

Civil F058698

IN THE  
COURT OF APPEAL  
OF THE  
STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

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STATE COMPENSATION INSURANCE FUND,

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD  
OF THE STATE OF CALIFORNIA and MARIO ALMARAZ,

Respondents.

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WCAB No. ADJ1078163

Hon. Terrence E. McEvoy, Bakersfield Office, WCAB

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Reply to Answer to Petition for Writ of Review

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Honorable Terrence E. McEvoy  
Bakersfield Office, WCAB

Reply to Answer to Petition for Writ of Review

To the Honorable Presiding Justice and the Honorable Associate Justices of the District Court of Appeal of the State of California, Fifth Appellate District from petitioner State Compensation Insurance Fund:

## ARGUMENT

Respondent contends that a physician may use any part of the *AMA Guides* to determine the most accurate method of determining impairment and that Labor Code 4660(b)(1) does not specify how the *AMA Guides* are to be used. Petitioner asserts that the statute *does* specify how the *Guides* are to be used by the language of Section 4660(b)(1), which specifically refers to the descriptions and measurements of impairment and *corresponding* percentages of impairment from the *Guides*.

Respondent admits that the statute provides that disability impairment determinations shall incorporate the descriptions and measurements of impairment and corresponding percentages of the *AMA Guides*, but on page 3 of his Answer, Respondent wrongly alleges, “There are no ‘corresponding’ description and measurements directed within 4660(b)(1) and this is consistent with 4660(e) wherein the whole *AMA Guides* are adopted and incorporated.” Indeed, the descriptions and measurements of physical impairment that “correspond” to percentages of disability are set forth in each chapter, and are arranged by part of body. Respondent provides no clear explanation to support his assertion that there “are no ‘corresponding’ descriptions and measurements directed within 4660(b)(1) . . .” The plain language of the statute specifically spells out that the descriptions and measurements of impairment and their corresponding percentages under the *AMA Guides shall be* incorporated into permanent disability assessments.

Respondent argues that a physician can use any section of the *AMA Guides* to determine the most accurate method of determining impairment because the Administrative Director incorporated the *AMA Guides* in their entirety when she adopted the *Schedule for Rating Permanent Disabilities*. Respondent's argument, however, ignores the express language in the *Schedule for Rating Permanent Disabilities*, which requires that a physician's impairment rating be made in accordance with the *AMA Guides's* evaluation protocols and rating procedures.

Respondent would have this Court find that a determination of impairment need not follow the *Guides's* evaluation protocols and rating procedures. This is simply incorrect. Such a conclusion is contrary to the explicit instructions set forth in the opening pages of the *Schedule for Rating Permanent Disabilities*:

The calculation of permanent disability rating is initially based on an evaluating physician's impairment rating, in accordance with the medical evaluation protocols and rating procedures set forth in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition (hereinafter referred to as the "AMA Guides"), which is hereby incorporated by reference . . . .The impairment standard is then adjusted to account for diminished future earning capacity, occupation and age at the time of injury to obtain a final permanent disability rating.

(*Schedule for Rating Permanent Disabilities*, January 2005, pp. 1-2, available at <http://www.dir.ca.gov/dwc/PDR.pdf>, adopted by and incorporated by reference into Title 8, California Code of Regulations, section 9805.)

Respondent's argument cannot be reconciled with the Administrative Director's instructions on the use of the *AMA Guides* and the plain meaning of section 4660(b)(1).

**Respondent argues that the *AMA Guides* are rebuttable and that the general protocols of the *Guides* may establish that another chapter, table, or method within its four corners more accurately reflects the injured employee's impairment. However, the Legislature did not intend for the *AMA Guides* to be rebuttable as shown by use of mandatory language that requires incorporation of the *Guides* as written.**

The well-established rule of statutory construction, that particular provisions will prevail over general provisions, can only lead to the conclusion that the Legislature did not intend for the *Guides* to be rebuttable. Code of Civil Procedure section 1859 provides:

In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and [a] particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.

The California Supreme Court has reiterated the principles of statutory construction as set forth in Code of Civil Procedure section 1859: "Also of importance here is the rule that where the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not enacted first, is an exception to the general statute and controls unless an intent to the contrary clearly appears."

