

ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

For past installments of the *George the Bartender* series, please visit our web site at <http://www.kttlaw.us/memos.html>

RE: GEORGE THE BARTENDER HAS A THIRD HELPING OF OGILVIE OR THE COURT OF APPEAL MAKES THE DEFINITION OF DIMINISHED FUTURE EARNING CAPACITY MURKIER¹

FROM THE LOBBY BAR AT THE HYATT:

I arrived at the Lobby Bar early tonight eager to see the reaction of Ron Summers, George the Bartender's workers' compensation attorney, to the various interpretations floating around in our wonderful world of workers' compensation regarding the Court of Appeal decision in *Ogilvie v. Workers' Comp. Appeals Bd.*, 197 Cal. App. 4th 1262 (Cal. Ct. App. 2011).

Taking my usual seat at the Lobby Bar I noted that Ron and his band of merry men had not yet arrived. This was fine with me as it gave me more time to look longingly at Kim, the Hyatt's breathtakingly beautiful cocktail waitress, in peace and quiet.

For those of you in the workers' compensation field who have been living under a rock for the past three years, the *Ogilvie* case has been a hotly contested issue over the interpretation of the diminished future earning incapacity (DFEC) as defined in Labor Code §4660.²

Previously the Appeals Board issued two en banc decisions known in the industry as *Ogilvie I* and *Ogilvie II*, so I suppose the Court of Appeal decision issued on Friday, July 29, 2011, will come to be known as *Ogilvie III*.³

In *Ogilvie II* the Board held that the DFEC component of the rating formula is rebuttable and proposed that there are different formulas which can be utilized to achieve this goal other than relying on the RAND study as specifically authorized in Labor Code §4660.

¹ For those new patrons to the lobby bar, George the Bartender's workers' compensation case involves an injury to his elbow, lateral epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

² On April 19, 2004, the California legislature enacted an amendment to Labor Code §4660 changing how permanent disability benefits are calculated and in addition to the adjustment factors of age and occupation brought in the concept of diminished future earning capacity based on the 2003 RAND study.

³ *Wanda Ogilvie v. City and County of San Francisco, Permissibly Self-Insured* Case No. ADJ1177048 (SFO 0487779) 74 Cal. Comp. Cases 478; *Wanda Ogilvie v. City and County of San Francisco, Permissibly Self-Insured* Case No. ADJ1177048 (SFO 0487779) 74 Cal. Comp. Cases 1127

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The Board reasoned that since the applicant's attorneys did not have \$20-\$30 million lying around they could not readily finance a study as comprehensive as the RAND study. The Board proposed utilizing formulas that involved obtaining information by word of mouth, from vocational rehabilitation consultants, the Employment Development Department or other sources available on the internet.

The Board in *Ogilvie II* explained that in this way an applicant's attorney could compare the diminished future earning capacity of the applicant with the potential earnings of uninjured employees in the same occupation.⁴

In striking down the Board's two decisions in *Ogilvie I* and *Ogilvie II* the Court emphasized that Labor Code §4660 clearly held that in attacking the DFEC component of the rating formula parties must rely on the RAND study thereby throwing out the Board's *Ogilvie* formulas.

The Court held that a litigant's only choice was to find an error in the application of the RAND study to the DFEC component.

However, to make matters interesting, the Court also held that in rare cases the concept of diminished future earning capacity has been available to rebut the final permanent disability rating both before and after the passage of California Senate Bill 899.

At this point in my thought process, a livid Ron Summers appeared with the rest of his cartel of chicanery: Dr. Nickelsberg, George's Primary Treating Physician; accompanied by Larry and Lenny Lien of the 8600 Group.

As I anticipated Ron and Dr. Nickelsberg began a heated argument over the interpretation of the Court's decision in *Ogilvie III*.

I knew from experience that Larry and Lenny Lien had made quite a good living as vocational rehabilitation "experts" under the Board's en banc decision in *Ogilvie II* by testifying as to the diminished future earning capacity of some of Ron's clients contrasted against similarly situated uninjured employees in the same occupation.

Eagerly wanting to hear the details of the spat up close I immediately asked George to bring Ron and his cohorts a round of drinks.

⁴ Actually in *Ogilvie II* the Board did not refer specifically to applicant attorneys, indicating instead that either party would be able to rebut the diminished future earning capacity (DFEC) component of the rating schedule. Let's be realistic here though, we all know that the attack on the DFEC component is always going to come from the applicant's side.

The demeanor of Larry and Lenny told me they had read the court's opinion as well, specifically the part about throwing out the alternate *Ogilvie II* formulas suggested by the Board which would now be considered dead on arrival.

In its decision the Court of Appeal emphatically stated that the California legislature, in enacting Labor Code §4660, did not allow a departure from the formula for diminished future earning capacity from the reliance on the RAND study.

