

Sample Questions for Ogilvie Expert

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1. What are your qualifications as an expert?
 - a. Education:
 - b. Degrees and certificates:
 - c. Experience:
 - d. Have you previously qualified as an expert to testify on the Ogilvie method of rating?
2. Upon what do you base your opinions?
 - a. Exhibit list – list all reports, depo transcripts and exhibits reviewed
 - b. The Ogilvie decisions
 - c. Interview(s) with the worker
 - d. Job market survey
3. Did you perform any ratings in this case?
 - a. Yes, two sets of ratings: ratings according to the 2005 Schedule for Rating Permanent Disability and ratings according to the Ogilvie cases.
4. What is the medical opinion(s) as to whether the worker can return to his or her usual and customary work?
 - a. Cite medical reports that say applicant cannot return to usual and customary
5. What is the medical opinion as to work restrictions?
 - a. Describe injuries the worker sustained based on the medical reports
 - i. For example: Surgery to left shoulder; manipulation under anesthetic
 - b. Describe injury: for example: fell while working on an RV; caught himself by left arm
 - c. Cite work limitations from the medical reports – reference report name, date, page
 - d. Deconditioning – reference report and worker interview
 - e. Sleep and mental alertness - reference report
 - f. Psychological problems
 - g. Medications affecting employment – reference report
6. Is it your opinion that the applicant is totally unable to work?
 - a. No. This is not a LeBoeuf situation. The applicant is capable of working. There is employment within the work restrictions. It is just a matter of finding suitable gainful employment or retraining.
7. What efforts did the employer make to interactively investigate and offer alternative or modified work?
 - a. Based on worker interview, none. He was terminated because he could not physically do the job

- b. Records subpoenaed from the employer showed no efforts
- 8. What was the labor market available to the worker in his or her geographical area?
 - a. The job market is very poor for this individual, however, ...
 - b. Unemployment rate in geographical area (economic downturn)
 - i. The job market is not good but there are job openings
 - ii. This is a long-term condition but does not preclude employment and an Ogilvie analysis.
- 9. What was the applicant's occupation? For example, Maintenance worker on RVs
- 10. Are there any other jobs that this individual could perform based on his or her education, experience, skill, and work history?
 - a. The outlook is very poor but there are jobs
- 11. What types of jobs was this individual capable of performing?
- 12. What factors did you consider is arriving at this opinion (Montana factors):
 - a. Worker's limitations
 - b. Worker's education
 - c. Skill and training
 - d. Age
 - e. Health
 - f. Language
 - g. Experience
 - h. Transferable skills
- 13. Did you conduct a job market survey?
 - a. What employment opportunities were available?
 - b. I found few appropriate jobs for this individual.
- 14. Has the applicant sought employment since he became P&S?
 - a. Yes.
- 15. What efforts did the worker make to seek employment?
 - a. Newspaper, resume, places applied, internet, agencies, former employer
- 16. What job occupations was the applicant looking for?
 - a. Any job within the work restrictions that offered suitable gainful employment
- 17. Did the worker pass up any job opportunities?
 - a. Applicant was not offered any employment
- 18. Is the applicant currently seeking employment?
 - a. Yes.
- 19. What is he doing currently to seek employment?
 - a. Looking in the newspaper and internet sites daily
- 20. In your opinion did the worker make reasonable efforts to find suitable gainful employment?
 - a. Yes, I found no evidence that the applicant was not making an effort to find employment

