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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BENJAMIN MESANOVIC,

Applicant,

vs.

SPECIALTY TERMITE; NATIONAL LIABILITY AND FIRE INSURANCE COMPANY,

Defendants.

Case No. ADJ5836774
(Oakland District Office)

OPINION AND ORDER DENYING APPLICANT'S PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the August 12, 2015 Findings, Opinion On Decision, Award And Order of the workers' compensation administrative law judge (WCJ) as served by mail on August 14, 2015. The WCJ found that applicant sustained industrial injury to his low back and psyche while employed as a carpenter by defendant on July 13, 2007, causing a need for future medical treatment. With regard to permanent disability, the WCJ found that "applicant did not rebut the [AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides)] for rating permanent disability," and the issue of permanent disability was deferred along with the related issue of applicant's attorney's fees, "pending development of the record regarding the apportionment" of permanent disability caused by the injury to psyche.

Applicant contends that he rebutted the Diminished Future Earning Capacity (DFEC) adjustment factor in the 2005 Permanent Disability Rating Schedule (PDRS) consistent with the holding of the Court of Appeal in *Ogilvie v. City and County of San Francisco* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie III*), by presenting evidence from a vocational expert showing that his diminished future earning capacity is higher than provided under the PDRS and AMA Guides.

An answer was received from defendant.

The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report) recommending that reconsideration be denied.

Applicant's petition for reconsideration is denied. Applicant did not present evidence showing that the industrial injuries he sustained rendered him incapable of vocational rehabilitation and such evidence is necessary in order to rebut the PDRS as recently held by the Court of Appeal in *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (September 24, 2015, A141046) __ Cal.App.4th __ [80 Cal.Comp.Cases ___] (*Dahl*).[1] Applicant's effort to rebut the PDRS through the vocational expert's opinion regarding diminished future earnings capacity did not comport with any of three methods approved by the Court in *Ogilvie III* and it is therefore foreclosed by the decision in that case. (*Id.*)

BACKGROUND

Applicant sustained an injury to his low back and psyche on July 13, 2007. His workers' compensation claim was accepted and benefits were provided. However, the parties were not able to agree on the level of permanent disability caused by the injury, and that issue was tried on June 4, 2015, along with the issues of injured body parts, need for future medical treatment and applicant's attorney's fee.

At trial, applicant presented the reporting of his vocational expert, Jeff Malmuth, M.S., to rebut the PDRS and show that the effect of the industrial injury on his future earning capacity is greater than provided by the PDRS. (Applicant's Exhibits 1 and 2.)

Following the trial, the WCJ issued her August 12, 2015 decision as described above, finding that applicant did not rebut the PDRS, but also determining that there was a need to develop the record on the issue of apportionment of the injury to psyche. Applicant only challenges the finding that the PDRS was not rebutted, and he does not challenge the WCJ's other findings of injured body parts and need to develop the record on the issue of apportionment of the injury to psyche.[2]

[1] The decision and opinion may also be found for a period of time on the Court's official web site at: <http://www.courts.ca.gov/opinions/documents/A141046.DOC>

[2] A petition for reconsideration "shall set forth specifically and in full detail the grounds upon which the petitioner considers the final order, decision or award . . . to be unjust or unlawful, and every issue to be considered by the appeals board." (Lab. Code, § 5902.) A petitioner, "shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration." (Lab. Code, § 5904.)

In her Report[3], the WCJ provides her view of the history behind the development of the PDRS, and then explains the reasons for her decision in pertinent part as follows:

