WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOAQUIN CORTEZ (JOAQUIN MARTINEZ CORTEZ), ***Applicant,*** **vs.** **FRU-CON CONSTRUCTION CORPORTION; ZURICH NORTH AMERICAN INSURANCE,** ***Defendant(s).***	**Case No. ADJ4299001 (SAL 0110239)** **OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award of December 15, 2009, in which the workers' compensation judge (WCJ) found, in relevant part, that on December 9, 2004, applicant sustained industrial injury to both knees, causing permanent disability of 54%, without apportionment.

Defendant contends, in substance, that the WCJ erred in finding permanent disability of 54% based on *Ogilvie v. City and County of San Francisco* (2009) 74 Cal. Comp. Cases 1127 [en banc] ("*Ogilvie II*"), and that even if *Ogilvie II* applies, the evidence does not justify the finding on permanent disability.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation. We adopt and incorporate the "Facts" section of the WCJ's Report. We do not adopt or incorporate the remainder of the Report.

In our prior decision of March 10, 2009, we returned this matter to the WCJ to revisit the issue of permanent disability in light of *Ogilvie v. City and County of San Francisco* (2009) 74 Cal. Comp. Cases 248 [Appeals Board en banc] ("*Ogilvie I*"):

> "In reference to rebuttal of the AMA Guides, it appears that the reporting physicians agree that applicant may need bilateral knee replacement. As noted above, however, Dr. Williams found 4% impairment in one knee and 2% in the

other. These percentages formed the basis for the recommended rating of 13% under the 2005 PDRS. The WCJ should provide the parties the opportunity to respond to *Almarez/Guzman, supra,* including further development of the record as deemed necessary or appropriate by the WCJ.

"In reference to rebuttal of the DFEC portion of the 2005 PDRS, we note that the WCJ determined permanent disability by directly applying Mr. Simon's opinion that applicant's knee injuries had resulted in 100% loss of earning capacity (less 27% apportionment to prior spinal disability). Under *Ogilvie*, however, 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. Moreover, as with rebuttal of the AME Guides, neither the parties, nor Mr. Simon, nor the WCJ have had opportunity to consider *Ogilvie's* holding that 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, which involves the four steps of data gathering and manipulation set forth in the *Ogilvie* opinion. Again, the WCJ should provide the parties the opportunity to respond to *Ogilvie,* including further development of the record as deemed necessary or appropriate by the WCJ."

To reiterate, the Board held as follows in *Ogilvie I*: (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. The Board further noted that 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.

In this case, after our prior decision the parties obtained a supplemental vocational report from Mr. Simon dated June 3, 2009, and a supplemental medical report from Dr. Williams dated August 28, 2009. The matter returned to the trial calendar on November 24, 2009, where the foregoing documents were admitted into evidence and the WCJ received additional testimony from Mr. Simon.

In the meantime, on September 3, 2009, the Board issued its en banc decision in *Ogilvie v. City and County of San Francisco* (2009) 74 Cal. Comp. Cases 1127 ("*Ogilvie II*"), wherein the Board held that: (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, the Board also noted that 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, and that 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 Finally, the Board held that 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.[1]

[1] Contrary to defendant's assertions, no panel of the Board has issued an "informal stay" of *Ogilvie II*, and in any event the panel decision cited by defendant is not binding or relevant herein. A writ of review has been filed in

In the decision disputed here, the WCJ rated applicant's permanent disability by starting with Dr. Williams' November 21, 2005 WPI assessments for each knee, 4% for the left and 2% for the right, and then inserting "individualized DFEC adjustment factors" for each knee, apparently relying on calculations in Mr. Simon's report dated June 3, 2009. The WCJ explained his approach in his Opinion on Decision, as follows:

