LIFE AFTER ALMARAZ/GUZMAN

TABLE OF CONTENTS

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I.
HISTORY

On February 3, 2009, a unanimous, *en banc*, Workers' Compensation Appeals Board issued its massive opinion in the consolidated cases of Almaraz v. Environmental Recovery Services and Guzman v. Milpitas Unified School District, 74 C.C.C.[2009] (hereinafter referenced as Almaraz/Guzman). The Board essentially held that the AMA Guides portion of the 2005 permanent disability rating schedule is rebuttable, based upon showings of inequity, unfairness and inaccuracy, and that the impairment determination can be made considering medical opinions outside of, or only partially based upon, the AMA Guides where such a rebuttal has taken place.

The decision is shocking only to the extent that many in the defense community considered the AMA Guides to be the holy grail of permanent disability ratings under the 2005 permanent disability rating schedule. Early on, we saw such examples of overconfidence in the application of the Guides as some claims examiners giving applicant's attorneys Carte Blanche in the selection of Agreed Medical Evaluators ("Sure, we'll go to an Agreed Medical Evaluation. Choose whoever you like"), although, fortunately, this did not last long. But, for the past several years, the defense community has felt relatively comfortable that the 2005 permanent disability rating schedule mandated the use of the AMA Guides in such a way that permanent disability ratings were drastically lowered. In its first year, the California Applicant's Attorney Association was estimating a 30% to 40% reduction in the value of permanent disability as an overall average (with respect to certain, specific types of injuries, the reduction was even greater). As soon as the schedule was on the books,

applicant's attorneys were exploring methods of circumventing it, arguing that the tables and schedules set forth in the AMA Guides were only Prima Facie evidence of impairment, and not conclusive, and citing chapters one and two of the Guides to support their positions in this regard.

These are the arguments which were eventually upheld in Almaraz/Guzman. However, when critically analyzed, Almaraz/Guzman is only surprising in its scope; it does not so much introduce a new principle of law as it does throw the whole field of permanent disability wide open. For decades, however, it has been settled law that applicant is entitled to rebut the rating proposed by the permanent disability rating schedule if he/she could show that it did not appropriately measure the true extent of permanent disability.

The first permanent disability rating schedule came into effect during 1937 in response to the enactment of Labor Code Section 4660, which mandated its adoption and stated that "in determining percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employer, and his/her age at the time of such injury..." (see Almaraz/Guzman, slip opinion, page 10). It was recognized for years, however, that the schedules adopted pursuant to Labor Code Section 4660 were not "absolute, binding and final" (Universal Studios, Inc. v. WCAB (Lewis), 44 C.C.C. 1133 [1979]), but were rebuttable where it could be shown that the schedule did not show an injured worker's true disability, (Glass v. WCAB, 45 C.C.C. 441 [1981]); (Almaraz/Guzman, slip opinion pages 11-12).

There were three primary areas wHere rebuttal and/or variation to the schedules could be found:

1. LeBouf type cases, characterized by LeBouf v. WCAB, 48 C.C.C.. 587 [1983], where a lower scheduled rating under the schedule was rebutted by medical opinion that the applicant was incapable of returning to the open labor market because his disability prevented him from participating in Vocational Rehabilitation. Although a vocational expert was involved

in this case, and reported that applicant was infeasible for vocational rehabilitation, the actual opinion that applicant was totally disabled came from the evaluating doctor. Over the years, subsequent cases applying this principal had perhaps been a little more loose about the evidence required, suggesting that vocational evidence alone may be sufficient. The point, however, is that a variation from the schedule is permitted when the impact of a disability on a particular applicant demonstrates true disability beyond that allowed by the schedule.

2. Unscheduled work restrictions. In the schedules prior to January 1, 2005, the use of work restrictions was essentially limited to spine and abdominal disabilities (they were expanded to lower extremities in 1997), and the work restrictions set forth in the schedule were specific and limited. Over the years, physicians began describing multiple types of activities and work limitations not only for the back, abdominal area, and lower extremities, but for other parts of the body as well (most notably, upper extremities); regarding the upper extremities, the Administrative Director specifically refused to adopt a schedule of work restrictions, although a suggested list of restrictive guidelines was in actual use by the workers' compensation community for years).

3. Range of evidence. Basically, the Board is empowered to make a disability determination based upon a review of all of the evidence (typically used when the applicant's high and the defendant's low are both unsatisfactory) (see Liberty Mutual Insurance Company v. IAC, 13 C.C.C. 267 [1948]).

A lot of people, including some Judges, seem to forget, in connection with the use of the 2005 permanent disability rating schedule, that the Workers' Compensation Judge (or, perhaps more accurately, the Workers' Compensation Appeals Board) is the Trier of Fact. (Almaraz/Guzman, slip opinion at page 49). Thus, the content of a particular rating instruction (which would form the basis of a permanent disability award), we think, has always been the province of the Workers'

Compensation Judge. In Hegglin v. WCAB , 36 C.C.C. 93 [1971], the Supreme Court stated that the Judge's rating instructions are, in effect, the Court's finding of fact as to the nature and extent of disability, and in the Universal Studio v. WCAB (Lewis), 44 C.C.C. 1133 [1971] case, the Court suggested that it was an abdication of judicial responsibility for the Judge to submit a rating instruction which simply told the rater to rate a particular medical report, since that left the decision of ultimate facts to the rater. Indeed, in Mihesuah v. WCAB, 41 C.C.C. 81 [1976], the Court noted that a rater is simply an expert witness whose testimony consists of the rating he/she recommends, and the Board, which is the Trier of Fact, is not bound by it. In fact, the Judge does not have to use the rater at all but can determine the rating without reference to the rating bureau (State Compensation Insurance Fund v. WCAB (Morgan) 61 C.C.C. 1332 [writ denied, 1996]).

II.

2005 PERMANENT DISABILITY RATING SCHEDULE

Almaraz/Guzman correctly notes that, in 2004, Senate bill 899 substantially amended Labor Code Section 4660. Percentages of permanent disability are based upon diminished future earning capacity as opposed to the ability to compete in the open labor market (Subdivision a), and Section 4660(b)(1) states that "the nature of the physical injury or disfigurement shall incorporate the descriptions and measure of physical impairments in the corresponding percentages of impairments published in the American Medical Association Guides to the evaluation of permanent impairment (5th Edition)." Labor Code Section 4660(d) provides "the schedule shall promote consistency, uniformity, and objectivity", although the Almaraz/Guzman decision also noted that SB 899 did not amend the language in Section 4660 to the affect that the permanent disability schedule "shall be Prima Facie evidence of the percentage of permanent disability".

The 2005 permanent disability schedule became effective on January 1, 2005, and incorporated by reference the AMA Guides, 5th Edition. Soon thereafter followed the two Costa

cases (Costa v. Hardy Diagnostics, 71 C.C.C. 1797 [2006] and 72 C.C.C. 1492 [2007]), which stood for the proposition that SB 899 did not change the characterization of the schedule as being Prime Facie evidence of permanent disability, and that the schedule could be rebutted in the appropriate case. The Board held that an applicant could introduce evidence for the purpose of rebutting the schedule, and showing that it did not accurately assess a particular applicant's loss of future earning capacity. The implication in these cases was that a vocational expert could be used for this purpose in the appropriate case.

III.

THE AMA GUIDES

Essentially, the AMA Guides are consensus driven estimates reflecting the severity of medical conditions and the degree to which the impairment decreases an individual's ability to perform common activities of daily living, excluding work. Impairment ratings were designed to reflect functional limitations and not disability (AMA Guides, page 4).

The AMA Guides recognizes that it is not all encompassing. The Guides specifically acknowledge that it "cannot provide an impairment rating for all impairments" and that "some medical symptoms are poorly understood" (AMA Guides, page 11). Furthermore, while the AMA Guides take subjective complaints into consideration to some extent, such complaints generally are not given separate impairment ratings, even though the Guides "does not deny the existence or importance of these subjective complaints to the individual or their functional impact." (AMA Guides, page 10).

The 2005 permanent disability schedule is the first time a California permanent disability schedule has specifically incorporated a medical guide as an indicator of initial impairment (actually, the schedule incorporates two medical guides, the AMA Guides, and the Global Assessment of Functioning scale in connection with psychiatric disabilities). The idea of using the Guides, was,

as expressed by the legislature in Labor Code Section 4660(d), and as acknowledged by Almaraz/Guzman (slip opinion at page 10) to promote consistency, uniformity, and objectivity. In chapter two, the Guides state that, "two physicians following the methods of the Guides to evaluate the same patient, should report similar results and reach similar conclusions." (AMA Guides, page 17)

The relatively conservative view with respect to the use of the Guides certainly made results predicable and reproducible. In a number of cases, subjective type tests (strength tests, grip tests) were discouraged (see chapter 16 with respect to the upper extremities), especially in cases where there were complaints of pain and/or loss of motion, since it was felt that those symptoms would invalidate any type of strength testing (i.e. the physician would not be able to get an accurate reading with respect to strength if the individual's pain was interfering with his ability to give a measurement).

A strict application of the Guides also permitted review by 3rd party evaluators, who would analyze an examining physician's report and critique it based on the application of the AMA Guides (utilizing the evaluating physician's objective findings, a pretty accurate assessment with respect to which table was applied could be given; in other words, the results were reproducible).

Finally, the Disability Evaluation Unit felt they were absolutely bound by the Guides, even to the extent of changing the classifications of impairments (i.e., changing a DRE II spinal impairment to DRE I) based upon a contention that the evaluating doctor did not include sufficient criteria to meet the category chosen by the doctor. In fact, in the Guzman case, the rater actually refused to consider a rating instruction from the Judge (he requested a rating based upon a functional capacity limitation suggested by the Agreed Medical Evaluator) on the basis that such a rating was not sanctioned by the AMA Guides. That approach tended to suggest that, in the minds of the Disability Evaluation Unit and a number of Judges, the Guides were absolute. It probably really did not take into

consideration the fact that the AMA Guides, in their general instructions with respect to use contained in chapters one and two, essentially permits a physician to deviate from the Guidelines if the physician finds that it is necessary to produce an impairment rating which is more accurate than the recommended formula, and allows the physician to use judgement, utilizing comparisons, where impairment ratings are not provided. (see AMA Guides generally, pages 4-5, 11).

IV.

ALMARAZ/GUZMAN

Costa v. Hardy Diagnostics, 71 C.C.C. 1797 [2006] had already held that the 2005 permanent disability rating schedule could be rebutted in the appropriate case. Almaraz/Guzman does not concern itself so much with the schedule as it does the medical basis of the schedule, the AMA Guides, 5th Edition, and the thrust of Almaraz/Guzman is that the Guides, while Prime Facie evidence of impairment, are also capable of being rebutted. This is new only because previous California rating schedules did not have specific medical guides incorporated as their basis.

The backdrop for these cases was the Guides' tendency to result in very low (even zero) impairment rating in cases where there was evidence of functional disability (unfortunately, we have seen a number of reports were evaluating physicians assign a "0" rating under the Guides and then indicate an applicant is functionally incapable of returning to usual work, or is in need of future medical treatment, including surgery). For this reason, we have always considered zero impairment in cases where there is some evidence of functional disability or need for treatment to be dangerous because they leave the defense very little wiggle room. This was the intolerable position of the defense in Alvernaz v. United Parcel Service, case number GRO 30976 [2006], where there was actual earning capacity loss with a zero impairment, and the defense felt compelled to obtain a vocational expert (an action which told the trial Judge, obviously, that the defense had no faith in

the rating reached pursuant to the permanent disability rating schedule). In reality, Almaraz/Guzman is simply a broad brush reflection of the problem which was confronted in Alvernaz.

In Almaraz applicant injured his back, with resulting surgery at L4-5, the residuals of which preventing him from returning to his usual and customary work as a truck driver, and, according to the Agreed Medical Evaluator, realistically limited him to light work. His permanent disability rating was under the 2005 permanent disability schedule, and he received a 17% permanent disability rating (apportioned down to 14%) based upon application of DRE III (under the old schedule, his rating would of been 58%, before apportionment).

Applicant petitioned for reconsideration, basically arguing that blind application of the AMA Guides was in error, and that it should be deemed rebuttable. State Compensation Insurance Fund did not file any reply.

In Guzman, applicant had a cumulative trauma injury to the bilateral upper extremities (essentially, carpal tunnel syndrome), which the Agreed Medical Evaluator, Steven Feinberg, M.D., (who has written a paper on this topic, based in part on the opinions he expressed in this case), felt resulted in a 25% loss of applicant's pre-injury capacity (functional capacity) in performing various tasks, and he felt applicant was precluded from returning to her former occupation. Under the 2005 permanent disability schedule, she received a 12% rating (if Dr. Feinberg's functional capacity measurement had been used, the adjusted rating would of been 39%).

The most important point, we think, of applicant's appeal here was her argument with respect to the importance of the opinion of the evaluating physician, who is expected to exercise his/her clinical judgement, and that, ultimately, the AMA Guides deferred to the physician's clinical judgement (Almaraz/Guzman, slip opinion at page 8).

Almaraz/Guzman started by observing that "Prime Facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. It may, however,

be contradicted, and other evidence is also admissible for that purpose" (Almaraz/Guzman, slip opinion at page 12). The decision noted Evidence Code section 602, noting that a statute providing that something is "Prime Facie evidence" establishes a "rebuttable presumption".

Almaraz/Guzman quoted extensively from multiple other jurisdictions with the AMA Guides used as initial indicators of work related disability, noting numerous examples from those jurisdiction where the AMA Guides were deemed insufficient, and were rebutted. One example was Hunter v. Industrial Commission, 633 P.2d 1052 [Arizona, 1981], where a meat cutter developed bronchial hypersensitivity resulting from fumes from the plastic used the wrap meat. The hypersensitivity was not ratable under the AMA Guides, but applicant was permanently precluded from exposure to lung irritants, and unable to return to his job. Under the circumstances, the Court held that applicant's loss of earning capacity would be the indicator of impairment.

The point was that most jurisdictions did not consider the Guides to be absolute, and that variations, changes, and sometimes complete abandonments were permitted.

Based upon all of this, the Board established a standard: "An impairment rating strictly based on the AMA Guides is rebutted by showing that such an impairment rating would result in a permanent disability award that would be inequitable, disapportionate, and not a fair and accurate measure of the employee's permanent disability"(Almaraz/Guzman, slip opinion at page 38). By way of amplification, the Board stated that California cases interpreting the former permanent disability schedule could be used by analogy, and " that the AMA Guides portion of the 2005 schedule is rebutted if it is established that the AMA Guides impairment rating does not accurately reflect the employee's true disability...,if the AMA Guides impairment rate is inequitable, is so disapportionate to the disability and the objectives of reasonably compensating an injured worker as to be fundamentally unfair, and it does not provide just and fair compensation..., if the AMA Guides impairment rating is not rationally related to the employees permanent disability..., or if the

AMA Guides impairment rating is not commensurate with the disability that the employee has suffered." Id. page 42. By way of example, the Board felt that the AMA Guides rating "will be deemed to have been rebutted where the employees injury has no permanent defect on his/her activities of daily living or it is simply not covered by the Guides-thereby resulting in no ratable AMA Guides impairment-but the injury seriously impacts the employees ability to perform his/her usual occupation and, therefore, significantly affects his/her future earning capacity." Id. page 43.

The Board pointed out that it is was not really concerned whether or not the particular injury and/or impairment was "covered" or "not covered" by the tables in the Guides, pointing out that "many of the cases discussed above allowed departures from the AMA Guides even where the Guides covered the employees condition to some extent and, therefore, provided for some impairment rating." Id. page 44.

Perhaps, the concept of reproducibility, which we think the Legislature considered important, and still appears to have some degree of importance in the Guides themselves (page 17) may be fading into nothingness. The applicant's bar finally has what it wants, and it is the personal evaluation and opinion of the physician which now takes on increasing importance (and the opinions of private rating services which adhere to a strict application of the Guides, correspondingly, become less important). We do note Almaraz/Guzman states that either the employee or the employer can rebut the Guides in an appropriate case (suggesting there may be cases where the rating is too high), but, as a particular matter, we think the employer's success in rebutting a rating considered too high is going to be exceeding rare. On the other hand, on the applicant's side, we are going to see it a lot.

As they stand right now, the Guides encompass activities of daily living. However, whether someone can brush their hair is different as to opposed to whether or not they are able to operate a machine. The Board indicates that the system must go beyond the activities of daily living and

determine whether or not the injured work is able to perform work activity (interestingly enough, the Guides specifically states that its function is measure of the degree to which an impairment decreases an individuals ability to perform common activities of daily living, excluding work) (AMA Guides, page 4). It appears that we are going to have to analyze different job tasks, and determine whether an injured individual is able to perform the activities to complete job tasks, aside from activities of daily living.

Thus, when considering a case of modified duty or career ending injury, it may well be found that the Guides are not able to reach an appropriate impairment level for this type of individual. Almaraz/Guzman clearly suggests that such a person should not be evaluated on the same level as a person who can return to their regular work, and thus suffers no loss of earning capacity.

Almaraz/Guzman attempts to direct physicians and others not to deviate from the AMA Guides simply to achieve a more desirable result. "The reasons for such a deviation must be fully explained and the alternative methodology set forth in sufficient detail so as to allow a proper evaluation of its soundness and accuracy; and therefore, within the report, an evaluating physician is expected to provide a full medical evaluation, analysis of the medical findings with respect to the patients life activities, and comparison of the results of the analysis with the impairment criteria." (Almaraz/Guzman, slip opinion at page 48). Essentially, physicians in their reporting, in order to rebut the Guides, need to give a careful and established analysis of the AMA Guides, and why the Guides are not fair and accurate in connection with the case they are evaluating.

V.

METHODOLOGY

To a certain extent, there is some speculation here. Almaraz/Guzman strongly emphasizes "that the methods for evaluating impairment described above does not mean that an impairment rating can be directly or indirectly based on what the employee's work preclusion would have rated under the

old schedule, had it been applicable. The legislature sought it to establish a new method for rating permanent disability; therefore, the old schedule can not be revived through surreptitious or unhanded methods merely because the Trier of Fact considers the old schedule rating to be fair." (Almaraz/Guzman, slip opinion at page 51).

