

## **The Board to WCJs: Show your Work**

By Dana Mitchell, Esq.

While the en banc decision of *Ogilvie II* is on appeal at the First District Court of Appeal, three recent Board cases interpreting *Ogilvie* appear to provide some guidance to defendants facing an attempted rebuttal of the DFEC adjustment factor (or who wish to rebut it themselves). While none of these cases were decided en banc, so they are not binding on workers' compensation judges, they do provide a glimpse into what the Board will look for when analyzing a challenge under *Ogilvie*. Here are some questions addressed by these decisions:

- **Now *Ogilvie* is on appeal, does that mean the Commissioners (and judges) will refrain from addressing rebuttal of the DFEC factor until the court of appeal takes action?**

Probably not, although in *Bowden v. Sunray Termite Control, Inc.*, issued in December 2009, this appeared to be the case. The parties in *Bowden* stipulated that the scheduled PD rating was 26%, but applicant sought to rebut the DFEC factor under *Ogilvie*. Defendant contended a final determination should await the outcome of the *Ogilvie* decision on appeal.

The Board awarded "interim benefits" at the scheduled permanent disability level agreed upon by the parties, and deferred the issue of whether the applicant should receive an increased award based on *Ogilvie* principles, pending the outcome at the appellate level. The Board did not specifically explain why, citing only "the circumstances presented here".

The workers' compensation community speculated that this signaled an informal "time out" or stay on *Ogilvie* proceedings. However, in *Shini v. Pacific Coast Auto Body* and *Garcia v. Patrick L. Hinrichsen* (discussed further below), the Board returned these cases to their respective WCJs for a more complete *Ogilvie* analysis instead of deferring the issue.

Therefore, it appears applicants and defendants, in general, are going to be able to proceed to trial on *Ogilvie* issues.

- **Is rebutting the DFEC as simple as a mathematical calculation?**

*Shini v. Pacific Coast Auto Body* (issued in January 2010) and *Garcia v. Patrick L. Hinrichsen* (issued in March 2010) demonstrate that a WCJ must fully analyze the issues in *Ogilvie I* and *II*, and not mechanically apply the *Ogilvie* formula. Additionally, the evidence relied upon must be strong enough to justify straying from the scheduled DFEC factor. If necessary, the WCJ may further develop the evidentiary record to perform a full *Ogilvie* analysis.

In *Shini*, the Board rescinded the award, concluding that while the WCJ determined that the applicant successfully rebutted the scheduled DFEC factor, the WCJ failed to fully analyze the issues outlined in *Ogilvie I* and *Ogilvie II*. The WCJ's findings regarding the applicant's lost earnings were based solely on the applicant's trial testimony. Noting that the AME had

questioned the applicant's credibility, and reiterating that the applicant carried the burden of rebutting the scheduled rating, the Board felt it was inappropriate for the WCJ to rely solely on applicant's testimony in this case in determining the issue of lost earnings.

Also, the WCJ in *Shini* did not explain why he used a three-year period to calculate the applicant's post-injury earnings and earning loss, especially since the applicant was not permanent and stationary for the entire three year span of time. Further, the WCJ failed to state what the scheduled DFEC adjustment was for either of the injuries.

There was no evidence presented that the applicant could not work at all, even though the applicant testified he could not return to his previous employment. Given that the applicant claimed zero earnings, and his individualized DFEC adjustment factor was "so divergent from" the scheduled DFEC adjustment factor in this case, the WCJ should have provided a complete *Ogilvie* analysis.

The WCJ should have explained, among other things, the evidence which was relied upon to find the applicant's earning loss and the earning loss period decided upon. The WCJ should have discussed whether the adjusted DFEC factor is a true reflection of the applicant's lost earning capacity, including a discussion of whether the applicant was malingering. The WCJ should have discussed the *Montana* factors [which include the applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated]. Additionally, the adjusted DFEC factor must be weighed against the scheduled DFEC factor to determine which better reflects the applicant's diminished earning capacity.

The matter was returned to the WCJ to address these issues.

Likewise, in *Garcia*, the WCJ did not fully analyze the issues outlined by the *Ogilvie* I and II decisions, according to the Board. At trial, the applicant testified that she attempted to return to work but her pain was too severe. Applicant presented evidence that her earnings since the injury totaled only \$440.

The WCJ mechanically applied the *Ogilvie* formula to award increased permanent disability benefits. However, again, the WCJ's findings were based on the applicant's trial testimony alone, and the decision contained no discussion of why the type of evidence outlined in *Ogilvie* was not used (e.g., EDD wage information and other empirical earnings information). Again, the Board emphasized a discussion of the *Montana* factors, to determine whether a calculation of an applicant's earning capacity is accurate.

While noting the applicant carried the burden of proof on rebuttal, the Board also noted the WCJ had discretion to develop the record before rendering a decision.

Also, the Board stated, “To the extent that the WCJ believes that a proper DFEC adjustment factor cannot yet be determined, the WCJ should consider an award utilizing the scheduled DFEC rating, subject to a later petition to reopen, as discussed in *Ogilvie II*.”

**Points to take away:**

- The burden of proof lies with the party seeking to rebut the DFEC adjustment factor, so make the other side meet that burden!
- However, note that, at his or her discretion, a judge may develop the record before rendering a decision;
- Rebuttal requires more than math—there must be sufficient evidence, and an adequate discussion of the evidence, to justify a rebuttal.

If you have any questions, please feel free to call Armstrong, Callan & Shiu, LLP at (408) 279-6400.