



LAW OFFICES  
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# ALMARAZ & OGILVIE II: NEW LIMITS ON CREATIVE PD DETERMINATIONS

In a rare process, the WCAB *en banc* has reconsidered its own holdings in *Mario Almaraz and Joyce Guzman v WCAB*, and *Wanda Ogilvie v City and County of San Francisco*, seminal cases which significantly liberalized the Permanent Disability rating process placed into effect with the passage of the SB 899. The new, modified holdings, just published (official citations not yet available) have placed limits on methods which may be used by applicant's counsel to challenge or avoid the conservative analysis of impairments in the *AMA Guides* or the DFEC adjustment of the rating schedule in an attempt to increase the permanent disability rating and, ultimately, the value of a case.

### **The Holding in Almaraz/Guzman**

On February 3<sup>rd</sup> of this year, the WCAB issued its *en banc* opinion in *Mario Almaraz v. Environmental Recovery Services* and *SCIF and Joyce Guzman v Milpitas Unified School District*, 74 CCC 201. Since their publication, these combined cases have been the subject of much

discussion, many cross-examinations of physicians, and a modicum of celebration among applicant attorneys. An expanded discussion of the impact of the February 3<sup>rd</sup> decisions can be reviewed in our March 2009 newsletter on our website at [www.McDermott-Clawson.com](http://www.McDermott-Clawson.com).

To briefly review, the first decision in February held 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*.

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Capitalizing on the belief held by many attorneys and doctors that the *AMA Guides* are simply too draconian in their assessment of often meager impairment ratings (when compared to the very liberal pre-2005 WCAB guidelines), since February of this year depositions of doctors have been routinely set and pre-examination letters to doctors have been modified to invite the doctors to express the opinion that the AMA impairment assessment is “inequitable, disproportionate, and not a fair and accurate measure of the employee’s permanent disability,” magic language which then conceivably allows the physician to substitute anything that sounds reasonable (including clinical judgment and experience) for the structure and arguable objectivity of the *Guides*. For the last several months defendants have viewed this as a retreat to the old way of doing business.

Now, the WCAB has modified its holding in the original decision. The Board still finds that a rating stemming from strict use of the *Guides* rebuttable, but all impairment evidence – including but not limited to rebuttal evidence – be within the four corners of the AMA Guides. In other words, no longer may a doctor simply substitute his or her clinical judgment for the *Guides* themselves. However, creative use of the *Guides*, such as finding additional or alternative impairment analysis from other chapters of the *Guides* is allowable. Said the Board: “a physician may utilize any chapter, table, or method in the *Guides* to assess WPI, provided that his or her opinion constitutes substantial evidence.”

The Board specifically retracted the statement that the *Guides* could be rebutted simply by the medical opinion that the *Guides* were unfair or inequitable in a given case. Not to put too fine a point on it, but essentially, whining about a low WPI rating gets you nowhere. Instead, a physician is going to have to be able to demonstrate that alternative applications from within other charts or chapters in

the *Guides* provide a more accurate assessment of the patient’s actual impairment than the recommended section. Since medical conclusions are now supposed to be formed out of whole cloth, the doctor will also have to be able to explain “how and why” the alternative charts and chapters provide a superior analysis from that which the *Guides* otherwise mandate for a given case.

The Commissioners pointed out that the party disputing a scheduled permanent disability rating has the burden of rebutting it. In most cases, the quest to rebut will be undertaken by counsel for the injured worker. We think, as we have for quite some time, that skills regarding creative use of the *Guides* will play a paramount role in determining the outcome of a case in many instances.

May an applicant’s attorney still bring forward a vocational expert to provide opinion that future loss of earning capacity is far greater than the rating suggests in a given case? For that matter, may an applicant attorney still show his client’s earning capacity is functionally zero (equating to 100% PD) as in the old *LeBoeuf* case? We think so, although the *Ogilvie* opinion discussed below may have put severe curbs on the admission of such testimony. The language used in part of the *Almaraz* opinion is very telling: “...one method of rebutting a scheduled permanent disability rating is to successfully challenge one or more of the component elements of the rating, such as the WPI under the *AMA Guides*.” If “one method” of rebutting the rating is to challenge an element of it, there must be other methods, and we think the alternative approaches are still alive and well in the appropriate case. The *Ogilvie* case discussed below is one such alternative approach.

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## What About Ogilvie?

Frankly, this writer has a tendency to regard the decision in the case of *Wanda Ogilvie v City and County of San Francisco*, 74 CCC 248, as somewhat of an intellectual curiosity. Also published as an *en banc* opinion by the WCAB last February, the case provided attorneys a somewhat difficult mathematical method of challenging the DFEC adjustment in the Permanent Disability Rating Schedule. Most applicant attorneys we have spoken with have indicated their opinion that this case has less real world application for them than *Almaraz*. Since the formula tends to have a more dramatic effect of potentially increasing relatively small ratings, it has been asserted that it will have important implications for cases where PD is apportioned into multiple small awards pursuant to *Benson v WCAB*.

The *Ogilvie* case presented a rather complex formulaic approach to making an argument that the DFEC adjustment should be higher (or lower, presumably) than the number provided by the Administrative Director in the schedule. The decision called for evidence consisting of three years of post injury earnings for the injured worker and three years of earnings for similarly situated workers, and then put forth a formula for using this data to re-compute the DFEC.

Further limiting the use of expert testimony regarding this data, the revised opinion indicates that data from the Employment Development Department should be used. The Board stated that data used must be consistent with the Rand data to which LC §4660(b)(2) refers as well as the numeric formula adopted by the Administrative Director in the 2005 schedule. We would think that, in theory, once all these requirements are met, the result should likely be the same number the schedule already uses.

We think the shouting is not done with regard to either *Almaraz* or *Ogilvie*. These are *en banc* opinions, meaning trial judges are bound by the decisions, but the decisions were by no means unanimous. It is likely these cases are headed for the Court of Appeals. We will continue to follow their progress.

Article by Howard Stevens, Orange Office

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