> "...[I]t is the case that applicant's earning capacity has been reduced to 0% by reason of his knee injuries. Dr. Williams was asked to apply *Almaraz/Guzman* to his evaluation of applicant's knee conditions; he opined that applicant would require a knee replacement. I would assume that was for one knee which would result in a best scenario of a 15%-Whole Person Impairment (WPI) for that knee. However, he does not indicate what the opposing non-surgically treated knee impairment would be, even though he had found impairment for both knees previously. He simply combined them when he re-determined the WPI for the knees.
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> "Because of the ambiguity of this alternative method, this [WCJ] will apply the original WPI in analyzing applicant's permanent partial disability, taking into account his diminished future earning capacity (DFEC) and *Ogilvie*. His left knee resulted in a 4% WPI which rates as follows after adjusting the DFEC number in compliance with *Ogilvie*:
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> "17.05.01.00[4 x 5.52.500]22 -480H -27 -33
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> "With respect to the right knee, it resulted in a two percent WPI; when that is adjusted, again using the new DFEC number, it rates as follows:
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> "17.05.06.00-[2 x 10.05000]20 -480H -25 -31
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> "These ratings are combined as follows:
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> "33 C 31 = 54% permanent partial disability."

We find at least one error in the WCJ's approach, which is not addressed in his Report. Mr. Simon's June 3, 2009 report calculated "individualized DFEC adjustment factors" of 3.95 (6/3/09 report, pp. 4-5.) for the right knee and 10.05 for the left knee (6/3/09 report addendum),

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Ogilvie II, but to date no action has been taken by the Court of Appeal. We follow *Ogilvie II* pursuant to *Diggle v. Sierra Sands Unified Sch. Dist.* (2005) 70 Cal.Comp.Cases 1480 [Significant Panel Decision].

both based on the calculations set forth in *Ogilvie I*,[2] whereas the WCJ applied 10.05 to the right knee and 5.525 to the left knee. Thus, the WCJ switched knees compared to Mr. Simon, and furthermore the Board cannot determine how the WCJ came up with the 5.525 factor; Mr. Simon had used 3.95 for the right knee.

But the most important issue is that under *Ogilvie II*, applicant has the burden of rebutting the scheduled permanent disability rating of 13%, and we find that Mr. Simon's calculation of a different DFEC from what the schedule provides is not substantial evidence to meet that burden. For the reasons discussed below, we conclude that Mr. Simon's vocational testing, opinion, and calculations do not establish an individualized adjustment factor which most accurately reflects this injured employee's DFEC.

At pages four and five of his June 3, 2009 report, Mr. Simon stated as follows:

> "I will begin my discussion by starting with an *Ogilvie* analysis. In order to appropriately put into place the necessary data, I have referred to my original reports, records and testimony. In the 1/8/2007 report, page 9, paragraph 6, "...I believe that it may, indeed, be the case that this gentleman's working days are complete. Certainly, if we utilize a semi-sedentary analysis, he would be able to do assembly and fabrication jobs, as described. However, we need to add in the following pre-existing factors that are brought to bear in this analysis. They include a prior back injury; he is monolingual; he has worked predominantly outdoors, and it is often difficult for individuals at his age to move to indoor jobs. He reports being nearly illiterate in Spanish, which is his base language." In the second to last paragraph on page 10, I opined that "...His future earning capacity would likely be 0% when the pre- and post-injury features are taken together as a whole."
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> "However, we now have the *Ogilvie* formula to adhere to. It is therefore appropriate to utilize a 0% DFEC factor in this case since he was deemed as unable to perform work of any kind after the 12/08/04 injury. Accordingly, the formula works out as follows:

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[2] Mr. Simon attempted to follow *Ogilvie I's* formula that where "the employee's individualized rating to loss ratio does not 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].)" (See *Ogilvie I*, 74 Cal. Comp. Cases at 273.)

"On Page 39, Paragraph 2 of the *Ogilvie* decision, the DFEC rebuttal approach basically distills down to:

"1) Obtaining two sets of wage data (one for the injured employee and one for similarly situated employees).

"2) Doing some simple mathematical calculations with that wage data to determine the injured employee's proportional earnings loss.

"3) Dividing the employee's Whole Person Impairment by the proportional earnings loss to obtain a ratio.

"4) Seeing if the ratio falls within certain ranges of ratios in Table A of the 2005 Schedule. It is does, the determination of the employee's DFEC adjustment factor is simple. If it does not, than a non-complex formula is used to do a few additional calculations to determine an individualized DFEC adjustment factor."

"Pre-injury, Mr. Cortez Martinez had performed work up to the heavy physical exertional levels. Post-injury, the Qualified Medical Evaluator, Dr. Williams, opined Mr. Cortez Martinez's bilateral knee injury resulted in a 4% impairment in the right knee and 2% in the left knee.

