Law Office of Mark Gearheart

Mark E. Gearheart
Justin C. Sonnicksen

P.O. Box 23124 ■ 367 Civic Drive, Ste. 17
Pleasant Hill, CA 94523

(925) 671-9777
Fax (925) 671-7916

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California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

RE: CONTRA COSTA COUNTY V. WORKERS' COMPENSATION APPEALS BOARD and DOREEN DAHL
CASE NO.: A141046
WCAB CASE NO.: ADJ1310387

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California:

Pursuant to the Rule of Court 8.1125, Amicus Curiae California Applicant's Attorneys Association respectfully requests that the Court decertify for publication the decision by the Court of Appeal filed September 24, 2015 in the above-captioned case. We believe that the opinion at its essence involves whether or not substantial evidence supported the Appeals Board's determination and does not enunciate any new rules of law. This, combined with several misstatements of what the law is, warrants de-publication.

At the first page of the slip opinion, the Court states that "*Ogilvie* held that there are only three ways in which the scheduled rating for an injured employee may permissibly be rebutted."[1] This is a misstatement of the law. The *Ogilvie* court never said there were only three ways to rebut the schedule; rather, they identified what they described as three permissible methodologies. They did not express any opinion that rebuttal was limited to those three methods. In fact, it is not: Neither Labor Code Section 4660 nor the case law limit rebuttal to only the three methods in the *Ogilvie* opinion.

In fact, there is at least one other rebuttal method that has been clearly identified by the Court of Appeal in the case of *Milpitas Unified School District v. WCAB* (*Guzman*) (2010) 187 Cal. App. 4th 808, 75 Cal. Comp. Cases 837. In that case, the Court of Appeal affirmed a WCAB decision endorsing a departure from the generic *AMA Guides* impairment rating by analogizing to other methods or chapters within the book, which essentially constitutes rebuttal of the presumptively correct impairment rating.

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[1] Referring to *Ogilvie v. Workers' Compensation Appeals Board* (2011) 197 Cal. App. 4th 1262.

(See discussion in St. Clair, *California Workers' Compensation Law and Practice*, Section 8:03.) The *Guzman* doctrine was subsequently codified in Labor Code Section 4660.1 (h). And given the absence of any statutory prohibition on other methods of rebuttal, the Court's misstatement is unsupportable.

At page 14 of the slip opinion, the Court expressed its skepticism regarding the Board's conclusion that the employee may invoke the second *Ogilvie* rebuttal method where the inability to rehabilitate results in less than permanent total disability. The Court was careful to note that the issue was not before it, however, even *dicta* from the Court of Appeal must be noted, and the idea that a rebuttal methodology is not available absent permanent total disability is inconsistent with the law. Nothing in Labor Code Section 4660 restricts rebuttal of the Permanent Disability Rating Schedule to permanent total disability cases. In fact, it does not even apply to total disability cases: Permanent total disability cases are adjudicated under Labor Code Section 4662 "according to the fact". Section 4660 and the Permanent Disability Rating Schedule primarily deal with less than permanent total disability, offering a range of possible ratings from zero to 100. The entire schedule is rebuttable per Section 4660.

The *Ogilvie* case itself was a permanent partial disability case in which vocational expert rebuttal methodology was utilized. The Court did not reject the expert opinion because it was not a permanent total case; but because of causation issues.

The essential holding of the *Dahl* Court is that Dahl failed to rebut her scheduled rating by showing that her injury made her not amenable to vocational rehabilitation (slip Opinion, page 9). This is a substantial evidence case and should be viewed as such. Given the misstatements of law, the California Applicant's Attorneys Association respectfully urges that the Court decertify this opinion for publication.

Respectfully submitted,

Mark Gearheart
Counsel for Amicus Curiae
California Applicant's Attorneys Association
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cc: see pages 3 and 4

cc: Court of Appeal – (via truefile)
First Appellate District, Division Two
350 McAllister Street
San Francisco, CA 94102

Workers' Compensation Appeals Board
PO Box 429459
San Francisco, CA 94142

The Honorable Christopher Miller, WCJ
Workers' Compensation Appeals Board
1515 Clay Street, 6th Floor
Oakland, CA 94612

Mark Cartier
Thomas, Lyding, Cartier & Gaus
PO Box 8072
Walnut Creek, CA 94597

Arjuna Hamsa Farnsworth
Boxer & Gerson
300 Frank H. Ogawa Plaza, Ste. 500
Oakland, CA 94612

Tiffany D. Corona
Lenahan, Lee, Slater & Pierace, LLP
1030 15th Street, Ste. 300
Sacramento, CA 95814

Ellen Sims Langille
Finnegan, Marks, et. al.
PO Box 478011
San Francisco, CA 94147

Michael Marks
Law Office of Saul Allweiss
18321 Ventura Blvd., Ste. 500
Tarzana, CA 91356

cc: Edward Louis Hummer
Mullen & Filippi, LLP
111 Santa Rosa Avenue, Ste. 200
Santa Rosa, CA 95404