(*Warne v. Harkness* (1963) 60 Cal.2d 579.) The Supreme Court has further stated: “It is also an established rule of statutory construction that particular provisions will prevail over general provisions.” (*In re James M.* (1973) 9 Cal.3d 517, 522.)

In this case, it is undisputed that Labor Code section 4660(c) is a general provision that mandates that the Schedule is prima facie evidence. The Appeals Board in *Almaraz II* relies upon section 4660(c) as the statutory authority to find the *Guides* rebuttable. However, based upon the well-established rule of statutory construction found in Code of Civil Procedure section 1859, it is apparent that Labor Code section 4660(b)(1) is a special provision which *requires* that the nature of physical injury or disfigurement shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments from the *AMA Guides*. Labor Code section 4660(b)(1) is an exception to the general rule that the Schedule is prima facie evidence. Therefore, the *Guides* are *not* subject to rebuttal. When the rules of statutory construction are properly applied, the only viable conclusion is that the Legislature did not intend to allow rebuttal of the *AMA Guides*.

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Respondent argues that the stated Legislative intent, that the *Schedule for Rating Permanent Disability* shall promote consistency, uniformity, and objectivity, is effectuated by simply requiring that an impairment determination be made within the four corners of the *AMA Guides*. The Appeals Board's holding in *Almaraz II*, however, does not effectuate the stated Legislative intent; instead, it permits the wholesale elimination of scientifically-based protocols that are geared to ensure consistent outcomes.

The Appeals Board's decision will allow for limitless variations in permanent disability results in cases involving injured workers with similar conditions. The Legislature's intent is contravened if an impairment determination is made without employing the evaluation protocols and rating procedures set forth in the *Guides*. As noted by Respondent, the Administrative Director adopted the *Guides* in their entirety. The *Guides* provide very specific evaluation protocols and rating procedures. By requiring each physician to follow those evaluation protocols and rating procedures, the *Guides* promote consistency, uniformity, and objectivity. For this reason the Administrative Director instructs that the calculation of the permanent disability rating must be based upon an evaluating physician's impairment rating in accordance with the medical evaluation protocols and rating procedures set forth in the *Guides*.

The method for determining the impairment component of permanent disability under *Almaraz II* fails to promote consistency, uniformity, and objectivity. Instead, case outcomes will be inconsistent and uncertain. Results will be based upon the degree of skillfulness with which a doctor can navigate the *Guides* to reach a desired result rather than the objective characterization of an injured worker's physical disability.

Without the *Guides*'s evaluation protocols and rating procedures, there is no standard for evaluating which chapter, table, or method most accurately describes the patient's impairment. Medical opinions will vary widely on this issue resulting in a lack of consistency, uniformity, and objectivity, in complete frustration of the Legislature's intent. As noted in the Petition (p. 23), the *Guides* specifically state on page 11 that:

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.

It is clear that applying the *Guides*'s criteria as written is a key component in the assessment of impairment. In contrast, Respondent discusses the Activities of Daily Living from the *Guides* but offers no authority for his assertion that an assessment of impairment may disregard the *Guides*'s evaluation protocols and rating procedures. This argument has no legal basis and is without merit.

**Respondent alleges that ratings derived from chapters in the *Guides* that do not relate to the injured body part under evaluation may more "accurately" reflect the injured worker's impairment but fails to set forth the method of comparison used to determine "accuracy." Petitioner contends that the quest for a more "accurate" rating is tantamount to reviving the old permanent disability schedule that the Legislature sought to put to rest by implementing the SB-899 reforms.**

Respondent seems to argue that because functions that involve lifting, carrying, bending, stooping, etc, are generally not listed as Activities

of Daily Living in the *Guides*, doctors are justified to go on an expedition into other chapters of the *Guides* to seek alternative impairment percentages for the “unlisted” activities. Petitioner contends that this is nothing short of an impermissible revival of the old permanent disability rating schedule. Indeed, in allowing doctors to use any chapter of the *Guides* to determine permanent impairment, the decision in *Almaraz II* invites the reintroduction and use of the old schedule despite the clear mandate for a significant change to the method by which the percentage of permanent disability impairment is determined. It is perplexing how an alternative impairment determination could be more “accurate” when the condition under evaluation *is covered* by specific rating criteria in the *Guides*, but the physician utilizes another chapter that does *not* pertain to that condition.

