



LAW OFFICES  
of  
McDERMOTT & CLAWSON, LLP

## LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

August 2010

[www.McDermott-Clawson.com](http://www.McDermott-Clawson.com)

August 2010

# GUZMAN: NEW DECISION, OLD MEDICAL BUSINESS

On 8/19/2010, the 6<sup>th</sup> District Court of Appeal weighed in with a published decision in the case of Milpitas Unified School District v WCAB (Guzman), HO 345853 (official cite not yet available). The case is one half of the oft-cited Almaraz/Guzman cases dealing with whether the AMA Guides must be strictly followed in rating permanent impairments.

Unfortunately, it would appear that the appellate court, being removed from the daily realities of Workers' Compensation litigation, has placed undue reliance on "clinical judgment" and reasoned opinion and, as a result, much of what we see in impairment determinations is likely to revert back to the type of subjective analysis that was rampant before the passage of SB 899. The opinion is unusually well written and easy to understand, and the Applicant's Bar will be making the most of it. Much of what follows is lifted from the language of the opinion itself. Time for defendants to fasten their seatbelts: The ride is going to get bumpy. **[Bold font is ours.]**

The Guzman case involved, in part, a debate about whether an upper extremity impairment should be rated by strict application of the applicable chapter in the AMA Guides to the Determination of Permanent Impairment, 5th Edition, or whether a judge was free to assign an alternative rating when a doctor opines that, in the doctor's judgment, the applicable chapter of the Guides is too conservative and some other method should be used to obtain a higher rating.

The opinion at the heart of the controversy came from an Agreed Medical Examiner, Dr. Feinberg, who stated that Guzman was "precluded for her upper extremities from very forceful, prolonged repetitive and forceful repetitive work activities." Dr. Feinberg pointed out that "there is often a discrepancy between the disability and the impairment." "The type of problem she has is legitimate but does not rate very much (if anything) under the AMA Guides. Based on her ADL [Activities of Daily Living] losses, each upper extremity would have a 15% WPI [( ) 25% of

*Los Angeles*  
16530 Ventura Boulevard, Suite 209  
Encino, CA 91436  
(818) 997-2100

*Orange County / Inland Empire*  
1700 West Katella Avenue  
Orange, CA 92867  
(714) 288-1700

60%).” This is not a method that is sanctioned by the AMA Guides.”

The Court noted: “Karen Wong, the evaluator from the Disability Evaluation Unit (DEU), testified that the Guides did not permit a medical evaluator to compute WPI directly from ADL loss. She didn't know why it's improper for the doctor to complete his own whole person impairment directly from ADL loss, but she was confident that the AMA Guides don't allow it.” She testified that if the 15 percent WPI figure Dr. Feinberg referred to were used for each upper extremity, each would yield a 22 percent permanent disability.”

Noting the discrepancy between Dr. Feinberg's assessment of Guzman's injury and that which the rating system of the Guides prescribed, the Court quoted the WCJ as stating, "Applicant has advanced the theory that, since Dr. Feinberg has opined that the Applicant's impairment precludes a higher level of ADL's than described in the AMA Guides, Dr. Feinberg's report is a sufficient rebuttal of the Schedule and should be rated outside AMA [sic]. **While the exact quantum of evidence required to rebut the PDRS has yet to be established by case law, I feel certain that a single paragraph in an AME report does not suffice.** In particular, Dr. Feinberg provides no data or clinical observations in support of his opinion; his opinion seems to be, rather, that the [G]uides generally underrate this impairment. He may be correct; he is certainly a highly respected and qualified physician; but without a significant amount of objective data I am unwilling to accept his opinion, standing alone, against that of the Legislature.”

We have previously reported on what transpired next in earlier editions of our newsletter. Applicant's counsel brought a successful Petition for Reconsideration. Guzman contended that her

permanent disability "should be an adjusted 39%, based upon the AME's clinical judgment and reporting, and the DEU rater's 10/03/2008 testimony." Guzman maintained that this method of calculation was consistent with the Guides. She was not, she insisted, seeking to rebut the current permanent disability schedule, but instead "to appropriately and accurately apply it." The Guides themselves, she argued, required the evaluating physician to exercise clinical judgment, and to take note of any functional loss of ADLs in deriving an impairment rating. Thus, it was a "mistake" to believe that the AMA did not approve of Dr. Feinberg's method of assessing impairment based on functional loss of ADLs. She argued that the **WCJ should have recognized that the application of clinical judgment to the AME's assessment of impairment and disability, including impairment of ADLs, was consistent with the current PDRS.**

Keenan & Associates responded that substantial evidence supported the WCJ's decision. Their counsel argued that if Guzman disagreed, she should have retained an expert to rebut Wong's rating. The WCJ agreed, noting that no direct evidence contradicted the expert opinion that the Guides may not be bypassed in favor of a physician's independent evaluation method. “On this record, it would be an abuse of discretion to rate in a manner other than that supported by the evidence.”

