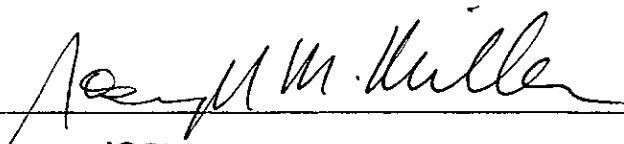


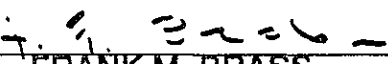
1 For the foregoing reasons,

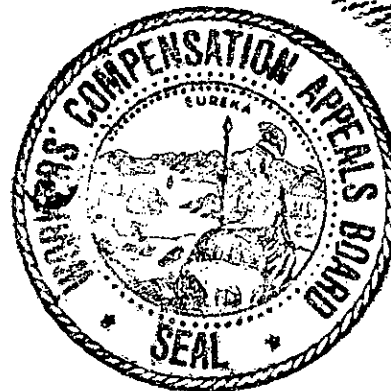
2 **IT IS ORDERED** that said Petition for Reconsideration be, and it hereby is, **DENIED**.

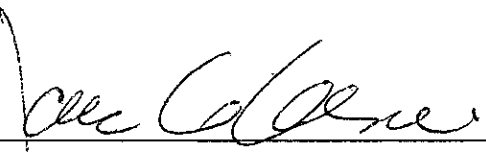
3
4 WORKERS' COMPENSATION APPEALS BOARD

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6 
7 JOSEPH M. MILLER

8 I CONCUR,

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11 
12 FRANK M. BRASS



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14 
15 JAMES C. CUNEO

16
17 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

18 **FEB 08 2010**

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

21 FERMIN OCHOA
22 RAYMOND E. FROST & ASSOCIATES
23 PRINDLE AMARO



24
25 csl

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

WCAB CASE NO. ADJ1758338 (OAK0336982)

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

FERMIN OCHOA

vs.

UPS AND LIBERTY INSURANCE CORP.

INTRODUCTION

Applicant, by timely and verified Petition for Reconsideration, contends that I erred by concluding that applicant had not met his burden of proof to overcome the DFEC adjustment pursuant to *Ogilvie II*.

For the reasons stated below, I disagree. However, the Appeals Board may wish to grant in order to give the industry further instructions on what it considers to be substantial evidence to overcome the DFEC adjustment.

STATEMENT OF FACTS

Mr. Fermin Ochoa sustained two industrial injuries. The first injury was on May 20, 2005 to his left wrist which is the subject of OAK0336982/ADJ 4656201. The parties stipulated that applicant's permanent disability in that case was 9%. A Findings and Award issued to that effect on the same date of the

Findings and Award in the companion back case. No Petition for Reconsideration is being sought in the wrist case.

Applicant sustained a second industrial injury while working for UPS, then insured by Liberty Insurance Corp., to his back on March 21, 2007 which is the subject of ADJ1758338/OAK0336982. The Petition for Reconsideration is filed in this case alleging that I erred by not giving applicant and *Ogilvie II* adjustment.

I reasoned as follows:

OPINION ON DECISION

"The parties stipulated that applicants sustained an injury to his wrist on May 20, 2005 that resulted in a 9% permanent disability. The parties further agree that since applicant returned to work after the wrist injury, defendant is entitled to a 15% decrease in the permanent disability. Based on Dr. Devor's AME opinion, applicant is entitled the future medical treatment on the wrist.

The main issue is whether *Ogilvie II* applies in the back case. Injury to the back occurred on March 21, 2007. After review of the evidence and briefs presented, I find defendant's analysis of the facts and law more convincing. It is clear from *Ogilvie II* that the party attempting to rebut the DFEC adjustment to the standard rating has the burden of proof. I further conclude from reading *Ogilvie II* that to get an "earnings loss estimate" that will constitute substantial evidence one must first set up a "control group" with earnings based on "similarly situated employees", which can be found by looking at EDD labor market data. Applicant's testimony that all the truck drivers and UPS got a \$3 an hour raise because they told him so is not the kind of "empirical" evidence that would be found in EDD's statistics. If the applicant's testimony had been backed up by a union contract, by testimony from coworkers with similar seniority and by paycheck stubs from those workers' that evidence may have been

sufficient. But, applicant's testimony standing alone with no corroboration is not substantial evidence.

Applicant argues that a long period of temporary disability is indicative of substantial permanent disability. That can be true, but the argument is not convincing in this case.

Dr. Devor, the AME, places applicant in DRE Category II because of non-verifiable redicular symptoms in his right leg. In many of Dr. Devor's reports he states that the pain that applicant describes in his lower extremities does not fit dermatome patterns. Dr. Devor states applicant is not a candidate for surgery. The doctor also states that applicant's progress toward healing has been very slow. While there are some objective findings, the impairments do not appear to be so great as to take applicant out of the labor market. The issue of motivation permeates the question of how much wage loss applicant has actually suffered. Applicant still has time on his five-year statute to reopen, should he actually take a job at a lesser salary because of his impairments. However, at the present time there is insufficient evidence to make that judgment. For the above reasons, no *Ogilvie II* adjustment will be made to the rating.

Based on Dr. Devor's opinion applicant is entitled to further medical treatment to his low back.

This was a case of above average complexity, entitling applicants attorney to a 15% fee out of the permanent disability awarded above in amount to be adjusted by and between the parties with jurisdiction reserved."

From this decision applicant now appeals, apparently contending that he does not have the burden of proof on this issue.

DISCUSSION

I have little further to add beyond the reasoning set forth in my original "Opinion on Decision" except to say that *Ogilvie II* clearly states the

party disputing the DFEC number has the burden of proof. Applicant seems to be saying that his alleged credible testimony alone that he lost earning capacity should be considered substantial evidence to shift the burden to the defendant to prove otherwise. As to applicant's credibility, I pointed out that Dr. Devor hinted that applicant's subjective complaints were not objectively verifiable. This raises credibility concerns. I did not find applicant's testimony alone to be substantial evidence so as to shift the burden of rebuttal to defendant. Applicant has made no attempt return to the labor market at a lighter job and I do not believe that his testimony alone that he cannot is substantial evidence.

CONCLUSION

For the reasons stated above, deny applicant's Petition for Reconsideration.

DATE: 01/13/2010



Valerie Sauban
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

EDD SDI OAKLAND, US Mail
FERMIN OCHOA, US Mail
FROST LAW, US Mail
GALLAGHER BASSETT, US Mail
PRINDLE AMARO, US Mail

ON: 1/21/2010
BY: W. Brooks