



## California Workers' Compensation Institute

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September 29, 2015

Significant Decision 15-05

**CONTRA COSTA COUNTY V WCAB (DAHL)  
COURT OF APPEAL, FIRST APPELLATE DISTRICT  
A141046**

FILED: SEPTEMBER 24, 2015

**TO REBUT THE SCHEDULED RATING, THE INJURED WORKER MUST ESTABLISH THAT THE INDUSTRIAL INJURY RENDERED HER INCAPABLE OF REHABILITATION.**

**SIGNIFICANCE:** In determining the employee's final permanent disability rating, whether the injured worker will be incapable of benefitting from rehabilitation is a factor that must be considered.

**FACTS:** The applicant's combined rating pursuant to the permanent disability rating schedule (PDRS) was 59%. The injured worker attempted to rebut that rating by presenting vocational evidence that her loss of future earning capacity would be greater than the DEU rating. In their reports and testimony, both vocational experts agreed that the injured worker would be a good candidate for rehabilitation.

**HOLDING:** The method of calculating future loss of earnings that simply differs from the rating schedule is not in accordance with the Ogilvie rationale and is not sufficient to rebut the DEU rating. To rebut the PDRS, the injured worker must also establish that the injury rendered her incapable of rehabilitation.

**DISCUSSION:** Dahl attempted to use the second method approved in Ogilvie, which the court referred to as the "LeBoeuf method" because it was based on the Supreme Court's ruling in that case. The Court dissected both Ogilvie and LeBoeuf in an extensive opinion and interpretation of the PD rebuttal standard. The court quoted Ogilvie, noting that under this method, the injured worker must establish that she "will have a greater loss of future earnings than reflected in a (DEU) rating because, due to the industrial injury, the employee is not amenable to rehabilitation."

The court found that Dahl's attempt to rebut the scheduled rating focused only on the loss of future earning and she presented no evidence of whether she was amenable to rehabilitation, which did not meet the standard established in Ogilvie and LeBoeuf.

The court noted:

"Dahl's attempt to rebut her disability rating bears little resemblance to any of the methods described in Ogilvie, including the rebuttal method derived from LeBoeuf. Dahl did not explain how her injury prevented her from participating in vocational

rehabilitation. In fact, Dahl's own vocational expert conceded that she was a good rehabilitation candidate and also stated a discussion of vocational rehabilitation was "irrelevant." The gravamen of Dahl's rebuttal is that her expert's analysis of the earning capacity—based on the earnings loss of a group of individuals that the expert identified as more similarly situated to Dahl than the group identified in the schedule for someone with her characteristics—is superior to the method and rating called for by the statute. This approach is at odds with, which rejected a similar attempt to simply substitute a vocational expert's or judge- or board-preferred methodology for the statutorily prescribed rating system. Ogilvie signaled that it would be a rare case in which an applicant or employer could rebut a scheduled rating."

When Ogilvie issued, it was this second method that seemed too open-ended to many, and the method used by the vocational rehabilitation expert in this case has become the most common calculation and the most often accepted by judges and the Board. The very strong and detailed interpretation provided by the Dahl court put an end to this simplistic approach to PD rating rebuttal and returns the process to what was intended and expressly stated by the Ogilvie court.

MMc/

CWCI Amicus Brief

Court Opinion