"Mr. Cortez Martinez's prior earnings as a construction Laborer were estimated to be $23.00 per hour, based on his reported earnings. According to the EDD, May 2007 wages for Construction Laborers, SOC Code 47-2061, or "similarly situated" control group, in the Sacramento-Arden-Roseville, CA MSA were as follows:

[Table omitted. Below, Simon finds applicant's wages fall between the 75th and 90th percentile of similarly situated employees.]

"***Ogilvie*** **Formula:**

"Based on EDD wage data, Mr. Cortez Martinez's reported hourly wages fall between the 75th and 90th percentile of similarly situated employees. The average earnings of Mr. Cortez Martinez's "control group" for the same period were $143,520 (calculated using 3 years at $23.00/hour for the average of 2,080 hours annually for three years.)

"Therefore, Mr. Cortez Martinez's estimated earnings loss during this period would be **$143,520.00** (i.e., $143,520.00 – 0% (estimated post-injury earnings) = $143,520.00

"Accordingly, the injured employee's proportional earnings loss would be 1.00.

"If the injured employees individualized proportional earnings loss is 1.00 and his whole person impairment for the right knee is 4% (as determined by QME Dr. Williams) then the individualized rating to loss ratio would be .04 (i.e., 23%[3] ÷ 1.00 = .04.)

"(1) Three year earnings of similarly situated workers equal $143,520.00

"(2) Applicant's 3-year post-injury earnings capacity equals 0

"(3) Applicant's earnings loss [(1) minus (2)] equals $143,520.00

"(4) Applicant's proportional earnings loss [(3) divided by (1)] equal 1.00

"(5) WPI rating equal 4%

"(6) Applicant's ratio of rating over losses [(5) divided by (4)] equal 0.04

"(7) Is (6) between 0.45 and 1.81?

NO

[DFEC Table omitted.]

"Since the loss ratio does not fall within the Range of Ratios as outlined in Table A (see above), the following step in the formula was utilized to determine the FEC:

"(8) ([1.81/a] x /1), where "a" is from (6) above:
([1.81 / 0.04]) x .1) + 1 = 3.95.

"Accordingly, utilizing the 4% impairment and the individualized proportional earnings loss, an individualized DFEC adjustment factor of 3.95 would be used to multiply Mr. Cortez-Martinez's 4% whole person impairment rating, resulting in a partially adjusted impairment rating (before adjustment for age and occupation) of 16% (i.e., 3.95 x .04 = 15.8%) for the right knee."

The addendum attached to Mr. Simon's June 3, 2009 report used the same set of figures to arrive at an "individualized DFEC adjustment factor" of 10.05 for the left knee.

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[3] Though it is not made clear, it appears that this 23% comes from $23.00 per hour.

However, we conclude that Mr. Simon's vocational opinion and calculations are fatally flawed and do not constitute substantial evidence, as they are based on irreconcilable contradictions. Mr. Simon first states that applicant's future earning capacity would likely be 0% when the pre- and post-injury features are taken together as a whole, and that applicant's working days are over, but then Simon goes on to assume, in calculating an alternative DFEC, that applicant would have continued to earn almost $50,000.00 per year for the next three years following the industrial injury. Furthermore, Simon's use of 0% earning capacity to start his calculations is flawed because it is based, in part, on the non-industrial factors of applicant's being monolingual and nearly illiterate. It is also flawed because it is based, in part, on applicant's prior industrial injury to his back. The accounting of lost earning capacity caused by the prior back injury violates Labor Code section 4664(a), which provides that "[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment."

In addition, Mr. Simon's use of $23.00 per hour as an "estimate" of applicant's prior earnings as a construction laborer, which factored into Simon's determination of $143,520.00 in estimated post-injury earnings, is flawed because applicant's actual pre-injury work history does not support this estimate. The WCJ recognized this in the following discussion at page three of his Report:

> "It is significant that for approximately 10 years before applicant went to work for Fru-Con *he had not been working because of a prior industrial back injury. He had been on Social Security disability during that period of time.* When he returned to work for Fru-Con, after nine months of his work, his social security benefits were terminated.
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> "Interestingly, the agreed vocational expert, Mr. Simon, concluded that because of this history, applicant when at work for Fru-Con had 0% earning capacity. His calculations of earning capacity are dependent upon data of five years of earnings immediately before the injury. *Since applicant did not have such data the Vocational expert could not therefore determine his earning capacity prior to the date of this injury.*" (Italics added.)

