

Case ID:ADJ4536632
(F11D02F4-EBCE-485C-B5A6-38D6BF95619E)

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DEC 22 2009
MARTIN S. WEISS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

STEVEN BOWDEN,
Applicant,

vs.

**SUNRAY TERMITE CONTROL, INC., and
NATIONAL LIABILITY AND FIRE, Adjusted
by BERKSHIRE HATHAWAY,**

Defendants.

Case No. ADJ4536632 (SJO 0263192)

**OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant, National Liability and Fire, adjusted by Berkshire Hathaway Homestate Company, on behalf of its insured, Sunray Termite Control, Inc., seeks reconsideration of the Findings, Award and Order, issued October 6, 2009, in which a workers' compensation administrative law judge (WCJ) found that as a result of his November 10, 2006 industrial injury to his low back, applicant Steven Bowden, sustained permanent disability of 44%, after adjustment for his Diminished Future Earnings Capacity (DFEC), concluding applicant had successfully rebutted the scheduled rating with regard to the DFEC adjustment factor. Applicant was awarded permanent disability in the sum of \$52,670.00, less credit for permanent disability advances of \$18,540.00, a temporary disability overpayment of \$6,281.58, and attorney fees of \$7,900.00. The parties were ordered to adjust the potential lien of the Employment Development Department (EDD).

Defendant contends the WCJ's upward adjustment of applicant's permanent disability is in error, as it relies upon the application of the Appeals Board's *en banc* decision in *Ogilvie v City and County of San Francisco* (2009) 74 Cal.Comp.Cases 1127, which is currently on appeal before the District Court of Appeal. Defendant asserts that a final determination in this matter should

ACC 3
RFT
1944

Case ID:ADJ4536632
{F11D02F4-EBCE-485C-B5A6-38D6BF95619F}

1 await the outcome of the appeal in *Ogilvie*, as the parties have stipulated that applicant would only
2 be entitled to 26% permanent disability if *Ogilvie* is not applicable or is overturned. Defendant
3 asserts that if it is required to pay the current award it would be unable to recover its
4 overpayments, in light of the credit for permanent disability advances and its temporary disability
5 overpayment. Defendant also contends that *Ogilvie* is not applicable because applicant's lack of
6 post-injury employment is due to his desire for lumbar surgery, which has been found not to be
7 warranted under the back surgery second opinion process. Applicant has filed an answer to
8 defendant's petition.

9 For the reasons set forth below, we shall grant reconsideration to amend the Findings,
10 Award and Order to award interim benefits pending the outcome of the appellate review of
11 *Ogilvie*, and return this matter to the trial level to await the final decision in *Ogilvie*.

12 The parties stipulated that absent the application of the principles set forth in *Ogilvie*, for
13 the modification of the DFEC factors, applicant's permanent disability for his November 10, 2006
14 industrial injury to his low back would be 13% WPI adjusted to 26%. They further stipulated that
15 if *Ogilvie* is applied, the permanent disability would adjust to 44%. The WCJ found an upward
16 adjustment was appropriate and awarded 44% permanent disability.

17 Under the circumstances presented here, we believe applicant should receive an interim
18 award of the amount of permanent disability to which the parties stipulated in the event the *Ogilvie*
19 factors were found not to be applicable. Therefore, we shall amend the Findings and Award to
20 award 26% permanent disability, with credit for defendant's permanent disability advances and a
21 15% attorney's fee, while the issue of whether there may be an upward adjustment of permanent
22 disability under *Ogilvie* is finally determined on appeal. We shall also defer the issue of
23 defendant's entitlement to credit for temporary disability payments, and whether the circumstances
24 in this case warrant the application of the principles in *Ogilvie*, if upheld on review.

25 ///
26 ///
27 ///

BOWDEN, Steve

Case ID:ADJ4536632
(F11D02F4-EBCE-485C-B5A6-38D6BF95619F)

1 For the foregoing reasons,

2 **IT IS ORDERED** that the October 27, 2009 Petition for Reconsideration be, and hereby
3 is, **GRANTED**, and as our Decision After Reconsideration, the Findings, Award and Order Award
4 is **AMENDED** as follows:

5 **FINDINGS OF FACT**

- 6 6) The issue whether applicant has rebutted the DFEC adjustment in the 2005 PDRS is
7 deferred.
- 8 7) Applicant is entitled to an interim award of 26% permanent disability, pursuant to the
9 parties' stipulations, equal to 106.75 weeks of permanent disability payable at the rate of
10 \$230 per week, in the sum of \$24,552.50, commencing 11/2/07, less credit for permanent
11 disability advances (amount subject to proof but stipulated as \$18,540.00 as of 8/5/09).
- 12 8) Applicant's attorney, Capurro, Rocha and Schmidt has earned a fee of \$3,682.87.
- 13 9) The issue of defendant's entitlement to credit for overpayment of temporary disability is
14 deferred.
- 15 10) The lien of the Employment Development Department may be adjusted by the parties, with
16 jurisdiction reserved at the trial level.

17 **AWARD**

18 **AWARD IS MADE** in favor of Steven Bowden, and against National Liability and Fire,
19 adjusted by Berkshire Hathaway, as follows:

- 20 a) 26% permanent disability, pursuant to the parties' stipulations, equal to 106.75 weeks of
21 permanent disability payable at the rate of \$230 per week, in the sum of \$24,552.50,
22 commencing 11/2/07, less credit for permanent disability advances (amount subject to
23 proof but stipulated as \$18,540.00 as of 8/5/09), and less an attorney fee in the sum of
24 \$3,682.87 payable to Capurro, Rocha and Schmidt.
- 25 b) Further medical treatment as may be reasonably required to cure or relieve applicant from
26 the effects of his injury, with surgery not at this time ordered.
- 27

BOWDEN, Steve

Case ID:ADJ4536632
{F11D02F4-EBCE-485C-B5A6-38D6BF95619F}

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

ORDER

IT IS ORDERED that pending a final determination of the Appeals Board's *en banc* decision in *Ogilvie v City and County of San Francisco* (2009) 74 Cal.Comp.Cases 1127, the issue of whether applicant has successfully rebutted the DFEC factors, and is entitled to an upward adjustment of his permanent disability rating, is **DEFERRED**.

///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///
///

BOWDEN, Steve

Case ID:ADJ4536632
{F11D02F4-EBCE-485C-B5A6-38D6BF95619F}

1 IT IS FURTHER ORDERED that the matter shall be RETURNED to the trial level to
2 await the issuance of a final decision on appeal in *Ogilvie v City and County of San Francisco*
3 (2009) 74 Cal.Comp.Cases 1127, after which the parties may proceed before the WCJ to resolve
4 all remaining issues.

5 WORKERS' COMPENSATION APPEALS BOARD

6
7
8 
9 ALFONSO J. MORESI

10 I CONCUR,

11
12
13  DEPUTY
14 RICK DIETRICH




15
16
17 
18 GREGORY G. AGHAZARIAN
19

20 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

21 DEC 21 2009

22 SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT
23 THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

24 Steve Bowden
25 Law Offices of Martin S. Weinstein
26 Capurro, Rocha & Schmidt

27 SV/jp 
BOWDEN, Steve