

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **DOREEN DAHL,**

5 *Applicant,*

6 **vs.**

7 **CONTRA COSTA COUNTY, Permissibly**  
8 **Self-Insured,**

9 *Defendant.*

Case No. ADJ1310387 (OAK 03333577)

**OPINION AND DECISION  
AFTER  
RECONSIDERATION**

10  
11 We earlier granted applicant's petition for reconsideration of the September 10, 2011 Findings  
12 and Award of the workers' compensation administrative law judge who found that applicant, while  
13 employed by defendant as a medical records technician during the period ending March 14, 2005,  
14 incurred industrial injury to her neck and right shoulder causing a need for future medical treatment and  
15 59% permanent disability as calculated pursuant to the 2005 Permanent Disability Rating Schedule  
16 (PDRS). In reaching his decision the WCJ expressed the view that under the Court of Appeal holding in  
17 *Ogilvie v. City and County of San Francisco* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]  
18 (*Ogilvie*) an injured worker could not rebut the Diminished Future Earning Capacity (DFEC) adjustment  
19 factor contained in the PDRS by expert testimony unless it was shown that the injury caused a total loss  
20 of future earning capacity and 100% permanent disability pursuant to the analysis of the Supreme Court  
21 in the pre-SB 899 case of *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48  
22 Cal.Comp.Cases 587] (*LeBoeuf*).

23 Applicant contends that she successfully rebutted the PDRS rating awarded by the WCJ by  
24 showing that her DFEC is higher than allowed by the scheduled rating, and that a *LeBoeuf* type of  
25 analysis is properly applied in cases involving less than 100% permanent disability when it is shown that  
26 the disabling effect of the injury impairs the employee's rehabilitation.

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1 An answer was received and the WCJ provided a Report and Recommendation on Petition for  
2 Reconsideration (Report).

3 As our Decision After Reconsideration we rescind the WCJ's September 10, 2011 Findings and  
4 Award and return the case to the trial level for development of the record and a new decision on whether  
5 applicant's rebuttal of the DFEC supports a finding of permanent disability that is higher than calculated  
6 under the PDRS.

### 7 BACKGROUND

8 It is admitted that applicant incurred cumulative trauma industrial injury to her neck and right  
9 shoulder while working for defendant during the period ending March 14, 2005. The parties' Agreed  
10 Medical Examiner (AME) Mechel Henry, M.D., found no basis for apportionment of permanent  
11 disability and no party disputes that she correctly evaluated the whole person impairment (WPI) caused  
12 by applicant's injury in accordance with the AMA Guides to the Evaluation of Permanent Impairment,  
13 Fifth Edition, which are incorporated into the PDRS. Nor does any party dispute that under the PDRS,  
14 the WPI found by Dr. Henry results in a rating of 59% permanent disability as found by the WCJ.  
15 Instead, applicant contends that she proved at trial that her permanent disability should be awarded at a  
16 higher rate because her DFEC is greater than reflected in the PDRS rating awarded by the WCJ.

17 In his Report the WCJ responds to applicant's contentions and explains why he awarded the 59%  
18 PDRS rated permanent disability as follows:

19 "After trial, I determined that, in invalidating the formulas derived by the  
20 Appeals Board in *Ogilvie*, the Court of Appeal effectively nullified a  
21 numerical analysis of earning capacity, and without such an analysis the  
22 only means of rebuttal, using vocational evidence, is in proving total  
23 disability by means of showing an inability to participate in vocational  
24 rehabilitation...

25 "[The court in *Ogilvie*] narrowed the possible avenues to rebut... the  
26 [PDRS] schedule, enunciating three such methods. First, a party may  
27 'show a factual error in the application of a formula or the preparation of  
the schedule.'

"Second, a party may rebut strict application of the [PDRS] schedule by  
means of evidence of the effect the injury has had on the employee's  
'rehabilitation,' meaning vocational rehabilitation. The court in *Ogilvie*  
pointed to several decisions since *LeBoeuf* supporting the conclusion that  
only evidence of inability to be rehabilitated that stems from the industrial  
injury, as distinct from other causes, ought to be considered.

1 "Third, a party may in rare instances prove that the medical complications  
2 of an injury are not captured by the generalized data used to classify  
injuries and impairments.

3 "In this case, I find no available evidence, including within the reports and  
4 testimony of the two vocational experts, supporting either the first or the  
third methods of rebutting the rating schedule.

5 "The second avenue of rebuttal remains... However, quantification of this  
6 aspect remains elusive. Where, to employ the former vernacular, an injury  
effectively renders an employee unable to compete for jobs in the open  
7 labor market or, to use the current phrase, it results in a total loss of earning  
capacity, *LeBoeuf* allows a finding of permanent, total disability. It is  
8 where vocational evidence points to a greater impact than provided by the  
schedule, but less than total disability, that some quantitative substitute for  
9 the schedule must be made. This is where the Court of Appeal has left us  
somewhat bereft of guidance...

10 "Because it is the burden of the party seeking to rebut the PDRS to  
11 overcome the presumption of its correctness, and because under what I  
considered to be controlling authority the rebuttal in this case had failed, I  
12 followed the PDRS in formulating the award." (Citations and footnotes  
deleted, bracketed material added.)