In other words, Mr. Simon's DFEC calculations are based on an indeterminate pre-injury earning capacity. As previously discussed, Mr. Simon's expert vocational opinion and DFEC calculations are flawed because, before the injury in question here, which happened about a year after applicant had returned to the workforce, applicant had been virtually retired and collecting social security benefits.

We further note that Dr. Williams stated in his August 28, 2009 report: "Although [applicant] worked in the construction business for 13 months before the injury, he worked for his son. The knee injuries have placed him back into semi-sedentary status. Because of the low back and education and language, he is not employable."

To the extent this statement suggests that applicant, after being on social security for many years, returned to work for his son, it contradicts Mr. Simon's assumption, in his DFEC calculations under *Ogilvie I*, that applicant supposedly would have had post-injury earnings comparable to a physically robust, literate construction worker. Therefore, it cannot be said that Mr. Simon's calculations meet the requirement of Labor Code section 4660(b)(2) that "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*." (Italics added.) It may have been laudable for applicant to return to work doing unskilled construction labor at 58 years old, but it is unreasonable to assume, as Mr. Simon apparently did, that applicant is "similarly situated" to the kind of construction workers whose loss of post-injury earnings would approach $150,000.00 over three years. It is too jarring a contradiction that applicant went from a long-term earning capacity of 0% before the injury to a long-term earning capacity approaching $50,000.00 per year after working a relatively short time for his son.

Therefore, we conclude that Mr. Simon's vocational reports, testimony, and DFEC calculations are unsupported by applicant's actual pre-injury work history and supposed loss of post-injury earnings, and that Mr. Simon's "proposed individualized DFEC adjustment factors" do not constitute substantial evidence.

In summary, we conclude that in failing to rebut the scheduled permanent disability of 13% under the 2005 Schedule for Rating Permanent Disabilities (PDRS), applicant failed to meet his burden of proof under *Ogilvie II*. Therefore, we will grant reconsideration, reverse the WCJ's finding on permanent disability, and issue an Award of 13% permanent disability.

For the foregoing reasons,

IT IS ORDERED, that reconsideration of the Findings and Award of December 15, 2009 is **GRANTED**, and that as the Appeals Board's Decision After Reconsideration, said decision is **AFFIRMED,** except that Finding 2, as well as paragraphs (A) and (B) of the Award, are hereby **AMENDED** to read as follows:

FINDINGS OF FACT

"2. The injury caused permanent disability of 13%."

AWARD

"(A) Permanent disability indemnity in the amount of $11,050.00, payable at the rate of $200.00 per week for 55.25 weeks commencing from the last date of payment of temporary disability herein."

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"(B) Less attorney's fees in the amount of $1,657.50, which will be commuted from the far end of the award, if necessary, to avoid interruption of applicant's benefits."

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

JAMES C. CUNEO

FRANK M. BRASS

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

MAR 0 8 2010

SERVICE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

JOAQUIN CORTEZ
RUCKA O'BOYLE, LOMBARDO & MCKENNA
STOCKWELL, HARRIS, WIDOM, WOOLVERTON & MUEHL

JTL/ebc

JOAQUIN CORTEZ (MARTINEZ)
SAL 110239; ADJ 4299001

v.

FRU-CON CONSTRUCTION CORP
ZURICH NORTH AMERICAN
INSURANCE COMPANY

DANIEL H. ASTURIAS
Workers' Compensation
Administrative Law Judge

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant, ZURICH AMERICAN INSURANCE COMPANY, has filed a timely and verified Petition for Reconsideration from a FINDINGS AND AWARD issued on 12/15/09. The Petition raises the statutory grounds. The Applicant filed a verified Answer to the Petition for Reconsideration.

II

CONTENTIONS

The Defendant contends:

1. The WCJ exceeded his authority by applying *Olgivie II* to this case because Olgivie case is currently pending before the First Appellate District on a petition for writ of review.
2. Even if *Olgivie II* is properly applied, there is no substantial evidence to support a finding of 54% permanent disability.

