

DEFENDING AGAINST OGILVIE: ITS SCOPE AND LIMITS

Carolyn Wood, Sacramento

Introduction

Ever since the *en banc* decision in *Ogilvie vs. City and County of San Francisco* was issued in February, 2009, and reaffirmed and clarified in September, 2009 (now referred to as '*Ogilvie I* and *II*, respectively) applicants' attorneys have been raising it with ever increasing frequency, and with particularly devastating effect in 'zero' earnings cases where the injured employee is on Social Security. In these cases the application of the *Ogilvie* alternative Diminished Future Earning Capacity ("DFEC") formula can increase the value of the case by 100%, and thus delay the resolution of the case as the parties address this new issue. The limits of *Ogilvie* have yet to be tested in the Courts. However, by looking carefully at the language of *Ogilvie* and its logical limitations, we can devise practical steps and legal challenges with which to defend against it.

What the Holdings in *Ogilvie I* and *II* Mean

By way of background, *Ogilvie I* and *II* hold that the scheduled rating under the AMA Guides is rebuttable, and can be challenged by showing that an individual's DFEC adjustment factor (based upon his individual estimated earnings loss) falls **outside** the scheduled Future Earning Capacity ("FEC") ranking. If so, the challenge is deemed successful, and the standard Diminished Future Earning Capacity ("DFEC") factor is replaced by an **alternative DFEC adjustment factor**, which is then used to adjust the Whole Person Impairment ("WPI"). This may be reasonable in some cases, where earnings have decreased but not vanished, and impairment is otherwise arguably inadequate under the AMA Guides. However, it is **not** so in cases where there are **no** post injury earnings. Why? **Any time** you input zero into the *Ogilvie* alternative DFEC adjustment formula in a rating string, that string increases in value by **18%**. If there are 4 or 5 strings to a rating, one can quickly see how this can increase the value of the case by 100% or more – e.g. a case that previously rated to 39%, might now become a 'life pension' case at 79%. Upon closer inspection, the *Ogilvie* case itself gives us some ways to defend against this, and limit its application to these cases.

***Ogilvie* Does Not Apply to Every Case**

Ogilvie I states "[w]hether the DFEC rebuttal method ... should or should not be used in any particular cases must be determined on a case – by- case basis." *Ogilvie II* points out that "[a]n important principle underlying our (*Ogilvie I*) opinion, is that any valid method of challenging the DFEC adjustment factor component of a scheduled... rating should be consistent with the Constitutional mandate that 'the administration of [workers' compensation] legislation shall accomplish substantial justice in all cases....'" Further, both *Ogilvie I* and *II* point out that "the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating" and that "even if the rebuttal evidence is legally substantial, the ... trier-of-fact may still determine that the evidence does not 'overcome' the DFEC adjustment factor component of the scheduled ... rating." Thus, *Ogilvie* does not apply to every case, and it is up to the trier-of-fact to make this determination.

***Ogilvie* Does Not Apply to Zero Earnings Cases**

In both *Ogilvie I and II*, the panel noted that they were **not** addressing the question of whether or not the alternative DFEC factor should be used in cases where there was a ‘total loss of earning capacity.’ The panel in *Ogilvie I* concluded that “...[i]n the usual case, there is not a one-to one correlation between an injured employee’s diminished future earning capacity and his or her disability.” In the footnote following they added:

We recognize, however, that there may be some circumstances where an injured employee’s DFEC might be the sole or dominant factor in determining permanent disability, such as where the employee’s injury causes a total loss of earning capacity or something approaching a total loss of earning capacity. (citation omitted) This question, though, is not before us now.

Ogilvie II explained **why** they exempted these cases from consideration:

However, when SB 899 amended section 4660, it not only substituted “diminished future earning capacity” for “diminished ability... to compete in an open labor market,” but it also defined both “diminished future earning capacity” and “nature of the physical injury or disfigurement.” Accordingly, the change in the nature and structure of section 4660 now means that permanent disability cannot simply be equated to diminished future earning capacity, even if it could be said that, under former section 4660, permanent disability could be equated to diminished ability to compete in the open labor market.