> The court in [*Ogilvie III*] stated that there are three permissible methods by which the scheduled rating could be rebutted.
>
> First, the court concluded that the Legislature left unchanged the case law allowing 'the schedule to be rebutted when a party can show a factual error in the application of a formula or the preparation of the schedule.' (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1273.) Second, the Legislature also left intact the cases, including [*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587] (*LeBoeuf*)], recognizing '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.' The court interpreted *LeBoeuf* and its progeny as limited in 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.' Third and finally, the court held '[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.'
>
> It was my understanding that applicant was relying on the second prong of [*Oglivie III*] to successfully rebut the permanent disability rating schedule. Applicant was arguing that his earning capacity has significantly reduced because of his injury, which reduction in earning capacity cannot be accounted for by applying the AMA guides for a straight application of calculation of permanent disability.
>
> Based on Mr. Malmuth's opinion I do not see the conclusion of any loss of earnings. Without a showing of an actual loss of earnings by an injured worker, prong two cannot be met.
>
> Applicant has retained sporadic employment during his work life. Applicant has not stayed at any of his places of employment for more than a year. Between 2001 and the date of injury of 2007, applicant had an entire year without employment, 2003. Looking at than a mere 5 years of employment, applicant had a total of five jobs with hourly rates ranging between $8.75 per hour to as much as $22.00 per hour. Most of his employment however was at a rate below $15.00 per hour. According to the jobs that are supposedly available to applicant, based on Malmuth, he could obtain employment that pays as much as $19.00 per hour. Applying this analysis, there is no loss of earning capacity at all.
>
> Since applicant is able to obtain employment, based on Malmuth's testimony at the rate of pay he was generally making before he was hurt, there is no true loss of earning capacity.
>
> And as I stated in my opinion on decision, Mr. Malmuth never explains why applicant would not be able to retrain utilizing the supplemental job displacement voucher. Applicant is a young man. He sustained his injury

[3] The WCJ's Report is incorrectly identified in the EAMS record as "F and A Opinion on Decision."

> when he was 25 years old. No explanation is provided as to why applicant could not attend community college or a vocational school to retrain himself into a different line of work. We are not dealing with an individual who has performed heavy duty labor work for all their lives and is at the advanced age of 50 plus.

DISCUSSION

As shown by the Report, the WCJ concluded that applicant has some amenability to vocational rehabilitation and the reporting by Mr. Malmuth does not establish that applicant sustained a loss of earning capacity due to his injury that supports a level of permanent disability that is higher than using the PDRS. We adopt and incorporate the reasoning provided by the WCJ in the above-quoted portion of her Report.

In addition, we note that in *Dahl* the Court of Appeal affirmed that an applicant must prove as part of any effort to rebut the PDRS that the industrial injury precludes vocational rehabilitation, writing in pertinent part as follows:

> The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach...It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule. The *Ogilvie* court did not sanction rebuttal of the statutory Schedule by a competing empirical methodology—no matter how superior the applicant and her expert claim it may be.

In this case, Mr. Malmuth addressed the issue of amenability to rehabilitation by noting on page 11 of his August 19, 2013 report that "in the instant case, post-injury jobs have been identified that the [*sic*] Mr. Mesanovic can perform without rehabilitation thus rendering a discussion of rehabilitation irrelevant." (Applicant's Exhibit 1.) However, on page 12 of that report, he further wrote as follows:

> I conclude when taking into account the residual functional limitations expressed by the evaluating physicians I do not believe that Mr. Mesanovic is amenable to rehabilitation and the effect thereof, *in the sense that rehabilitation cannot restore him, or a similarly situated worker, to his full pre-injury earning capacity*. Thus, there is diminished future earning capacity. (*Id*, emphasis added; cf. January 3, 2014 deposition of Jeff Malmuth, 13:8-10.)

Mr. Malmuth's opinion that the issue of vocational rehabilitation is irrelevant because there are jobs applicant can perform without it and because vocational rehabilitation would not restore "full pre-

injury earning capacity" is inconsistent with the view of the Court in *Dahl*, as expressed in footnote 6 of that decision, as follows:

> [A]llowing rebuttal whenever an employee shows she cannot be expected to earn the same as she did prior to injury...would allow for rebuttal in a wide swath of cases. Many injured employees cannot return to the precise position they held before their injury or to an equally remunerative one. *Ogilvie* does not appear to contemplate rebuttal of the scheduled rating in this circumstance, since the Schedule's formula for determining diminished future earning capacity takes into account such limitations.

Mr. Malmuth also wrote on page 11 of his report that because vocational rehabilitation is not available to injured workers in the form that existed when *LeBoeuf* was decided, the analysis as to whether the injured worker is in need of rehabilitation has changed. (Applicant's Exhibit 1.) That view was also rejected by the Court in *Dahl*, as shown by its statement in its decision as follows:

> *Ogilvie* holds claimants must show they are not amenable to rehabilitation due to their industrial injury, not due to extraneous factors, such as the cessation of certain state-sponsored rehabilitation benefits. To hold otherwise would mean every employee could now rebut their scheduled rating using a *LeBoeuf* analysis, turning a limited exception into the general rule. There is no indication *Ogilvie* intended the second rebuttal method to be so broad and all-encompassing. (Citation deleted.)

