
New and Unresolved Issues Under Almaraz-Guzman-2 (AG)

Both the Almaraz-Guzman and Ogilvie Decisions continue to be binding in the Workers Compensation Community until such a time a higher court rules otherwise. However, Writs have been filed with the Court of Appeals of the State of California 5th (Almaraz) & 6th (Guzman) Appellate Districts.

As of today, Monday, December, 07, 2009, it has been 95 days since the Almaraz-Guzman-2 decision was served. In the Workers Compensation System an En-Banc Decision can be the final answer to a question. Sometimes such decisions have the opposite effect and create a multitude of new issues that eventually will need to be addressed by further en-banc decisions of the WCAB.

Based on the rating requests we have received in the past 95 days dealing with Almaraz-Guzman-2, we would like to share some thoughts with you regarding the following two areas:

I. Physicians Can Not Initiate Rebuttal of an AMA Guides Rating: Only Employee or Employer can object to a PD Rating. (Unrepresented Cases Only?)

- A Rebutting an AMA Guides Rating under Almaraz-Guzman II is not an Automatic Process and the right to challenge the correct rating under the AMA Guides LC § 4660(b)(1) is a right that the WCAB only gives to the Employer and Employee (the 'parties').
- Nothing in the AG-2 decision allows the evaluating physician to usurp that right when neither an employer nor an employee has disputed a scheduled rating. In their decision, the WCAB was very clear that:
 - The correct AMA Guides Rating is presumed to be correct and is 'prima facie evidence' of the employee's percentage of permanent disability. Section 4660(c)
 - Therefore, a strict reading of section 4660(c) would suggest that rebuttal evidence may be presented only *after* the presumptively correct (prima facie) percentage of permanent disability under the Schedule has been determined.
 - In other words, in unrepresented cases, is the PTP bound to provide only the correct rating under AMA Guides?
 - AG-2 outlines the progression of a challenge to the AMA Guides component of a Scheduled Permanent Disability Rating.
 - The burden of rebutting a scheduled PD Rating rests with the party disputing the rating. – [Almaraz-Guzman-II, pg. 2](#)
 - If a party disputes a treating physician's opinion regarding the injured employee's WPI under the AMA Guides, or if the treating physician is unable to offer such an opinion, the parties may obtain an AME or a panel qualified medical evaluator (QME) to address the issue of the employee's WPI under the Guides.*** (See Lab. Code, §§ 4062.1, 4062.2.)
 - Without being asked, can the PTP or any other physician providing treatment or a consultative rating for the PTP provide an alternative rating under Almaraz-Guzman to rebut his own unchallenged rating? Or without being asked, are these physicians bound to only provide a rating applying the AMA Guides as intended?
 - For Represented Cases:** Once a treating physician, AME, or QME has offered an opinion regarding the injured employee's WPI under the AMA Guides, then the injured employee or the employer may seek to challenge that opinion through rebuttal evidence.
 - If a party seeks to challenge a WPI based on the Guides, section 4660(b)(1) requires that this rebuttal evidence must also be founded on the Guides.
 - Requiring that rebuttal evidence and determination of impairment be based anywhere within *the 4 corners of the AMA Guides*, kept open the door of subjectivity previously opened by AG-1. This subjectivity completely defeats the intended purpose & use of the AMA Guides and the 05PDRS. Nowhere in the sequential historical continuity of the AMA Guides as followed in its multiple editions, was a single physician's opinion ever given precedent over that of scientific evidence, prevailing medical consensus, or that of Chapter authors and medical associations.

II. AMA 5th Edition Rates The Objective Manifestation of Impairment

- A **Even after Almaraz-Guzman-2, the AMA Guides 5th Edition continues to define the standard methods the medical evaluator must follow to measure the objective manifestations of impairment when considering both anatomic and functional loss.**
- 1 Misquoting the AMA Guides and case law has become part of the current trend in workers compensation. This also applies to Almaraz-Guzman-2.
 - 2 Nothing in the Guides allows an individual physician's opinion to overrule the consensus impairment determination of the AMA Guides Chapters, and never was individual judgment intended to bypass the diagnosis or measurement portions of the Guides in favor of only subjective complaints.
 - 3 Nothing in the AMA Guides allows for the determination of impairment to be only based on uncorroborated subjective complaints or the work capacity functional loss.
 - (a) Did the WCAB say the physician could do all of the above when rebutting a correct AMA Guides Rating when a *physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment* ?
 - (b) Or, isn't physician still required to start and support any rebuttal of a correct impairment rating with an objective clinical foundation of measurable factors of impairment? Isn't that what the WCAB is defining as substantial medical evidence?
- A **The WCAB said: *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).)**
- 1 *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). (Heggin 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").)*
 - 2 **Section 1.5, AMA Guides, p. 10:** Subjective concerns, including fatigue, difficulty in concentrating, and pain, when not accompanied by demonstrable clinical signs or other independent, measurable abnormalities, are generally not given separate impairment ratings. Rating permanent impairment by analogy is permissible only if the *Guides* provides no other method for rating objectively identifiable impairment. "In situations where impairment ratings are not provided, the *AMA 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 It can be deduced that the courts have not yet established the minimum quantity of evidence that is required to rebut the schedule. However, one thing AG-2 has made very clear: It is not substantial medical evidence to have one or two paragraphs based only on the physician's opinion without any clinical foundation in support of such opinion. The AMA Guides impairment determinations are based on consensus and scientifically based data.
 - (a) Link for Writ of Review for J. Guzman in our website (Pages 01 to 64 only).
<http://www.pdratings.com/petitionforwritGuzmanpages01to64.pdf>
 - (b) Link to Writ of Review for J. Guzman <http://www.bradfordbarthel.com/Press.htm> (Pages 01 to 278)
 - (c) Link to Writ of Review for Almaraz - <http://www.pdratings.com/petitionforwritAlmaraz.pdf>

In closing, there are two individuals in our community we personally would like to thank.

They represent the best of what the WC Community has to offer. They provide educational seminars and materials (such as rating calculators) reasonably accessible to all of us. Colleagues, there is still some world out there that is not under the dominion of workcomp central!

• **Jay Shergill, Esq.:** Provides us with the best internet available permanent disability rating calculators. - <http://www.pdrater.com/>

• **Don Barthel, Esq.** – Provides us with the clearest seminars on: AMA Guides, Almaraz-Guzman & Ogilvie, case law. <http://www.bradfordbarthel.com/default.htm>

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