III

FACTS

Joaquin Cortez Martinez, born 1/12/46, sustained an admitted injury arising out of and occurring in the course of his employment (AOE/COE) to both knees while working as a construction laborer for Fru-Con Construction Company, then insured for workers' compensation by Zurich American Insurance Company, on 12/9/04. He had stumbled and fallen over boards that he was using to tarp down a roof on a building.

The injured worker was diagnosed with medial meniscus tears including a discrete traumatic Cartilage injury in both the right and the left knee. Applicant underwent two surgeries for each knee; the left knee was surgically treated on 3/9/05 and the right knee on 5/11/05. Post surgically, Mr. Martinez described difficulty climbing stairs up or down, walking slopes and irregular surfaces; he is unable to squat kneel or crawl. He tries to avoid any running and jumping; noting that his left knee was giving more trouble than his right knee. The injury to his knees and resultant disability are considered industrial. There is no apportionment of his knee disability to non-industrial factors.

The evaluating physician, Dr. Don Williams M.D. (D-1) reports his impressions on page 5 of his 11/21/05 report. He reports that the applicant is status post partial medial menisectomy on the left knee, 70% excised; chondromalacia of the medial tibial compartment on the left knee, post-traumatic; patellofemoral chondromalacia on the right knee. And finally old lumbar disc injury.

In describing applicant's impairment in his activities of daily living he includes preclusion from squatting or kneeling activities and limits him from heavy lifting from a squatting position. He concluded that 100% of his knee disability and impairments are because of the injury of 12/8/04.

Applying the 5th Edition of the AMA guide, he concluded that the applicant's functional impairment resulted in a 6% whole-person impairment.

In his supplemental report dated 9/19/06 Dr. Williams notes that "future medical treatment should allow for a total knee replacement".

In regards to Mr. Cortez's work history, he had been employed at California farms in the Salinas region from 1978 to 1984 where he cut and packed lettuce. Most of his jobs involved field work doing packing, earning $300-$450 a week. In his last position he worked for Fru-Con in Sacramento from January 2004 through February of 2005 earning $25 an hour as a general construction laborer. His responsibilities included digging trenches, cleaning offices, and picking up the trash; his specific duties depended upon the contractor he worked for. According

to the history given to the vocational expert, the applicant worked for a month following his original injury being terminated in February of 2005 because of a dispute with the contractor on the project. Following this termination and his surgeries applicant returned to his union hall, where they sent him out to other jobs in November of 2005; however, his attempt to handle the work which included digging trenches and covering buildings with tarps to prevent rain from entering was too physically demanding. From the reports of the examiner, Dr. Don Williams, it is noted that Mr. Cortez had worked for Fru-Con construction for about 13 months doing his general labor which included continuous bending, kneeling, pushing, polling and lifting activities. Doctor concluded the applicant could no longer handle those activities.

It is significant that for approximately 10 years before applicant went to work for Fru-Con he had not been working because of a prior industrial back injury. He had been on Social Security disability during that period of time. When he returned to work for Fru-Con, after nine months of his work, his social security benefits were terminated.

Interestingly, the agreed vocational expert, Mr. Simon, concluded that because of this history, applicant when at work for Fru-Con had 0% earning capacity. His calculations of earning capacity are dependent upon data of five years of earnings immediately before the injury. Since, applicant did not have such data the Vocational expert could not therefore determine his earning capacity prior to the date of this injury.

However, it is uncontroverted that on the date of this injury the injured worker was earning $947.00 a week - approximately $50,000.00/year; that he had held his position with Fru-Con for nine months; that he was 58 years of age, an active member of his union and fully intended to continue to work in the construction field for the foreseeable future. Further, there is additional evidence that supports this finding of earning capacity for he continued to work into February of 2005 after his injury and that he did not leave that position except for a controversy with his employer.

However, following his knee surgeries, in November of 2005, when he returned to work through his union hall, he was unable to continue to do the heavy work, the squatting, the

kneeling and the crawling. It was concluded by the examining physician Dr. Williams as well as by his treating physician that he could not return to his usual and customary employment. At that point in time the knee disability rendered him unable to continue in the construction work.

The Panel QME Dr. Williams concluded that the knee impairments would result in a 6 WPI which would rate under the 2005 Permanent Disability Rating Schedule (PDRS) at 13%.

The formal rating from the DEU rated applicant's condition at 13% permanent partial disability entitling him to the sum of $11,050.00 payable at the rate of $200.00 a week.

