

Trovillion, Inveiss & Demakis

Trovillion, Inveiss & Demakis, APC has grown in reputation as one of Southern California's premier law firms specializing in representation of employers, insurance carriers and third party administrators in workers' compensation litigation.

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DECEMBER, 2015

TID FRAUD SEMINAR

On February 10, 2016, please join TID in partnering with San Diego District Attorney Bonnie Dumanis, San Diego County Supervisor Dianne Jacob, orthopedic surgeon Jeffrey Bernicker and applicant attorney Lisa Hernandez in a panel discussion on identifying and addressing workers' compensation fraud throughout the course of a claim. Join us for a wine tasting after the seminar.

For additional information and registration, please email Events@TIDLAW.com for registration information.

ATTORNEY OF THE YEAR AWARD

TID is proud to announce the recipient of this year's First Annual Attorney of the Year Award, which was awarded in early November at the annual attorney retreat. This award was

PRACTICE POINTER: LIMITING OGILVIE RATING REBUTTALS

A recent Court of Appeal decision, *Contra Costa County v. WCAB (Dahl)*, issued on September 24, 2015, has provided limits on applicant attempts to utilize *Ogilvie* to increase permanent disability ratings. *Ogilvie v. Workers' Compensation Appeals Board* (2011) 197 Cal.App.4th 1262 held that there are only three ways in which a scheduled rating for an injured employee may be permissibly rebutted. One of these ways, the "*LeBouf* method" is to demonstrate that the injury impairs rehabilitation and that the employee's diminished future earning capacity is greater than the scheduled rating.

Dahl sustained a 2005 cumulative trauma injury resulting in a scheduled rating of 59% disability. Dahl attempted to rebut the scheduled rating through vocational expert testimony. The Court held Dahl's attempted rebuttal did not comport with any of the methods in *Ogilvie* because the rebuttal did not include any evidence that the industrial injuries she sustained to her neck and shoulder rendered her incapable of rehabilitation. Rather, Dahl's rebuttal consisted solely of a vocational expert's opinion that his method for determining diminished future earnings capacity produced a higher rating than that of the rating schedule and that his method was more accurate. The First Appellate District reversed the prior WCAB decision and annulled the award. The result is a win for the defense community.

presented to the attorney whom, this past year, most exemplified the ethics, values, professionalism, and maturity expected from a TID attorney. This lawyer time and again has demonstrated dedication to the law firm, has always put the best interests of the firm and its clients first and has repeatedly demonstrated competence in every aspect of handling a workers' compensation claim. This year's First Annual Attorney of the Year Award was proudly presented to Kristine Aaron-Jacobi. Congratulations to Kristine on a well-earned honor.



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Practitioners should keep the following tips in mind when defending against applicant's attempts to rebut a scheduled permanent disability rating:

- Applicants must demonstrate they are not amenable to rehabilitation due to their industrial injury and not due to extraneous factors.
- Applicants must explain how their injury prevents them from participating in vocational rehabilitation.
- Applicants will not be able to rebut their scheduled rating in virtually all cases where an expert can provide a statistical analysis of a group of individuals he or she claims is more similarly situated to the applicant than that identified in the rating schedule.
- A vocational rehabilitation expert cannot simply rationalize that rehabilitation is not feasible because it would not restore the applicant to their pre-injury earning capacity. According to *Dahl*, this type of argument would render the statutory rating system virtually meaningless. Most work related injuries that qualify an employee for workers' compensation benefits reduce earning potential to some degree.
- There is a limited nature of rebuttal to the permanent disability rating system.
- Based on the reasoning in *Dahl*, defendants should argue that an applicant may not utilize a *LeBouf* argument where the inability to rehabilitate results in less than a 100% permanent disability.

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