Moreover, in addressing applicant's amenability to vocational rehabilitation, Mr. Malmuth testified during his January 3, 2014 deposition that he believed applicant would benefit from using the approximately $8,000 vocational rehabilitation voucher that was available to him by taking classes in basic computers, software use, and use of a tablet, and also by the potential purchase of a computer. (Applicant's Exhibit 2, 7:15-19; 8:25-9:15; 14:20-24.) He further testified that applicant's vocational rehabilitation could also assist him in securing jobs that he is otherwise physically able to perform. (*Id*, 16:2-7.) This evidence that applicant is amenable to vocational rehabilitation that will improve his future earning capacity precludes the *Ogilvie III* methods of rebutting the PDRS. (*Dahl*, *supra.*)

In sum, an injured worker may rebut a PDRS rating by establishing that he or she is not amenable to rehabilitation and, for that reason, his or her DFEC is greater than reflected in the scheduled rating. (*Ogilvie III, supra,* 197 Cal.App.4th at 1274-1278; *Dahl*, *supra.*) Such a showing was not made in this case. To the contrary, the evidence shows that applicant would benefit from vocational rehabilitation,

1 even if it would not fully restore his pre-injury earning capacity. For that reason, applicant's DFEC is
2 already accounted for as part of the PDRS, and the schedule was not rebutted. (*Id.*)

3 The August 12, 2015 decision of the WCJ is affirmed.

4 For the foregoing reasons,

5 **IT IS ORDERED** applicant's petition for reconsideration of the August 12, 2015 Findings,
6 Opinion On Decision, Award And Order of the workers' compensation administrative law judge is
7 **DENIED**.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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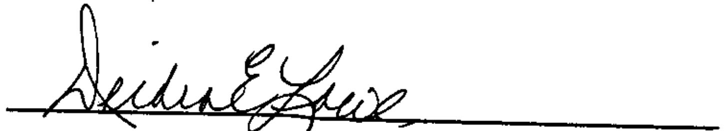
10 

11 DEIDRA E. LOWE

12 **I CONCUR,**

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15 RONNIE G. CAPLANE

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19 **MARGUERITE SWEENEY**

20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**
21 NOV 04 2015

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

24 **BENJAMIN MESANOVIC**
BOXER & GERSON
25 **KARASOFF ASSOCIATES**

26

27 **JFS/abs**

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Benjamin Mesanovic, applicant

vs.

National Liberty and Fire Insurance Co. c/o Berkshire Hathaway Homestate Co. for Specialty Termite, Inc., Defendant

LILLA J. RADOS

WORKER'S COMPENSATION ADMINISTRATIVE LAW JUDGE

ADJ58367744

REPORT AND RECOMMENDATION

ON PETITION FOR RECONSIDERATION

Applicant filed a petition for reconsideration from my decision that applicant did not rebut the permanent disability rating schedule via his vocational rehabilitation expert's report. Defendant filed a response to the petition for reconsideration.

INTRODUCTION

Applicant sustained an injury to his low back and psyche on July 13, 2007. Applicant's claim was accepted and benefits were provided. Because the parties could not come to an agreement as to what applicant's level of permanent disability

was, this matter proceeded to trial on June 4, 2015 and a decision issued on August 12, 2015.

Applicant at trial relied upon the report of his vocational expert, Jeff Malmuth, to argue that he had rebutted the permanent disability schedule because applicant's future earning capacity had significantly been impacted by his work related injury. It was my finding that applicant failed to rebut the permanent disability rating schedule hence a rating must be issued based on the opinions of the medical doctor's reports. I did not issue a final award of permanent disability because the record needed further development as to what percentage of the psychiatric disability should be apportioned to factors other than the work related injury.

Applicant has appealed my decision that he failed to rebut the permanent disability schedule.

DISCUSSION

Labor Code 4660(a) says: "in determining the percentage 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 injury, consideration being given to an employee's diminished future earning capacity. Labor Code section 4660(c), says that "the schedule…shall be prima facia evidence of the percentage of permanent disability to be attributable to each injury covered by the schedule.

