



LAW OFFICES  
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## LEGAL BRIEFS NEWSLETTER

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# Life After Almaraz/Guzman

Recently, the WCAB issued an important *en banc* decision which is expected to impact the way permanent disability is calculated in many of your post-SB899 cases. In two cases heard together, the WCAB ruled **1) the AMA Guides portion of the post 2005 rating schedule is rebuttable**; 2) the impairment rating of the Guides may be rebutted by a showing that an impairment rating based on the Guides would result in a permanent disability award that would be **inequitable, disproportionate, and not a fair and accurate measure** of the employee's permanent disability; and 3) when an impairment rating based on the AMA Guides has been rebutted, the **WCAB may make an impairment determination that considers medical opinions that are not based, or are only partially based on the AMA Guides.**

Don't be fooled by recent "webinars" hosted by certain well-known pitchmen who have been heard to proclaim that these cases

"are not the law in California" and will not be unless the Supreme Court says so. While we think an attempt to appeal this decision to the Court of Appeal will be made, in the meantime **WCAB *en banc* decisions are binding** precedent on all Appeals Board panels and judges per 8 Cal. Reg. 10341. These cases, *Mario Almaraz vs. Environmental Recovery Services and SCIF* and *Joyce Guzman vs. Milpitas Unified School District* are and will remain binding case law unless a stay order issues from a higher court (very rare) or unless ultimately reversed by a higher court (unlikely in our estimation).

The importance of this case is that it gives doctors and judges the opportunity to go around the strict and sometimes draconian impairment assessments provided in the Guides, and instead assign impairment ratings based on other methods, including the doctor's "clinical judgment."

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**This will now allow doctors to issue impairment ratings which are significantly higher than those assigned by strict use of the Guides** and in some cases (at least in theory) to assign *lower* ratings than those assigned by the Guides. It is now being hotly debated whether these cases open the way to a complete abandonment of the now familiar and allegedly objective methodology of the AMA Guides as part of the new PD rating system.

In the *Almaraz* case, Dr. Bruce Fishman declared the applicant's back injury to be permanent and stationary with a 12% Whole Person Impairment based on DRE category III of the Guides. Almaraz had a job that was extremely heavy. The doctor indicated the applicant could not do at least some part of his former work, and was limited to light duty work and no prolonged sitting. Applicant argued that the WCAB had discretion to award PD based on the work restriction instead of by multiplying his AMA Guides impairment by the appropriate DFEC adjustment. The WCAB Judge opined that he was not free to comply with that request due to SB 899 provisions.

In *Guzman*, the applicant had bilateral upper extremity impairments which rated 3% Whole Person Impairment on each arm under the Guides. Dr. Steven Feinberg, the AME, opined that applicant lost 25% of her pre-injury capacity for pushing, pulling, grasping, gripping, keyboarding and fine manipulation, and that she could not return to her former job as a secretary. In his final report the doctor opined that, as is often the case, there was a discrepancy between the Guides WPI number and the degree of disability the applicant actually had and, using an alternative logic,

indicated that since the applicant had effectively lost 25% of her ability to use each extremity, and that since each extremity had a 60% WPI value for total loss, in reality applicant had a 15% Whole Person Impairment in each arm. He noted, however, that this was not a methodology endorsed by the Guides.

In its unusually lengthy opinion discussing these cases on reconsideration, the WCAB cited a large number of pre-2005 case decisions and noted that permanent disability "is one which causes impairment of earning capacity, impairment of normal use of a member, or a competitive handicap in the open labor market." (citations omitted). The Board then engaged in an assessment of cases historically dealing with the definition of permanent disability under Labor Code 4660 and noted that SB 899 did not amend the language which stated that the PD schedule, which now consists of description of the impairments and corresponding percentages in the AMA Guides, was (only) *prima facie* evidence of impairment and disability, and did not provide a conclusive presumption in regard to those issues. The ability to rebut the PD schedule is not a new concept. The opinion cites many earlier cases in California, and many others from other states, in which a party was allowed to successfully rebut the scheduled rating based on other factors. In other words, reference to the Guides and the PDRS makes an initial case for what the PD should be, but it always has been and continues to be rebuttable.

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The Board went to great lengths to point out that the Guides themselves indicate **that it is appropriate in some cases for a physician to consider factors outside the Guides, including the injured employee's ability to perform work and his or her need for work restrictions or accommodations.** The Board stated "...a physician may assess how the industrial injury will affect the employee's ability to return to his or her job. Further, with respect to the broader job market, other evidence may be appropriate – specifically including the expert opinion of “vocational specialists.”

In much of the opinion, the Board examined cases from other jurisdictions, noting many examples where Industrial Commissions held that where the impairment assessment of the Guides did not fairly reflect the impact on the injured person's ability to work, it is permissible to use an alternative method to assess PD. Among the examples given were a case of a meat wrapper developing “meat wrapper's asthma” as a result of PVC exposure (condition not covered by the Guides) and a truck driver precluded from working due to chronic back sprain (also not directly covered by the Guides). The Board cited other cases where the impairment rating was either nothing or very low, but the resulting work disability was very high.