21. Did the worker mangle in the sense of loss of earnings?
22. Are there any medical reports that indicate applicant has poor veracity or is malingering?
 - a. Dr. Example's report indicated that the applicant may be exaggerating his symptoms but this did not reflect on his veracity or malingering in the sense of taking himself out of the job market. This is not the situation in the Shini case.
23. Did the worker voluntarily retire or partially retire or take him or herself out of the labor market?
 - a. No.
24. In your opinion is the worker motivated to seek employment?
 - a. Yes
 - i. The worker said so
 - ii. The worker told this to the physician(s):
 - iii. There are was no evidence and no medical reports indicating that the worker was malingering or that raised questions regarding credibility as in the Shini case (page 3 and 6).
25. Is the Ogilvie method appropriate to use in this case?
 - a. Yes.
26. What period was used to compute the employee's earnings for the Ogilvie method?
 - a. Three years from the date of injury. Ogilvie I, page 22, line 7
 - b. The DOI in this case is xx/xx/xx.
27. What were the worker's earnings in the three years post injury?
 - a. He had no earnings in the period
 - b. How did you determine this?
 - i. Interview with employee; I have no reason to doubt this.
 - ii. Subpoenaed records from the employer
 - iii. Social security records
28. Did you use potential earnings or earnings capability to arrive at that figure?
 - a. No, actual earnings are used to apply the method set forth in the Ogilvie cases. The RAND studies upon which the Schedule is required by statute to be based on used actual earnings in the three year period.
29. Do you have an opinion as to what the employee could have or should have earned in the three year period?
 - a. No. Absent a finding that there was employment or malingering, "could-have" and "should-have" are not involved in the Ogilvie method. The Ogilvie method uses actual earnings – not earnings based on an opinion.
30. Would a different Ogilvie period have been more appropriate (Shini case, page7)?
 - a. If possible, the same period as used in the RAND study should be used because that period provided "the best balance between representing long-term outcomes and a sufficient number of observations with which to conduct analysis for a large-scale study." (Ogilvie I, 74 CCC at page 266)

- b. There is no authority giving guidelines as to when to use a period other than that used in the RAND study. Ogilvie I, page 23, gave the only criteria that the employee's injury results in a "long period of temporary disability."
 - c. The period of TTD is included in the three year period.
 - d. There is no indication that a different period should be used.
31. Was there a long period of TTD?
- a. No. The P&S date was xx/xx/xx.
 - b. For serious injuries it is expected that TTD would be longer.
 - c. This was not due to the fault of the employee.
 - d. RAND took varying periods of TTD into consideration and determined this was the best balance to obtain valid data.
32. Should the period have started after the P&S date?
- a. No. That is not what the RAND study did. To do that now would result in Table A and B values being invalid. The Ogilvie opinion did not provide a method whereby the period starts at P&S.
33. Did you perform any ratings in this case?
- a. Yes, I performed two sets of ratings. I performed standard ratings according to the 2005 Schedule for Rating Permanent Disabilities, exhibit x, and I performed ratings in accordance with the Ogilvie cases, exhibit x. (Attorney should authenticate the ratings and offer in evidence.)
34. The following questions refer to the Ogilvie ratings. Question: At page 22, line 4, of the Ogilvie I opinion did you apply the four steps of phase I to this case?
- a. Yes

Phase I

35. Question: Referring to Step 1 of the Ogilvie I opinion at page 22, line 8, did you determine the employee's actual earnings in the period?
- a. Yes.
36. What were the actual earnings of the employee in the period?
- a. Zero. There were no earnings in the period. (Answer should be zero. Keep asking questions until you get zero as an answer. You could say that you know the expert has testified to what he or she thinks the employee should have earned in the period, but what you are asking is. "What did the employee earn in the period?" If you just cannot get a zero then consider asking a hypothetical question to assume it is zero earnings in the period, but only do this as a last resort. Note that empirical data does not refer to empirical data of job surveys of possible openings but is empirical data of earnings of the employee. See page 22, line 13. This is a determination of the employee's ACTUAL earnings in the period. The question is, "What did the employee earn in the period." Get an answer. You should not let the expert testify to his or her opinion as to the employee's possible earnings in

the period. Also, the word “estimated” is used when there is not a three-year period. The estimate should be based on actual earnings to project a three-year post-injury period. Page 23, line 12. That is an estimate of the employee’s actual earnings not of his potential earnings.)

37. How did you determine that?
- Employee
 - EDD printout
 - W-2 form
 - Subpoenaed employment records
38. Question: Step 2. At page 23, line 14, did you determine the earnings of similarly situated employees in the period?
- There is a printout of the analysis of applicant’s earnings loss. It is exhibit x.
39. What were those earnings for each of the years following the DOI? (When the employee had no earnings in the period then it doesn’t matter what the expert answers to this question. If the employee had earnings in the period then go to the EDD website www.labormarketinfo.edd.ca.gov/?pageid=152. There are lots of questions that could be asked regarding this, but since in this case the employee had no earnings in the period you don’t need to bother. Questions could be: “What SOC number did you use?” “What does SOC stand for?” “What percentile was the employee’s earnings in?” “What percentile did you use?” At page 25, line 5, the case talks about the possibility of an expert to “estimate” the earnings of SSE.)
40. Question: Step 3. At page 26, line 1, what did you compute as the estimated earnings loss? Did you do that by subtracting the actual earnings post-injury for the injured employee (step 1) from the average earnings of the SSE in the period? (SSE earnings loss minus zero = SSE earnings loss)
- Refer to exhibit x
41. Question: Step 4. At page 26 line 6 did you determine the employee’s proportional earnings loss by dividing the earnings loss by the earnings of SSE in the period? (SSE earnings minus zero divided by SSE = 100% earnings loss.)
- Yes, his earnings loss is 100%.

Phase II

42. Question: At page 27, line 1, did you determine the individual ratio of rating over proportional earnings loss for each of the impairments?
- Answers could be:
14.01.00.00 $20/100 = .20$
13.03.00.00 $9/100 = .09$
15.01.01.00 $18/100 = .18$
16.02.02.00 $17/100 = .17$
43. Question: Did you determine the rank of each of the impairments? What did you determine as the rank of each of the impairments?

- a. This is shown on the standard ratings, exhibit x. Answers could be:
 - 14.01.00.00 8
 - 13.03.00.00 6
 - 15.01.01.00 5
 - 16.02.02.00 7
- 44. Question: Page 28, line 20, for any of the impairments does the individual ratio fall within the range of ratios of its corresponding rank based on Table A of the Schedule?
 - a. No.
- 45. Question: Page 28, line 22-23, then according to the Ogilvie case is the Schedule rebutted?
 - a. Yes. The range of ratios as shown in Table A of the Schedule are from .450 to 1.810. All of the individual ratios in this case are below the lowest rank of .450.
- 46. Is it your opinion that the Schedule is rebutted and that this is an appropriate case to apply the Ogilvie method?
 - a. Yes.
- 47. Question: Page 29, line 1, for any of the impairments does the individual ratio fall within the range of any rank within Table A of the Schedule?
 - a. No. The range of table A is from a low of .4500 to a high of 1.8100. None of the individual ratios are within that range. All are below the limit of table A. Ogilvie I discussed this situation on page 32 lines 6-16.
- 48. Question: What does the Ogilvie I case say to do when the individual ratio is below the limit of Table A?
 - a. Starting at page 30 the Ogilvie case says to use the formula on page 1-6 of the Schedule. That formula is $FEC = ([1.81/a] \times .1) + 1$
- 49. Question: Page 30, line 15, what is the FEC adjustment factor for each of the impairments by applying the formula. These are shown on the Ogilvie ratings, exhibit x.
 - a. Answers could be:
 - 14.01.00.00 1.9050
 - 13.03.00.00 3.0111
 - 15.01.01.00 2.0056
 - 16.02.02.00 2.0647
- 50. Question: What are the adjusted ratings for each of the impairments based on the calculated Ogilvie FEC adjustment factor and the employee's occupation and age and taking into consideration apportionment?
 - a. Answers could be:
 - 14.01.00.00 46
 - 13.03.00.00 37
 - 15.01.01.00 46
 - 16.02.02.00 45
- 51. Is the Schedule rebutted?

- a. The Ogilvie opinion tells the criteria. If the individual ratio of rating over proportional earnings loss falls outside the range of ratios for the body part given in Table A, then the Schedule is rebutted. Ogilvie I, page 28, lines 20-24
52. What is the final rating?
- a. For example: 90%