***Ferras v. United Airlines* exemplifies how the *Guides* may be misapplied under *Almaraz II*.**

Respondent contends that the discussion of the Board’s decision in *Ferras v. United Airlines* (exhibit 17) was misleading. (Answer p. 5.) He alleges that the case is not relevant to *Almaraz II* because it was decided under *Almaraz I*. Although *Ferras* was decided in the interim between *Almaraz I and II*, its rationale follows the method of evaluation approved in *Almaraz II*. The Workers’ Compensation Judge in *Ferras* stated the following in his Report and Recommendation on Reconsideration, which was adopted by the Appeals Board as its decision:

In this case, the QME concluded that a zero impairment rating compelled by use of chapter 17 would not be a fair and accurate measure of the employee’s permanent disability. . . .

With respect to the appropriate rating following rebuttal of a specific section of the Guides, the board in *Almaraz/Guzman* [I] concluded that "...a physician may depart from the specific recommendations of the AMA Guides and *draw analogies to the Guides' other chapters, tables, or method of assessing impairment*[\"]. . . .This is precisely the method that the QME used in the present case, drawing an analogy to the impairment of applicant's lifting restriction, as measured under a different chapter of the Guides.

(Exhibit 17, p. 356; italics in original.)

Thus, the trial judge notes that the QME opined that the rating under the appropriate section of the AMA *Guides* was not an accurate measure of the applicant's impairment; therefore, he measured the applicant's impairment under a different chapter of the *Guides*. This is the methodology set forth by the Appeals Board in *Almaraz II*. Accordingly, *Ferras illustrates* what certainly will occur under *Alamaraz II* if it is allowed to stand.

## CONCLUSION

Because *Almaraz II* contravenes the language and intent of the Legislature in SB 899 and potentially will affect every compensation case involving permanent disability, a grant of review is warranted.

For the reasons given above and for the reasons given in State Fund's Petition for Writ of Review, State Fund respectfully requests that its Petition for Writ of Review be granted.

Dated: November 19, 2009

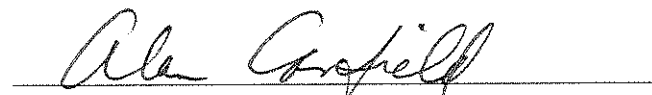
San Francisco, California

Respectfully submitted,

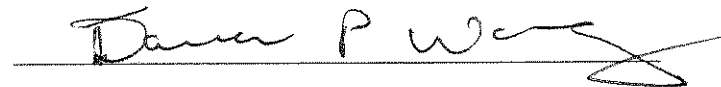
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## CERTIFICATION OF BRIEF LENGTH

Pursuant California Rules of Court, Rule 8.204(c)(1) and (3), I hereby certify that the foregoing brief (not including the Table of Contents, Table of Authorities, and this Certification of Brief Length) contains less than 14,000 words.

I further certify that pursuant to Rule 8.204(b)(3) & (4), the font used was Times New Roman, not smaller than 13-point.



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Appellate Counsel (State Bar No. 127602)  
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DATED: November 19, 2009

**Proof of Service By Mail**

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I declare that I am a citizen of the United States, employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within entitled action.

My business address is 1275 Market Street, San Francisco, California, 94103.

On November 19, 2009, I served the attached **REPLY TO ANSWER TO PETITION FOR WRIT OF REVIEW** on the parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at San Francisco, California addressed as follows:

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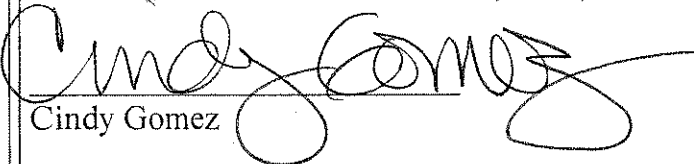
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Following ordinary business practices, the envelopes were sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2009, in San Francisco, California.

  
Cindy Gomez