The WCAB weighed in with two *en banc* decisions in favor of the applicant, ultimately ruling that creative use of the Guides is allowable as long as, for purposes of impairment determination, the medical opinion relied on is substantial evidence and stays within the “four corners” of the Guides. While the Guzman decision was combined with another case (Almaraz) at the WCAB level, they

Los Angeles  
16530 Ventura Boulevard, Suite 209  
Encino, CA 91436  
(818) 997-2100

Orange County / Inland Empire  
1700 West Katella Avenue  
Orange, CA 92867  
(714) 288-1700

were separated before the Courts of Appeal and went to different Appellate Districts.

According to the published decision of the Court of Appeal, **counsel for the District limited its appellate argument to a position that the Guides were not rebuttable and must be strictly followed.** Said the Court: “The District's position on appeal is a narrow one: Whereas the PDRS is rebuttable, the criteria set forth in the Guides are not rebuttable for purposes of making a determination of whole person impairment. Relying primarily on subdivision (b)(1), the District points out that determination of an employee's impairment must incorporate the descriptions and measurements set forth in the Guides. This provision, in the District's view, mandates the application of the Guides "as written" and "as intended" and prohibits physicians from "rewriting the Guides by applying 'any chapter, table or method' he/she deems more appropriate." Thus, the District argues, "the Guides, properly applied, are the final word on impairment. There is no other way to interpret the plain language of section 4660.”

The Court of Appeal responded by carefully looking at the language of Labor Code 4660. “The statutory revision most significant for the resolution of Guzman's case is the new condition that the determination of ‘the nature of the physical injury or disfigurement’ shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, (5th Edition.)” (§ 4660, subd. (b)(1).)”

The Court then opined: “We cannot expand the statutory mandate by changing the word “incorporate” to “apply exclusively.” Nor can we read into the statute a conclusive presumption

that the descriptions, measurements, and percentages set forth in each chapter are invariably accurate when applied to a particular case. **By using the word “incorporation,” the Legislature recognized that not every injury can be accurately described by the classifications designated for the particular body part involved.** Had the Legislature wished to require every complex situation to be forced into preset measurement criteria, it would have used different terminology to compel strict adherence to those criteria for every condition. A narrower interpretation would be inconsistent with the clear provision that the Schedule -- which itself incorporates the Guides (PDRS p. 1-2) -- is rebuttable (§ 4660, subd. (c)), and it would not comport with the legislative directive to construe the workers' compensation statutes liberally “with the purpose of extending their benefits for the protection of persons injured in the course of their employment.” (§ 3202.)”

“The District agrees with the statement by the authors of the Guides that its application “as intended” facilitates “an appropriate and reproducible assessment to be made of clinical impairment.” (Guides, p. 11.) However, the District omits the rest of that paragraph, which makes a rather different point, an important one: “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. **Clinical judgment, combining both the ‘art’ and ‘science’ of medicine, constitutes the essence of medical practice.**” (Guides § 1.5, p. 11.) The Guides itself recognizes that it cannot anticipate and describe every impairment that may be experienced by injured employees. The authors repeatedly caution that notwithstanding its “framework for evaluating new or complex

*Los Angeles*  
16530 Ventura Boulevard, Suite 209  
Encino, CA 91436  
(818) 997-2100

*Orange County / Inland Empire*  
1700 West Katella Avenue  
Orange, CA 92867  
(714) 288-1700

conditions," the "range, evolution, and discovery of new medical conditions" preclude ratings for every possible impairment. (Guides § 1.5, p. 11.) The Guides ratings do provide a standardized basis for reporting the degree of impairment, but those are "consensus-derived estimates," and some of the given percentages are supported by only limited research data. (Guides, pp. 4, 5.) The Guides also cannot rate syndromes that are "poorly understood and are manifested only by subjective symptoms." (Ibid.) “

**“The Board thus correctly rejected the argument that only the descriptions and measurements of impairments with their corresponding percentages may be incorporated into the WPI assessment.** The statute, noted the Board, did not prohibit incorporation of the portions outside the descriptions, measurements, and percentages in a complex case not addressed by the chapter devoted to the affected body part or system. In the Board's view, the Administrative Director complied with the statutory mandate by adopting and incorporating the entire Guides without limitation. As a result, the Board concluded, "the entire AMA Guides is part of the Schedule." Given the comprehensiveness and precision attendant in the chapters pertaining to each system, in most cases a WCJ will credit ratings based strictly on the chapter devoted to the body part, region, or system affected.”