This not only leaves open the argument that *Ogilvie* was **not** intended to apply to zero income cases, but implicitly states that it **should not** apply where it would become the ‘sole or dominant’ factor in determining permanent disability. Since the effect of applying the *Ogilvie* formula to a zero earnings case is to increase its value by 100%, one could easily argue that it does become the “sole or dominant” factor, and does create the impermissible “one-to-one effect” prohibited by SB 899.

***Ogilvie* Does Not Apply When The Total Loss of Earning Capacity is Due to A Combination of Medical Factors Other Than the Injury**

Oftentimes there are multiple reasons why an employee has a total loss of post-injury earning capacity. For example, it can partially be due to prior injuries or non industrial conditions. In *Ogilvie I* the panel noted that the application of the alternative formula to these situations may not be appropriate:

...in calculating an individual injured employee’s proportional earnings loss, there may be occasions where the portion of that calculation relating to the employee’s post-injury earnings will not accurately reflect his or her true earning capacity – or where the employee’s diminished post-injury earnings are partially caused by factors other than the injury itself.... So, in either case, the question will have to be resolved by the trier-of-fact.

In cases where the total loss of earning capacity is due in part to an earlier injury for which the employee has already been compensated, the argument is that to apply *Ogilvie* would double compensate the applicant for an injury for which they have already been compensated. In the case where the loss of earning capacity is due in part to a non-industrial condition, the argument is that its application would effectively nullify any valid apportionment given under Labor Code sections 4663 or 4664. Either way, it appears that the Panel intended the formula to be applied *only* in cases where the loss of income can be related solely to the injury for which the impairment is being determined. Thus, the *Ogilvie* formula does not apply to these cases.

***Ogilvie* Does Not Apply When the Total Loss Of Earnings Is Due to Non-Medical Factors, Such as the Economy or Lack of Motivation**

In every case where an employee has **no** post injury earnings, the question of motivation must be raised. *Ogilvie I* specifically addresses this issue:

Certainly an individual employee should not be able to manipulate the proportional earning loss calculation through malingering, or otherwise deliberately minimizing his or her post injury earnings. Similarly, motivational or other factors may play a role in determining whether a particular employee's post-injury earnings accurately reflect his or her true post-injury earning capacity.

So, the question becomes, "how do you test motivation?" Arguably, the only way to do so is to use an outside expert to prepare a labor market survey and determine what jobs and wages are available to this employee with these specific restrictions, training and experience. (Note: *Ogilvie* does not prohibit the use of experts, but limits their use to only those situations where they are needed to determine the actual or estimated loss of earning capacity, such as where motivation is an issue.) Judges are cognizant of the need to test motivation. Thus, as soon as the *Ogilvie* issue is raised, defendants should immediately take steps to undertake this discovery by setting an *Ogilvie* deposition, and by requesting a labor market survey. To disallow this evidence before trial is a basis for a Petition for Removal. To disallow it at trial is a basis for Reconsideration.

Conclusion

In sum, the application of the *Ogilvie* formula to zero earnings cases can and should be defended vigorously as its application to these cases was **not** intended or considered in the decisions, and if applied, will invariably become the 'sole or dominant factor' in determining impairment, which is expressly prohibited by *Ogilvie*. Discovery on this issue is **essential** to building a strong defense to an *Ogilvie* claim. Until the Court of Appeal has addressed these issues, they should be raised at every stage, and kept alive for appeal. Whether or not *Ogilvie* will ultimately be overturned in the Court of Appeal is uncertain. But what is certain is that at this time there are a number of tools available within the decisions themselves which support these arguments, and ensure that *Ogilvie* is applied **only** to those cases for which it was written – where there are diminished future earnings based solely on the injury being rated, and not in cases with '0' future earnings.