The WCAB indicated that **the Guides will be deemed rebutted when it can be shown that an impairment rating strictly based on the AMA Guides would result in a permanent disability award that would be “inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability.”** We

think these terms are “magic words” in the legal sense, and we predict you are likely to see them raised in many cases where the AMA Guides provide a low impairment rating. After all, the California Applicant's Attorney Association (CAAA) has long advocated the proposition that the entire post-SB 899 rating methodology has been unfair and inaccurate although at a recent CAAA seminar on *Almaraz*, the seminar leaders advocated restraint and selectivity in attempts to rebut the Guides (possibly for concern about possible legislative response to wholesale attacks on the Guides methodology).

Magic words notwithstanding, **the tough issue at the heart of the matter is the determination of what evidence will be sufficient** to establish that the impairment rating given by the Guides is inequitable, disproportionate, and unfair. This part of the decision was probably the weakest with the Board admitting there was probably no “bright line test” for determining whether these standards have been met in any given case. However, the WCAB opined that, as an example, “the AMA Guides rating will be deemed to have been rebutted where the employee's injury has no permanent effect on his or her “activities of daily living” or is simply not covered in the Guides - thereby resulting in no ratable AMA Guides impairment - but the injury seriously impacts the employee's ability to perform his or her usual occupation and, therefore, significantly affects his or her future earning capacity. ...”

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The WCAB also opined that “**a defendant also can show that an AMA Guides rating should not be followed where it is inequitably high.**”

The Board noted its opinion that in most cases the opinion about whether the Guides rating is fair and equitable should come from a doctor. The Board noted that “a physician may invoke his or her judgment based upon his or her experience, training and skill.” We find the Board’s holding this reference to be sufficient but most unfortunate as it moves the process of PD assessment from an attempt to be objective, to a completely subjective arena, much as it was before the passage of SB 899.

The opinion cites alternative methodologies available to doctors, noting the doctor might depart from specific recommendations of the Guides and instead draw analogies to other chapters, tables or methods of Guides used to evaluate other types of disabilities. According to the opinion, “This is consistent with the long-established principle in California that **non-scheduled ratings may be arrived at by making comparisons and drawing analogies to scheduled ratings.**” They further noted that a physician might consider a wide range of evidence including evaluations by vocational experts.

If there is any good news here, it is that the Board did attempt to put some definition to the burden of proof required to torpedo the Guides by adopting language out of a New Hampshire decision noting “... our decision does not permit physicians...to deviate from [the AMA Guides] simply to achieve a more desirable result... 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 “... within the report, an evaluating physician is expected to provide a full medical evaluation, analysis of the medical findings ... and comparison of the results of analysis with the impairment criteria.” ... “In other words ... the physician’s report must constitute substantial evidence upon which the WCAB may properly rely. ...”

On a cautionary note repeated several times in the opinion, the WCAB stated that the method for evaluating **PD cannot be directly or indirectly based on what the employee’s work preclusions would have rated under the old system.** That is not to say that you can’t base PD on a work preclusion under the present system, but it does mean that the rating for the preclusion will have to be determined under a different methodology than the 1997 rating schedule.

We do find several interesting questions and observations coming from this opinion. First and foremost is trying to predict how often the issue will now be raised. We think that, despite the cautionary statements of the CAAA presenters in Los Angeles, we are going to see attempts to circumvent the low ratings of Guides becoming the norm any time the Guides ratings are low. We would expect to see more advocacy letters (much as is the custom and practice in the north) by applicant attorneys to QMEs and AMEs asking them to consider alternative methodologies for rating as discussed in the *Almaraz* decision.

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It is also now unclear as to what role, if any, the balance of the PDRS should play in a case where a physician has assessed higher impairment due to the impact of the injury on the applicant's ability to work. That was supposed to be the function of the rating schedule, which incorporates an upward modifier for the predicted loss of earning capacity due to injury. There is dicta in the opinion that once an alternative impairment rating is determined, you simply plug that into the rating schedule. If a doctor has already taken the employment and earnings factors into account, as this opinion says is permissible, use of it again in the schedule arguably results in unfair duplication. Much will depend on the doctor's explanation of the factors being considered when an alternative rating is provided.

So, what will you need to do when *Almaraz/Guzman* is raised as an argument to increase the PD? Consider the *evidence* available to determine why the AMA Guides rating should be ignored: Is it legally substantial evidence? (See our [past articles](#) on this subject.) Consider the alternative assessment method being offered: Does it meet the standard set forth for the doctor's opinion to be valid? Remember that the *Almaraz/Guzman* arguments work both ways: If the Guides rating is not fair, it may be arguable that the alternative method is also unfair or capricious.

If you wish to read the entire opinion, please go to [www.mcdermott-clawson.com](http://www.mcdermott-clawson.com) and click on the tab titled "Recent Events." There, you will also find copies of past newsletters for your review.

*Article by Howard Stevens, Orange Office*

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