The court went on to note that in attacking the DFEC component of the rating schedule one must find an error in the RAND study. In fact, the court pointed out that the RAND Institute for Civil Justice, the same organization that conducted the study, released a working paper discussing some of the caveats of the data employed in their study.⁵

I knew that Larry and Lenny were contemplating that the alternate formulas they had devised for their countless reports and testimony were now obsolete and they were wondering whether or not they would be paid.

A look of frustration seemed permanently affixed to Ron's face. I was curious about this since the Court of Appeal had also stated in rather clear and concise terms that the law had not changed; that an applicant's diminished future earning capacity could rebut the ultimate rating.

When I pointed that out to Ron he replied that unfortunately most of his current clientele had returned to their jobs. Some had even been promoted and were earning more money. Ron could see the grin forming on my face, which we both knew was enough to point out the irony in his statement.

THE CONCEPT OF WAGE LOSS VS. DIMINISHED FUTURE EARNING CAPACITY

Fed up with dealing with their own frustration, Ron and Dr. Nickelsberg now concentrated their efforts on trying to cheer up Larry and Lenny Lien.

However, the two lien claimant representatives were inconsolable at the prospect of being on able to produce reports along the lines of the formulas as devised by the Board in *Ogilvie II*.

After Ron had his third cocktail he told Larry and Lenny that he would advise his clients to remain off work so that Larry and Lenny could still testify before the Board as to the wage loss by Ron's applicants.

⁵ RAND Inst. for Civil Justice, Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899 (2004) (Working Paper).

While I admired Ron's feeble attempt to cheer up the Lien brothers I couldn't resist the temptation to further rain on his parade. I broke in by telling Ron that, despite the language of Labor Code §4660 and the DFEC component of the ratings schedule, California was not a wage loss state and the Court of Appeal in *Ogilvie III* referred to earning capacity and not wage loss.

I reminded Ron that the California Supreme Court decision in *Argonaut Ins. Co. v. Industrial Accident. Com.* (Montana) (1962) 27 Cal.Comp.Cases 130, 133, was still the law and in order to establish a loss of earning capacity account must be taken of the state of the labor market, the education of the applicant, the applicant's motivation to go back to work, etc.

WHAT IS OUR LIABILITY TO PAY "VOCATIONAL EXPERTS?"

Larry and Lenny Lien snapped out of their stupor long enough to ask the following question: What is the defense's liability to pay "vocational experts" who have prepared reports and testified as to the formula devised by the Board in *Ogilvie II*?

I answered the dastardly duo that it was my conclusion that a defendant had no liability whatsoever to pay the cost of the applicant's vocational rehabilitation "experts" under the formulas promoted by *Ogilvie II*, except under unique circumstances.

Ron disagreed wholeheartedly, pointing out that even though the Court of Appeal had overruled the Board's decision in *Ogilvie II* Larry and Lenny had in good faith prepared reports based on the now defunct decision.

With yet another mischievous grin on my face I told Ron that notwithstanding this fact the only obligation of a defendant to pay an expert witness is the fact that the witness qualifies as an "expert" in the first place.

Ron had a quizzical look on his face and wanted to know what I meant by that.

I quickly produced a copy of the California Evidence Code from my briefcase, which I always carry with me. I showed Ron the definition of an "expert witness."

According to Evidence Code 720 an "expert witness" is essentially a witness who has specialized knowledge beyond the knowledge of a lay witness.

I pointed out to Ron that the training and expertise that Larry and Lenny had developed in vocational rehabilitation brought nothing to the table in figuring out the *Ogilvie II* formulas, as these calculations could easily be made by a lay person such as Ron, myself or an adjuster.

I told Ron that Larry and Lenny were testifying as lay witnesses in figuring out the formula and their compensation should not be as expert witnesses testifying as to specialized expertise.

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OGILVIE III: A SWORD OR A SHIELD?

There is little question that the defense won the narrow issue with the Court of Appeal decision in *Ogilvie III*.

However, the Court spent some time in talking about the California Supreme Court's decision in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 242-243 and remarked that the concept remained the same and was not changed by Senate Bill 899 and the amendments to Labor Code §4660.

In approving the decision in *LeBoeuf* the Court indicated that a loss of future earning capacity basically was equivalent to the old version of Labor Code §4660 which was predicated on loss of an ability to compete in an open labor market. In certain unnamed situations this could rebut a permanent disability rating.

Our more savvy Lobby Bar patrons will see what I see: a hole in the fabric of permanent disability. And that rumbling you hear? The sound of applicant attorneys starting up their Mack trucks.

DISCLAIMER:

All characters at the Lobby Bar are a product of my very active imagination, with the exception of Kim, George and myself.

I started in this business in 1973 and have experienced countless reforms and/or revisions of the system. Every reform came with the stated purpose of "simplifying the system" and expediting the delivery of workers' compensation benefits to injured workers.

Unfortunately, reforming our workers' compensation laws is like reforming the Tax Code i.e., revisions and/or reforms may seldom clarify anything and certainly do not make for a simpler life.

Make mine a double, George.

-Joe Truce