“A permanent disability is 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. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320.) Payments for permanent disability are designed to compensate an injured employee both for physical loss and reduction in earning capacity. (Ibid.) But workers' compensation benefits are not damages awarded due to injury, and are not designed to restore the worker all he has lost. (*Flores v. Workmen's Comp. Appeals Bd.* (1973) 36 Cal.App.3d 388, 394, Fn. 1.) Benefits are designed to rehabilitate, not indemnify. (Ibid.)” *Ogilvie v. Workers' Comp Appeals Bd.* (2011) 76 Cal.Comp.Cases 624, 629.

In order to compensate injured worker's for the disability they had sustained as a result of a work related injury the legislature devised a system by which each injured worker's permanent disability may be measured. SB899 created Labor Code Section 4660 as we know it today. Labor Code 4660(a) says: “in determining the percentage 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 injury, consideration being given to an employee's diminished future earning capacity. Section 4660 (b)(2) says: “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. This

Labor Code section requires the AD to use the 2003 RAND study in addition to the 2004 RAND study.

The 2003 RAND Study had two primary purposes: (1) to evaluate benefit consistency under the "old" Schedule by addressing the accuracy of and disparity in ratings of similar injuries by different doctors; and (2) to evaluate benefit equity under the "old" Schedule by addressing whether, in general, injuries causing the highest earnings losses actually received the highest ratings. As part of the "benefit equity" portion of the Study, RAND came up with average rating to average proportional earnings loss ratios for various body parts --- which could be used to reorder PD ratings so that injuries with the highest earnings losses would receive the highest ratings. Nevertheless, the Study really wasn't designed for or appropriate for the task of adjusting diminished future earnings capacity. But the 2004 Study really did little more than refine the rating to proportional wage loss ratio data of the 2003 Study, with the intent that the revised data could be used to compute the DFEC adjustment factors for the new Schedule.

Since 2004 parties have tried to come up with a way to overcome the DFEC multiplier factor Ms. Hoch had devised as an adjustment to an injured worker's standard permanent disability rating level, to account for the injured worker's loss of earning capacity. Until, the only citable opinion regarding how one may attempt to rebut the diminished future earning capacity factor is *Ogilvie v. Workers' Comp Appeals Bd.* (2011) 76 Cal.Comp.Cases 624.

The court in Ogilvie stated that there are three permissible methods by which the scheduled rating could be rebutted.

First, the court concluded that the Legislature left unchanged the case law allowing "the schedule to be rebutted when a party can show a factual error in the application of a formula or the preparation of the schedule." (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1273.) Second, the Legislature also left intact the cases, including *LeBoeuf*, recognizing "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." (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1274.) The court interpreted *LeBoeuf* and its progeny as limited in 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." (*Id*. at pp. 1274–1275.) Third and finally, the court held "[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." (*Id*. at p. 1276.)

It was my understanding that applicant was relying on the second prong of *Oglivie* to successfully rebut the permanent disability rating schedule. Applicant was arguing that his earning capacity has significantly reduced because of his injury, which reduction in earning capacity cannot be accounted for by applying the AMA guides for a straight application of calculation of permanent disability.

Based on Mr. Malmuth's opinion I do not see the conclusion of any loss of earnings. Without a showing of an actual loss of earnings by an injured worker, prong two cannot be met.

Applicant has retained sporadic employment during his work life. Applicant has not stayed at any of his places of employment for more than a year. Between 2001 and the date of injury of 2007, applicant had an entire year without employment, 2003. Looking at than a mere 5 years of employment, applicant had a total of five jobs with hourly rates ranging between $8.75 per hour to as much as $22.00 per hour. Most of his employment however was at a rate below $15.00 per hour. According to the jobs that are supposedly available to applicant, based on Malmuth, he could obtain employment that pays as much as $19.00 per hour. Applying this analysis, there is no loss of earning capacity at all.

Since applicant is able to obtain employment, based on Malmuth's testimony at the rate of pay he was generally making before he was hurt, there is no true loss of earning capacity.

And as I stated in my opinion on decision, Mr. Malmuth never explains why applicant would not be able to retrain utilizing the supplemental job displacement voucher. Applicant is a young man. He sustained his injury when he was 25 years old. No explanation is provided as to why applicant could not attend community college or a vocational school to retrain himself into a different line of work. We are not dealing with an individual who has performed heavy duty labor work for all their lives and is at the advanced age of 50 plus.

RECOMMENDATION

I recommend the Petition for Reconsideration filed by applicant be ***DENIED***.

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DATE: 10/07/2015

Lilla Rados
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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ON: 10/07/2015 BY: