
Almaraz-Guzman II from a Rating Point of View:

Our analysis of this decision will try to place the various points presented in a sequence to first emphasize a correct rating under the AMA Guides 5th Edition, 05PDRS & LC § 4660(b)(1). We will provide some examples of recent ratings we have prepared using the (A&G-2) decision, including language that is no longer ratable. We will address the return to the consideration of duplication among impairment factors now that A&G-1 is no longer valid.

A. Impairment Ratings cannot be based on Subjective Data Outside the AMA Guides.

On September 03, 2009 the WCAB modified its prior decision and very specifically rejected its prior subjective standard by making three points that ended the subjective determination of impairment by analogy outside the 5th Edition of the AMA Guides:

We also are now persuaded that the “inequitable, disproportionate, and not a fair and accurate measure of the employee’s permanent disability” standard is not supported by either the California or the out-of-state cases which were cited in our February 3, 2009 opinion and upon which the dissent continues to rely. The California cases were interpreting former section 4660, which focused on the injured employee’s diminished ability to complete in the open labor market. Under our current opinion, parties seeking to challenge the WPI component of a scheduled permanent disability rating cannot go outside the AMA Guides. – Almaraz-Guzman II, pages 31 & 32 [14 & 15].

B. WPI within the PD Rating Formula is the Rebuttable Factor – Not the AMA Guides.

1. It is not the AMA Guides that is rebuttable but the permanent disability rating established by the schedule.
2. The burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating;
3. One method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee’s whole person impairment (WPI) under the AMA Guides;
4. When determining an injured employee’s WPI, it is not permissible to go outside the four corners of the 5th Edition of the AMA Guides;
5. **However, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee’s impairment.** - Almaraz-Guzman, pages 02,03, & 08, 10

C. Assessment of Impairment utilizing all of the 5th Edition of the AMA Guides must be substantial medical evidence.

We emphasize that our decision does not permit a physician to utilize any chapter, table, or method in the AMA Guides simply to achieve a desired result, e.g., a WPI that would result in a permanent disability rating based directly or indirectly on any Schedule in effect prior to 2005. A physician’s opinion regarding an injured employee’s WPI under the Guides must constitute substantial evidence; therefore, the opinion must set forth the facts and reasoning which justify it. Moreover, a physician’s WPI opinion that is not based on the AMA Guides does not constitute substantial evidence. - Almaraz-Guzman II, pg. 03, 14, 15

- 1.1. *This does not mean, of course, that a physician may arbitrarily assess an injured employee’s impairment. As stated by the AMA Guides, “[a] clear, accurate, and complete report is essential to support a rating of permanent impairment” and the report should “explain” its impairment conclusions. (AMA Guides, § 2.6, at pp. 21-22.)*
- 1.2. *In other words, a physician’s WPI opinion must constitute substantial evidence upon which the WCAB may properly rely, including setting forth the reasoning behind the assessment. (See Escobedo V. Marshalls (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc).*

- 1.3. *A physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence because it is inconsistent with the mandate of section 4660(b)(1). (Hegglin V. Workmen's Comp. Appeals Bd. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97] ("Medical reports and opinions are not substantial evidence ... if they are based ... on incorrect legal theories"); Zemke V. Workmen's Comp. Appeals Bd. (1968) 68 Cal.2d 794, 799 [33 Cal.Comp.Cases 358, 360] ("an expert's opinion which ... assumes an incorrect legal theory cannot constitute substantial evidence").*

D. Burden of Proof for Rebutting a Scheduled of Permanent Disability Rating [WPI] Rests with the Party Disputing the Rating.

- 1. The doctor is mandated by law to be impartial in his determination of impairment.**
- 2. Question: Without being asked, can he/she be the one who 'starts' the rebuttal process?**

*We construe this language to mean that the burden of rebutting or contradicting the scheduled percentage permanent disability rating is on the party disputing that rating. **By providing that the scheduled permanent disability rating will apply unless contradicted and overcome by other evidence, section 4660(c) helps implement the Legislature's expressly declared public policy of promoting "consistency, uniformity, and objectivity" in permanent disability ratings (Lab. Code, § 4660(d)).**— Almaraz-Guzman II, pg. 17 & 18*

- 1. The correctly calculated impairment rating under the 5th Edition of the AMA Guides is presumed to be correct. To overcome this presumption the challenging party, whether the injured worker or the employer, must carry its burden by a preponderance of the evidence that includes a well-reasoned medical opinion based on objective evidence that follows the proper assessment criteria of the 5th Edition of the AMA Guides.**
2. If the rating doesn't start with the correct AMA Guides impairment rating, then a physician's WPI does not constitute substantial evidence because it is inconsistent with the mandate of LC § section 4660(b)(1).
3. A doctor's opinion which does not base the WPI percentage on the AMA Guides is not substantial medical evidence under either the WCAB's Escobedo Decision or the Almaraz-Guzman-II decision. – Almaraz-Guzman II, pg. 26
4. The 5th Edition of the AMA Guides defines the standard methods the evaluator must follow to measure the objective manifestations of impairment when considering both anatomic and functional loss. **The physician's role is to provide a full an independent unbiased assessment of the individual's medical condition. However, both medical and non-medical professionals can insure that the reporting is fair, consistent and reliable with the AMA Guides evaluation principles, thus insuring that individuals have the information needed to pursue any benefits to which they are entitled.** – AMA Guides 5th Edition, pgs 17 & 18, 26, 65, 88, 118, 144,174, 192, 212, 246,278, 305, 358 & 05 [PDRS pg. 1-12], 374, 434, 524 and 566. **This standardization of evaluation and reporting procedures allows all professionals to scrutinize the impairment determination against the objective clinical impairment findings, which are a matter of fact, not opinion.** Any other approach is neither reasonable nor fair and not in compliance with LC § 4660(d) & 4660(b)(1): That the 05PDRS shall promote, consistency and objectivity by incorporating the 5th Edition of the AMA Guides regardless of the evaluating physician or the disability evaluator.
5. **If the medical evaluator provides a miscalculation of impairment and the body of the medical report supports and includes objective clinical criteria that would support a higher or lower impairment, the AMA Guides allows any knowledgeable observer to adjust the reported impairment accordingly. —** AMA Guides 5th Edition, Chapters 2, page 17

E. The Language of Section 4660(b)(1) Does Not Preclude a Physician from Assessing Impairment Using Any Chapter, Method, or Table of the AMA Guides.

Nevertheless, although the WPI component of a scheduled rating must be founded on the AMA Guides (except in the case of psychiatric impairments), a physician is not inescapably locked into any specific paradigm for evaluating WPI under the Guides. Section 4660(b)(1) provides that the WPI component of a scheduled rating is to be rooted in “the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the [AMA Guides].” Therefore, section 4660(b)(1) does not mandate that the impairment for any particular condition must be assessed in any particular way under the Guides. – Almaraz-Guzman II, pg. 24

How It’s to Be Done:

- 1. If in spite of an observation or test result the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the physician may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing. (Id., § 2.5c, at p.19.)*
- 2. In situations where impairment ratings are not provided, the Guides suggests that physicians use clinical judgment, comparing measurable impairment resulting from the unlisted condition to measurable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living.*
- 3. The physician’s judgment, based upon experience, training, skill, thoroughness in clinical evaluation, and ability to apply the Guides criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment. (Id., § 1.5, at p. 11.)*
- 4. **Therefore, based on experience, training, and skill, each reporting physician (treater or medical-legal evaluator) should give an expert opinion on the injured employee’s WPI using the chapter, table, or method of assessing impairment of the AMA Guides that most accurately reflects the injured employee’s impairment.** – Almaraz-Guzman II, pg. 25*
- 5. This does not mean, of course, that a physician may arbitrarily assess an injured employee’s impairment. As stated by the AMA Guides, “[a] clear, accurate, and complete report is essential to support a rating of permanent impairment” and the report should “explain” its impairment conclusions. (AMA Guides, § 2.6, at pp. 21-22.) In other words, a physician’s WPI opinion must constitute substantial evidence upon which the WCAB may properly rely, including setting forth the reasoning behind the assessment. (See *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc). – **physician’s WPI opinion that is not based on the AMA Guides does not constitute substantial evidence because it is inconsistent with the mandate of section 4660(b)(1).***

F. WCAB is the ultimate trier of fact on medical issues (not any particular physician).

Therefore, once all of the evidence relating to permanent disability has been presented – including both original and rebuttal evidence regarding the injured employee’s WPI under the AMA Guides – the WCAB will determine the injured employee’s percentage of permanent disability. In this regard, it is the WCAB and not any particular physician that is the ultimate trier-of-fact on medical issues. - Almaraz-Guzman II, pg. 26

On pages 27 to 29 (Section H), the WCAB discusses the ordinary progression of a challenge to the AMA Guides component of a scheduled permanent disability rating. Section I on page 30 discusses other issues with the final conclusion found on page 38, Section III. The dissenting opinion starts on page 42 to 56. http://www.dir.ca.gov/wcab/EnBancdecisions2009/WCAB_EnBanc_AlmarazMGuzmanJ_Sep2009.pdf

Luis Pérez-Cordero & Craig Andrew Lange – Friday, October 02, 2009

Certified, AMA Guides Impairment & California Disability Rating Specialists