The original decision issued before the original *Almaraz/Guzman* and *Olgivie* decisions finding that the DEU permanent disability rating was wholly inadequate and disproportionate to the actual permanent disability sustained by the injured and found that the rating should have been 73% based upon the Agreed Vocational Expert's apportionment of disability to the industrial injury. The commissioners rescinded the decision and returned it to the WCJ to consider the evidence in light of *Almaraz/Guzman* and *Olgivie*. In the mean time the Board issued *Olgivie II*.

On rehearing the Agreed Vocational expert submitted an additional report and testimony. He also reviewed the supplemental report of Dr. Williams, who recommended that medical be left open for knee replacements. In an analogous *Almaraz/Guzman* analysis, he used the 15% WPI for a single successful knee replacement. However, he did not consider the impairment for the alternate knee but combined them to be 15% WPI without explanation.

The agreed vocational expert concluded the applicant was not employable with his disability and that his earning capacity was 0% as compared to similarly situated workers. The defendant did not challenge the vocational expert's opinions.

Now, Dr. Williams had concluded that all of the applicant's knee disability was the result of his work injury, but He did not address the apportionment of the overall disability to his low back injury. His supplemental report simply stated that his "knee injuries have placed him in a semi sedentary status. Because of the low back and education and language, he is unemployable." (W-5)

But no medical evidence of the prior low back injury was ever presented to the panel QME for his review. His comment is most likely based upon his review of the vocational expert's reports. This is not a proper medical foundation for apportionment. Certainly, if that had been presented to the Doctor for his review some additional information may have resulted in a finding of 100 % overall disability before apportionment to the prior low back injury. However, that evidence was not presented. Instead, the doctor only had the benefit of the knee disabilities which he concluded were 2 % and 4% WPI and all caused by the injury.

Now then there is substantial evidence that the injured worker's earning capacity had been seriously compromised by his knee injuries and that there is substantial evidence to rebut the DFEC number for the original rating. With the benefit of the Vocational expert's *Olgivie II* calculations it was determined that the portion of his disability due to his knee injuries could be adjusted using these mathematical calculations. Applying *Olgivie II,* WCJ concluded that the applicant had sustained a 53% industrial disability.

The simple math calculations were as follows:

17.05.01.00 – [4 x 5.52500]22 – 480H – 27 – 33

17.05.06.00 – [2 x 10.05000]20 – 480H – 25.31

These ratings for each knee were combined as follows:

33 C 31 = 54%

While the panel QME had given an analogous WPI (15%)in his supplemental report he had not adequately addressed BOTH knees so his analysis was rejected by this WCJ. It appeared that using the original WPI was the more appropriate in light of the *Olgivie II calculations.*

The Defendants filed a Petition for reconsideration with the aforementioned contentions.

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IV

DISCUSSION

1. The WCJ is bound by the *en banc* decisions of Olgivie and Almaraz Guzman

It is well settled that the administrative law judge is bound by *en banc* decisions even when they are pending appellate review. The panel decision cited by the defendant does not bind this judge or this panel. Furthermore, the facts are different as the parties had in the cited panel decision had *stipulated* to a specific rating if Olgivie *II* would not be applicable to their case. They in effect would await a final decision from the courts. That is not the case in this matter. The parties have not entered a stipulation to that effect.

2. The unchallenged testimony and documentary evidence presented by the Agreed Vocational Expert constitutes substantial evidence to support the rebuttal of the FEC number and determination of the FEC number by the *Ogilvie* calculations.

The defendant contends without identifying any fact in the record that the injured worker did not have the earning potential of other similarly situated full time construction workers. The evidence showed that this gentleman was a member in a union, that he had the desire and motivation to continue to work. And there was no evidence that his low back condition impaired him in doing his construction work before his injury. Some implied that because of his age and prior back injury he could not continue to work, however, there was no evidence presented that once he returned to construction that he had missed work or sought medical treatment because of his prior low back injury. But again the defendant never challenged the assumptions of the Vocational Expert who this WCJ found to be persuasive.

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V

RECOMMENDATION

It is recommended that the Petition for Reconsideration be Denied.

Respectfully submitted,

DANIEL H. ASTURIAS
Workers' Compensation
Administrative Law Judge

Served 1/19/2010 on the following:

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