Of course, the key language here is that impairment ratings can not be based on what the employee's work preclusion would have rated under the old schedule; the language does not actually say that work preclusions can not be rated. What is suggested is that it might be possible to assign impairments to work preclusions, which would then be rated under the new schedule. The Board does state that "any relevant factors may be considered. Id. page 48.

Thus, potentially, we may be looking at the following methodology:

1. Rating by analogy. If a particular table, in the physicians opinion, does not accurately capture an applicant's impairment, utilize other tables or chapters, explaining how an applicant's particular situation justify their use.

2. A combination of impairments which would normally be mutually exclusive. For example, strength type impairments are generally excluded from consideration where the body part involved has loss of motion or pain. Thus, a physician may be able to use grip strength, or loss of strength, even in the presence of pain, if a physician can explain why he believes there is actual weakness.

3. Combining multiple rating factors in lower extremity evaluations (traditionally, strict application of the AMA Guides with respect to the lower extremities produce very low ratings).

4. Use of combined disabilities from different chapters in the Guides, or even different Guides, where appropriate. For example, in connection with a failed back, a physician may be able

to justify use of Gait derangement, muscle pain, central nervous system disorder, or even outside criteria to reach an overall impairment rating.

5. Adding impairments together, rather than combining (this is a suggestion of Steven Feinberg, M.D., in a case where the physician feels that the combining of impairments does not accurately characterize the total impact of the disability).

6. The real problem area is consequential disability. Finding compensable consequence conditions has become an art form for applicants attorneys since the implementation of the 2005 permanent disability schedule. With Almaraz/Guzman liberalizing the method of determining impairments, compensable consequence conditions (psyche, sleep, internal medicine type conditions, and even sex) could add significantly to the impairment. These may be areas where the employer rebuttal might become important since the piling on of compensable consequence disability might actually convince a Judge that the overall rating is much too high for what would normally be considered a simple whiplash.

7. Use of vocational experts to determine lack of earning capacity. Actually, this method has been under consideration since Costa.

8. Measurements based upon functional capacity. This might well be the most attractive approach, since it more or less incorporates the specific references in the Guides to which particular disability relates. The proposal would be that the loss of capacity in a particular body region be compared to the ultimate impairment value set forth in the Guides for that particular body region (for example, a leg is an ultimate Whole Person Impairment of 40%; an upper extremity has an ultimate Whole Person Impairment of 60%; and the spine has an ultimate Whole Person Impairment of 90% to 100%). Thus, for example, if a person has a 50% capacity loss in the ability to use an upper extremity, that would equate to a 30% Whole

Person Impairment (this was the alternative method of determining applicant's impairment suggested by the Agreed Medical Evaluator, Dr. Feinberg, in the Guzman case).

9. Pain. The simple contention of applicants attorneys here is that pain is not accurately considered by the Guides, so it is either rated by analogy, or by the degree it restricts functional capacity. Fibromyalgia may be back.

VI.

CONCLUSION

How do we handle this from the standpoint of the defense? In cases where the parties are writing separate letters to the doctors, do we suggest to the physician right out of the box that any impairment rating which deviates from the strict application of the AMA Guides is inappropriate? We suppose we might have to if we know applicant's attorney is making a creditable pitch for deviation.

We are tempted to suggest that, at the outset, we do not give the evaluating physician any reason to believe or think that deviation from strict application of the AMA Guides may be appropriate. Certainly, if there is a deviation, we think the physician is going to have to set forth the AMA impairment rating, and specifically describe why it is not appropriate in a particular case. In the end, we think the following criteria, at a minimum, is going to be required in a medical report:

1. Diagnoses.
2. Clinical factors/findings, supporting diagnoses.
3. Discussions summarizing findings.
4. Usual and customary job analysis and description.
5. Functional capacity/functional loss, this being the details of both the activities of daily living as well as work activities.
6. Impairment rating under the AMA Guides.

7. If there is a need for rebutting the impairment rating under the AMA Guides, a thorough and specific discussion with respect to why the AMA impairment rating is inequitable and unfair.

8. A specific description with respect to how and why an alternative permanent disability impairment is calculated.

Interestingly, Almaraz/Guzman probably makes rebuttal of the 2005 permanent disability rating schedule itself of less importance. Applicant's attorneys will probably have no problem with the rating string calculated using that schedule so long as they get what they consider to be an appropriate impairment.

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