### 13 DISCUSSION

14 We agree with the WCJ that the record in this case does not support use of the first or third  
15 method of rebutting the PDRS as described in his Report and *Ogilvie*. However, we do not agree that the  
16 second *Ogilvie* method described in the Report is only available in cases involving 100% total permanent  
17 disability. Instead, we accept applicant's contention that a *LeBoeuf* type of analysis may be properly  
18 applied in a case involving less than 100% permanent disability when it is shown that the injury impairs  
19 the employee's rehabilitation, as in this case.

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

25 "Indeed, the terms 'diminished future earning capacity' and 'ability to  
26 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  
27 alter the purpose of an award of permanent disability through this change

1 of phrase. Nor does its use suggest that a party seeking to rebut a  
2 permanent disability rating must make any particular showing...

3 “[T]he cases have long recognized that a *scheduled rating has been*  
4 *effectively rebutted* [] *when the injury to the employee impairs his or her*  
5 *rehabilitation, and for that reason, the employee’s diminished future*  
6 *earning capacity is greater than reflected in the employee’s scheduled*  
7 *rating.*

8 “*An employee effectively rebuts the scheduled rating when the employee*  
9 *will have a greater loss of future earnings than reflected in a rating*  
10 *because, due to the industrial injury, the employee is not amenable to*  
11 *rehabilitation. (Emphasis added.)*

12 The view of the Court in *Ogilvie* is consistent with the opinion expressed by Commissioner  
13 Caplane in her dissent in the earlier en banc decisions of the Appeals Board in *Ogilvie*, as follows:

14 “*The percentage of her actual loss of future earnings as demonstrated by*  
15 *both parties’ expert witnesses is the most accurate reflection of her*  
16 *diminished future earning capacity. Therefore, her permanent disability*  
17 *rating should be the percentage of her lost future earning capacity...*

18 “The method that I propose is comprehensive, analytically sound, and  
19 operationally simple. It would require vocational or other experts to  
20 estimate the injured employee’s post-injury earning capacity based upon  
21 medical opinions evaluating her permanent impairments and earning  
22 capacity had she not suffered the industrial injury, both to be determined  
23 from the permanent and stationary date through her projected years in the  
24 work force. Such expert testimony is common in marriage dissolution  
25 cases, personal injury cases, and employment cases.” (*Ogilvie v City and*  
26 *County of San Francisco* (2009) 74 Cal.Comp.Cases 248 (Appeals Board  
27 en banc), emphasis added.)<sup>1</sup>

18 Although the Court of Appeal annulled the Appeals Board’s majority en banc opinion in *Ogilvie*,  
19 it did not reject the opinion of Commissioner Caplane as expressed in her dissent as quoted above.<sup>2</sup> To  
20 the contrary, the Court recognized that there is no meaningful distinction between the terms “diminished  
21 future earning capacity” and “ability to compete in an open labor market,” and held that an employee  
22 rebuts the PDRS rating by showing that he or she will have a greater loss of future earnings than reflected

23  
24 <sup>1</sup> Commissioner Caplane is now Chairwoman of the Appeals Board. See also, *Ogilvie v City and County of San Francisco*  
25 (2009) 74 Cal.Comp.Cases 1127 (Appeals Board en banc) and *Ogilvie v City and County of San Francisco* (2009) 74  
26 Cal.Comp.Cases 478 (Appeals Board en banc).

27 <sup>2</sup> 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

1 in the PDRS rating. In sum, *Ogilvie* does not preclude a finding of permanent disability that takes into  
2 account the injury's impairment of rehabilitation and its effect upon the worker's DFEC.

3 Application of a *LeBoeuf* type of analysis in cases of partial permanent disability requires expert  
4 opinion on the effect of the injury's impairment on the worker's amenability to rehabilitation and the  
5 effect of that on DFEC. Such an analysis can be done even where there is less than total permanent  
6 disability, as in this case where the employee has rebutted the PDRS by showing that she will have a  
7 greater DFEC than reflected in the PDRS rating.

8 Accordingly, the September 10, 2011 Findings and Award is rescinded and the case is returned to  
9 the trial level for development of the record as appropriate in light of our decision, and for further  
10 proceedings and a new decision by the WCJ concerning applicant's DFEC and its relationship to the  
11 percentage of her permanent disability.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision after Reconsideration of the Appeals Board that the  
3 September 10, 2011 Findings and Award of the workers' compensation administrative law judge is  
4 **RESCINDED** and the case is **RETURNED** to the trial level for development of the record as  
5 appropriate, further proceedings and a new decision by the workers' compensation administrative law  
6 judge in accordance with this decision.

7 **WORKERS' COMPENSATION APPEALS BOARD**

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10 **FRANK M. BRASS**

11 **I CONCUR,**

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14 **ALFONSO J. MORESI**

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17 **MARGUERITE SWEENEY**

18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **MAY 18 2012**

20  
21 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**  
22 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

23 **DOREEN DAHL**  
24 **BOXER & GERSON**  
25 **THOMAS, LYDING ET. AL.**

26  
27 *JFS/abs*

**DAHL, Doreen**