decided and the June 7, 2012 award is without "legal authority."

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An answer was received from applicant and the WCJ provided a Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied.

The WCJ's June 7, 2012 Findings and Award is rescinded as our Decision After Reconsideration, and the case is returned to the trial level for development of the record and a new decision on whether applicant has carried his burden of rebutting the DFEC component of the 2005 PDRS and showing that he is entitled to a finding of permanent disability that is higher than the level of permanent disability determined pursuant to the 2005 PDRS. The analysis described in *Dahl* may be properly applied in this case of less than total permanent disability, but the evidentiary record must be developed on the issues of applicant's amenability to vocational rehabilitation and his post-injury earnings, as discussed below.

BACKGROUND

It is admitted that applicant incurred cumulative industrial injury to his low back while working as a firefighter for defendant during the period ending June 16, 2009. In his May 25, 2011 report, the parties' AME Dr. Post explained that he used the range of motion method to rate applicant's back impairment under the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) in accordance with the 2005 PDRS, and the physician opined that applicant has a 21% whole person impairment using that rating. With regard to apportionment, Dr. Post noted that applicant obtained a prior award of 3% permanent disability for a January 11, 2004 specific injury to the back, which was rated using subjective factors under the earlier 1997 PDRS. Dr. Post questioned how apportionment "can be legally applied" by subtraction of the earlier award of permanent disability pursuant to Labor Code section 4664 because it would be "like subtracting apples from oranges."[1] However, he then offered the following alternative opinion: "[W]hen considering all medical causes of the current physical/orthopedic disability, it is medically probable that the approximate percentage

[1] Further statutory references are to the Labor Code. Section 4664(b) provides as follows: "If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof." (See *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1009 [71 Cal.Comp.Cases 1229] ["The burden of proving overlap is part of the employer's overall burden of proving apportionment, which was not altered by section 4664(b), except to create the conclusive presumption that flows from proving the existence of a prior permanent disability award."]; cf. *Minvielle v. County of Contra Costa* (2010) 75 Cal.Comp.Cases 896 (writ den.).)

caused by the industrial injury/exposure is 95% and the remaining 5% is secondary to other factors (i.e. 1/11/04 industrial injury)."

The issue of permanent disability and other issues were tried on May 21, 2012. In addition to receiving testimony from applicant and Dr. Van de Bittner along with his December 17, 2011 report, the WCJ received the May 25, 2011 report of Dr. Post into evidence. Following the trial the WCJ issued his June 7, 2012 decision as described above. In his Report the WCJ responds to defendant's contentions in pertinent part as follows:

> "Defendant first contends that the report and testimony of Dr. Van de Bittner does not constitute substantial evidence. Defendant claims that Dr. Van De Bittner's opinion (that the actual DFEC is sufficient to rebut the schedule) is a 'mere conclusion' without any stated basis or underlying logic. This argument simply ignores pages 27-30 of Exhibit 2, wherein the DFEC is calculated to be 65%, well above the highest DFEC adjustment allowed for in the PDRS.
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> "Defendant next claims that it was improper for the vocational expert to exclude the Applicant's actual post-injury earnings for his calculations and substitute wages Dr. Van De Bittner estimated and calculated to be available to Applicant in the open labor market. I agree with Applicant's expert that the actual wages were properly excluded under the narrow facts of this case. Ordinarily, such wages would be presumed to be the best evidence of Applicant's post-injury earnings potential. *In this case, however, those earnings are artificially high because the work is being done for a close relative, Applicant's brother. Dr. Van De Bittner found that this work lies outside that Applicant could expect to compete for in the open labor market; it is essentially sheltered employment. The charity of Applicant's family* should not be used to create a false impression of Applicant's true capacity for earnings...
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> "Defendant's second contention is that the rationale set forth in *Dahl, supra*, is not an accurate statement of the law. Defendant accurately points out that *Dahl* is not an en banc opinion and is not, therefore, binding. That fact does not mean, however, that it may not be looked to as a source of persuasive logic. The panel in *Dahl* held, along with the [*Ogilvie v. City and County of San Francisco* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie* or *Ogilvie III*)] *Ogilvie* court, that a [*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587] (*LeBoeuf*)] *LeBoeuf* analysis is proper where it is shown that the injury impairs the employee's rehabilitation. That is surely the case here, where as a result of the injury the Applicant has been excluded from 75% of that portion of the open labor market formerly open to him, and where an expert analysis of his DFEC shows it to fall outside the range allowed for in the PDRS. Under such circumstances, the *Dahl* panel found that it would be proper to adopt the percentage of loss of future earnings, as demonstrated by expert testimony, as the percentage of permanent disability. I know of no other appropriate method by which use of such testimony may be made." (Bracketed citations and emphasis added.)

DISCUSSION

We agree with the WCJ that a *LeBoeuf* type of analysis as described in *Ogilvie* may be properly applied in a case involving less than 100% total permanent disability as occurred in *Dahl*. However, as the Appeals Board panel discussed in *Dahl*, "a *LeBoeuf* type of analysis may be properly applied in a case involving less than 100% permanent disability *when it is shown that the injury impairs the employee's rehabilitation*..." (*Dahl*, supra, 3:17-19, emphasis added.)

The Court in *Ogilvie* described permanent disability as "the irreversible residual of a work-related injury that causes *impairment in earning capacity*, impairment in the normal use of a member *or a handicap in the open labor market*." (*Ogilvie, supra*, citing *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565], emphasis added.) The Court further wrote:

> "Indeed, the terms 'diminished future earning capacity' and 'ability to compete in an open labor market' suggest to us no meaningful difference, and nothing in Senate Bill No. 899 suggests that the Legislature intended to alter the purpose of an award of permanent disability through this change of phrase. Nor does its use suggest that a party seeking to rebut a permanent disability rating must make any particular showing...
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> "*[T]he cases have long recognized that a scheduled rating has been effectively rebutted* [] *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.*
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> "An employee effectively rebuts the scheduled rating when the employee will have a greater loss of future earnings than reflected in a rating because, due to the industrial injury, *the employee is not amenable to rehabilitation.* (Emphasis added.)

The view of the Court in *Ogilvie* is consistent with the opinion expressed by Commission Chairwoman Caplane in her dissent in the earlier en banc decisions of the Appeals Board in that case as follows:

> "*The percentage of her actual loss of future earnings as demonstrated by both parties' expert witnesses is the most accurate reflection of her diminished future earning capacity.* Therefore, *her permanent disability rating should be the percentage of her lost future earning capacity...*
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> "The method that I propose is comprehensive, analytically sound, and operationally simple. It would require vocational or other experts to estimate the injured employee's post-injury earning capacity based upon medical opinions evaluating her permanent impairments and earning capacity had she not suffered the industrial injury, both to be determined

> from the permanent and stationary date through her projected years in the work force. Such expert testimony is common in marriage dissolution cases, personal injury cases, and employment cases." (*Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 248 (Appeals Board en banc), emphasis added.)[2]

Although the Court of Appeal annulled the Appeals Board's majority en banc opinion in *Ogilvie*, it did not reject the opinion of Commissioner Caplane as expressed in her dissent as quoted above.[3] To the contrary, the Court recognized that there is no meaningful distinction between the terms "diminished future earning capacity" and "ability to compete in an open labor market," and held that an employee rebuts the 2005 PDRS rating by showing that he or she will have a greater loss of future earnings than reflected in that rating. In sum, *Ogilvie* does not preclude a finding of permanent disability that takes into account the effect of the injury's impairment on the worker's amenability to rehabilitation and the effect of that on his or her DFEC. As held in *Dahl*, such an analysis can be done even where there is less than total permanent disability, as in this case. However, the current record does not fully address the worker's amenability to rehabilitation and the potential effect of rehabilitation on his DFEC.

In his December 17, 2011 report, Dr. Van De Bittner describes applicant's employment history and his experience as a painting contractor, firefighter and fire medic/engineer. He also discusses applicant's post-injury work for his brothers as a construction site manager. On page 8 of the report, Dr. Van De Bittner notes that applicant "has had experience with bookkeeping, inventory control, shipping, receiving, scheduling, supervising, and instructing," along with "some experience with office machines such as computers and typewriters." He further notes that applicant has used a "variety of hand and power tools related to mechanics tools and painter tools," and "machine and shop tools such as table saws." Dr. Van De Bittner discusses applicant's "Vocational Rehabilitation Efforts" and "Self-initiated Return to Work Activities" on page 9 of his report as follows:

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[2] See also, *Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 1127 (Appeals Board en banc) and *Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 478 (Appeals Board en banc).

[3] The Court agreed that the PDRS could be rebutted but did not accept the formula expressed in the Appeals Board majority opinion for calculating the degree of impairment. The Court annulled the Appeals Board decision because it could not determine "the degree to which the experts may have taken impermissible factors into account in reaching their conclusions..." as part of their *LeBoeuf* analysis.

> "*Mr. Gerton has effectively conducted his own vocational rehabilitation* by identifying ways that he can use his transferable skills from his employment as a painting contractor and painter to perform modified construction supervision and the purchase and delivery of construction supplies and equipment for his brothers....
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> "*He has also explored the possibility of working as a floor man at a local card room.* He is not sure how much the job would pay. He also noted that he is not interested in working at this job on a full-time basis because of the social problems associated with casinos such as customers spending their entire paycheck the same day they receive it and alcoholism,
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> "*Mr. Gerton said that he had also considered some type of volunteer work,* possibly related to an animal shelter or overseeing the remodeling of homes for needy people from an organization like Christmas in April." (Emphasis added.)[4]

Beginning on page 15 of his report Dr. Van De Bittner discusses "Vocational Feasibility" in pertinent part as follows:

> "When considering the opinions of Dr. Post regarding work restrictions, *Mr. Gerton retains the medical capacity to work. Therefore, Mr. Gerton would be able to benefit from vocational rehabilitation services* when considering the opinions of Dr. Post.
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> "*There are many vocational factors that would have a positive impact on Mr. Gerton's ability to benefit from vocational rehabilitation services.* Among other things, he is a high school graduate who completed nearly all of the requirements for an Associate of Science degree in accounting and data processing. He later completed paramedic and other training in relation to his work as a firefighter. He worked initially as a painting contractor and later as a firefighter and fire medic/engineer. Since his work injury of 6/16/09, he has performed some modified duty construction supervision work on a part-time basis for his brothers. His scores on the standardized tests suggest the capacity to learn new job skills either in school or on the job. *There were many job matches on the transferable skills analysis under both scenarios. All of these vocational factors indicate that Mr. Gerton would be able to benefit from vocational rehabilitation services.*
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> "*At the same time, there are several additional vocational factors that would have a negative impact on Mr. Gerton's vocational feasibility.* Among other things, his personal presentation suggests a significant disability. Specifically, he stands in a fixed position momentarily while changing positions from sitting to standing. He also walks with a slight limp. He described a significant level of pain in several areas of his body.

[4] Applicant testified at trial that he was offered full-time work as a manager at a casino, a job he held before becoming a firefighter, but he did not believe he could handle being on his feet all day. (7:41-44.) However, in his December 17, 2011 report, Dr. Van De Bittner relays applicant's statement that he is not interested in working full-time at a casino "because of the social problems associated with casinos such as customers spending their entire paycheck the same day they receive it and alcoholism." (9.)

> He reported side effects of medication that would likely have an impact on work activities, if taken during the day. These additional vocational factors may have a negative impact on Mr. Gerton's vocational feasibility.
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> "*In summary*, when considering the opinions of Dr. Post, Mr. Gerton would be able to benefit from vocational rehabilitation services in addition, when considering all of the vocational factors outlined above, in combination with the opinions of Dr. Post, *Mr. Gerton would most likely be able to benefit from vocational rehabilitation services*." (Emphasis added.)

On page 19 of his report Dr. Van De Bittner noted that, "Vocational feasibility, one's ability to benefit from the provision of vocational rehabilitation services, was also considered in assessing Mr. Gerton's vocational labor market access and placeability." After discussing the various factors, he again opined, "Mr. Gerton *can most likely benefit from vocational rehabilitation services* when considering all of the opinions of Dr. Post in combination with vocational factors." (Emphasis added.)

As shown by the above excerpts from Dr. Van De Bittner's December 17, 2011 report, he opines that applicant can "benefit" from vocational rehabilitation. However, he does not directly address whether applicant is "amenable" to vocational rehabilitation as discussed in *Ogilvie*, which may be a different thing. Moreover, if applicant is "amenable" to vocational rehabilitation, the effect of that amenability on his DFEC must be fully addressed before it can be found that the 2005 PDRS scheduled rating has been rebutted. This leads us to conclude that the record requires development on whether applicant is amenable to vocational rehabilitation and the effect of any such amenability and potential rehabilitation on his DFEC. The "principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims." (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].)

We also find a need for the WCJ to further address applicant's post-injury earnings. On page 8 of his December 17, 2011 report, Dr. Van De Bittner discusses applicant's post-injury employment by his brothers, as follows:

> "Starting in 6/10, he performed some work as a type of *construction supervisor* for his older brother and younger brothers. He has done this work on a part-time irregular basis. His first assignment was to live at a multimillion dollar home in Carmel, California during a remodel project

> conducted by his older brother. *Mr. Gerton supervised the work of construction workers at this home. He worked for about 6 weeks at the rate of about 40 hours per week. Since then he has assisted his younger brothers in apartment remodeling projects.* Apartments are gutted and remodeled when tenants vacate the premises. *In exchange for his services, his brothers will perform construction work at his home in Livermore and at his cabin.*" (Emphasis added.)

According to the May 21, 2012 Minutes of Hearing, Mr. Gerton testified at the trial about his work for his brother, as follows:

> "Since he [*sic*] retirement, *he has continued to work 20 to 40 hours per week as a jobsite supervisor for his brother's construction company. He works as much as he wants to work. He is paid $45 per hour for his time...*
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> "He last worked 40 hours a week in February or March of 2012." (7:26-36, emphasis added.)

As shown by the above, applicant has worked substantial hours for his brothers following his industrial injury, including full-time hours as a construction supervisor at the rate of $45 per hour, and he testified that he can do that work as much as he wants. However, when Dr. Van De Bittner evaluated applicant's DFEC he did not utilize the $45 per hour rate that applicant *actually* earned following his injury, but instead references other *hypothetical* employments that on average pay only about one-half that rate.

We find no evidence in the record that supports the WCJ's conclusion that applicant was performing "sheltered work" or that his post-injury earnings are "charity" provided by his family as stated in the Report. Instead, the expected duties of a construction supervisor, the continuing availability of that work to applicant and the $45 per hour pay he receives for it indicates otherwise, as does applicant's expressed interest in performing that same kind of work as a volunteer overseeing the remodeling of homes. Upon return to the trial level the record should be further developed on the issue of applicant's post-injury earnings and whether his actual earning history should be utilized to evaluate his DFEC and permanent disability.

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Accordingly, the June 7, 2012 Findings and Award is rescinded and the case is returned to the trial level for development of the record in accordance with our decision, and for further proceedings and a new decision by the WCJ concerning applicant's post-injury earnings, his amenability to vocational rehabilitation and the relationship of vocational rehabilitation to his DFEC and percentage of permanent disability.

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For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Appeals Board that the June 7, 2012 Findings and Award of the workers' compensation administrative law judge is **RESCINDED** and the case is **RETURNED** to the trial level for development of the record as appropriate, further proceedings and a new decision by the workers' compensation administrative law judge in accordance with this decision.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

ALFONSO J. MORESI

I SEPARATELY CONCUR (See attached Concurring Opinion),

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 12 2013

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

RONALD GERTON
J. BRUCE SUTHERLAND
PARENTE & CHRISTOPHER

JFS/abs

CONCURRING OPINION OF COMMISSIONER LOWE

I concur with the majority's decision to rescind the June 7, 2012 Findings and Award and return the case for development of the record on whether applicant is amenable to vocational rehabilitation and the effect of any such amenability on his DFEC. However, I see no need to develop the record on applicant's earnings from his post-injury employment as a construction supervisor. In my view, applicant's actual post-injury earnings should be used in the *Ogilvie* analysis.

Dr. Van De Bittner notes in his December 17, 2011 report that applicant has acquired many transferable skills while working in a variety of employments and that there are many possible jobs that he hypothetically could perform. He also acknowledges in his report that applicant regularly works as a construction supervisor. However, when calculating applicant's DFEC, Dr. Van De Bittner did not use the $45 per hour wage rate that applicant actually earns as a construction supervisor. Instead, he applied wage rates for the other hypothetical employments he selected that are significantly lower than applicant's actual construction supervisor wage. That is a significant deficiency in Dr. Van De Bittner's DFEC analysis.

That deficiency also illustrates why a DFEC percentage should not be found to equate to a permanent disability percentage as occurred in *Dahl*. Changing the hypothetical estimated future earning variable used in Dr. Van De Bittner's analysis to reflect applicant's actual post-injury earnings significantly changes the DFEC percentage.[5] However, that change in DFEC has no bearing on applicant's actual whole person impairment, which is objectively determined under the AMA Guides by evaluating the effect of the injury on his ability to perform activities of daily living. Using the AMA Guides to objectively determine whole person impairment leads to an objective permanent disability rating under the 2005 PDRS. That cannot be said of the kind of *Ogilvie* analysis performed by Dr. Van De Bittner because it is based upon his estimate of hypothetical future earnings in hypothetical jobs that he selected. It also does not take into proper account applicant's actual post-injury earnings.

[5] Dr. Van De Bittner also assumes "job search costs" in his analysis that increase the DFEC calculation by a full two percent. However, it is unlikely that applicant would ever incur any such job search costs in light of his trial testimony that he already currently "works as much as he wants to work" at a job that he likes that pays $45 per hour.

An *Ogilvie* analysis is appropriate when the applicant is not amenable to vocational rehabilitation and the injury has reduced his or her future earning capacity significantly beyond what the scheduled permanent disability rating indicates. If those factors are not proven by applicant in this case, his actual whole person impairment should be used to rate his permanent disability pursuant to the 2005 PDRS.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 12 2013

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

RONALD GERTON
J. BRUCE SUTHERLAND
PARENTE & CHRISTOPHER

JFS/abs