The Board stated that by having the latitude to use the "four corners" of the Guides, the physician “is not inescapably locked into any specific paradigm for evaluating WPI under the Guides.” **The statute, the Board reasoned, “does not mandate that the impairment for any particular condition must be assessed in any particular way under the Guides [or] relegate a physician to the role of taking a few objective measurements and then**

**mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgment.** Instead, the AMA Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill in assessing WPI.”

At the same time, however, the WCAB majority did not explain how far the physician may go in relying on the "four corners" when the descriptions, tables, and percentages pertaining to an injury do not accurately describe the injured employee's impairment. If the physician expresses the opinion that the chapter applicable to a particular kind of injury does not describe the employee's injury, but all other chapters address completely different biological systems or body parts, it would likely be difficult to demonstrate that that alternative chapter supplies substantial, relevant evidence of an alternative WPI rating. In order to support the case for rebuttal, **the physician must be permitted to explain why departure from the impairment percentages is necessary and how he or she arrived at a different rating. That explanation necessarily takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue.** In our view, a physician's explanation of the basis for deviating from the percentages provided in the applicable Guides chapter should not a priori be deemed insufficient merely because his or her opinion is derived from, or at least supported by, extrinsic resources. The physician should be free to acknowledge his or her reliance on standard texts or recent research data as a basis for his or her medical conclusions, and the WCJ should be permitted to hear that evidence. If the explanation fails to convince the WCJ or WCAB that departure from strict application of the applicable tables and measurements in the Guides is warranted in the

*Los Angeles*  
16530 Ventura Boulevard, Suite 209  
Encino, CA 91436  
(818) 997-2100

*Orange County / Inland Empire*  
1700 West Katella Avenue  
Orange, CA 92867  
(714) 288-1700

current situation, the physician's opinion will properly be rejected. Without a complete presentation of the supporting evidence on which the physician has based his or her clinical judgment, the trier of fact may not be able to determine whether a party has successfully rebutted the scheduled rating or, instead, has manipulated the Guides to achieve a more favorable impairment assessment.

We believe this language from the Court of Appeal is unfortunate. You will recall from our prior articles that normally the burden of proof falls to the party trying to prove an issue, and in the case of proving permanent disability, that burden falls to the applicant. A trial judge is empowered, if not obligated, to make sure the record in a case is complete. The statement by the Court that without proper substantiation a WCJ "may not be able to determine" whether a party has successfully rebutted the *Guides* opens the door for a trial judge to order a supplemental report or cross-examination of a doctor when a *Guzman* opinion is inadequately expressed, rather than merely issuing a finding that the rebuttal attempt has fallen short. This is another apparent victory for the applicant's bar.

Whether this opinion truly does open the time portal back to the days of the pre-SB 899 Wild West still remains to be seen. Having gone this far, it is unlikely the defense will fail to seek redress before the Supreme Court. We suspect such an attempt unlikely to succeed. At the same time, an opinion in *Almaraz* is yet to come. We suspect, over time, that there will be accumulated a body of case law defining exactly what constitutes substantial evidence in support of creative use of the Guides.

We know there are tactics that defendants can and should consider to ameliorate the effects of this decision. There will also be strategies to employ in determining when and how to

challenge a Guzman-style creative medical assessment of impairment. We will have more on that in our next edition. Stay tuned.

[Article by Editor-in-Chief, Howard Stevens](#)

### **Need Assistance with Training?**

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email

[Howard Stevens](#) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

Legal Briefs is a publication of [McDermott & Clawson, LLP](#)  
[Howard Stevens](#) (Orange office), Editor

Legal Briefs is provided free of charge as a service to our valued clients to provide general assistance in the day to day review of claims and cases. Comments and recommendations provided are not necessarily meant to apply to any specific case currently under review, as many cases present unique facts and circumstances which should be reviewed by legal counsel when litigation is involved. Please feel free to call our [Education Committee](#) with questions or comments. Contact [Howard Stevens](#) in the Orange office, 714 288-1700, or any of our [managing attorneys](#) for more information.

*Los Angeles*  
16530 Ventura Boulevard, Suite 209  
Encino, CA 91436  
(818) 997-2100

*Orange County / Inland Empire*  
1700 West Katella Avenue  
Orange, CA 92867  
(714) 288-1700