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DEFENDING AGAINST GUZMAN

In last month's *Legal Briefs*, we discussed the Court of Appeals decision in Milpitas Unified School District v. Workers' Compensation Appeals Board, (Guzman), 75 CCC 837 (2010) upholding the WCAB *en banc* opinion in the joint cases generically referred to by the public as "Almaraz/Guzman." 74 CCC 1084 (2010). These cases stand for the proposition that a permanent disability rating can be based on creative use of the AMA Guides to the Evaluation of Permanent Impairment, 5th ed. to produce an impairment rating beyond what strict adherence to the Guides would otherwise allow.

As we have pointed out in previous discussions, it is now commonplace for applicant's counsel to ask treating physicians, Qualified Medical Examiners and Agreed Medical Examiners to explore alternate methods of determining impairment by referring to other protocols or chapters within the Guides, in order to produce an increased rating. There seems to be little doubt, in light of the Guzman decision (Almaraz is still pending before a different Appellate Court) that creative use of the Guides is allowable.

However, this does not mean that there is no way to defend against this method of inflating the impairment rating otherwise called forth by orthodox application of the Guides.

Since the Guides are *prima facie* evidence of what the impairment rating should be, it is the applicant that has the burden of proving that strict application of the Guides methodology is inequitable and that an alternative use of the Guides more appropriately reflects the true nature of the impairment, which should be greater than otherwise scheduled. "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 defendant may seek to challenge that opinion through rebuttal evidence. (Lab. Code, § 4660(c); see also Lab. Code, § 5704.) Section 4660(c) provides, in relevant part: "[the] schedule . . . shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." We construe this language to mean that the burden of rebutting or contradicting the scheduled percentage permanent disability rating is on the party disputing that rating." Mario Almaraz, Applicant

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v. Environmental Recovery Services (aka Enviroserve), State Compensation Insurance Fund, and Joyce Guzman, v. Milpitas Unified School District, PSI, Keenan & Associates, Defendants (2010) 74 CCC 1084, p.1097 (WCAB *en banc*).

In order to legally “rebut” the methodology called for under the Guides for any specific impairment, a doctor’s opinion is needed and, assuming the doctor opines that strict application of the Guides would produce an inadequate result, the opinion must pass the legal requirement that the opinion be “substantial evidence.” The term “substantial evidence” means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Insurance Co. of North America v WCAB (Kemp)* (1981) 46 CCC 913.

In the context of a Workers’ Compensation Case, one need not look much further than an earlier line of cases dealing with apportionment to understand just how difficult it may be to overcome the rebuttable presumption that the strict application of the Guides will control the level impairment and disability to be awarded. “A physician cannot make an arbitrary percentage finding simply because it is “fair” in a particular case. (Cf. Zemke v. Workmen's Comp. Appeals Bd., supra, 68 Cal.2d at pp. 798, 800; Berry v. Workmen's Comp. Appeals Bd., supra, 68 Cal.2d at pp. 790-791; Callahan v. Workers' Comp. Appeals Bd., supra, 85 Cal.App.3d at p. 630.)

... if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how

and why it is responsible for approximately 50% of the disability. Escobedo v. Marshalls (2005) 70 CCC 604, 620-621 (WCAB *en banc*).

The same rules would be applicable to the opinion of a physician seeking to offer an alternative approach to assessing impairment under the Guides. The physician must explain “how and why” the orthodox application of the Guides is inadequate and “how and why” some other protocol within the Guides produces a more adequate evaluation of the applicant’s impairment.

“We emphasize that our decision does *not* permit a physician to utilize any chapter, table, or method in the AMA Guides simply to achieve a desired result, e.g., a WPI that would result in a permanent disability rating based directly or indirectly on any Schedule in effect prior to 2005. A physician's opinion regarding an injured employee's WPI under the Guides must constitute substantial evidence; therefore, the opinion must set forth the facts and reasoning which justify it.” Almaraz/Guzman (supra) at p. 1087.

“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 (supra) 620-621.)

“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

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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 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.” Guzman (supra) p.854.

This is the Achilles' heel of many reports, either as they are written or as exposed by successful questioning of the doctor under cross-examination. Most reports we see simply contain a litany, borrowed from language of the WCAB opinion, that based on the doctor's "skill, experience and expertise" the impairment as described in the appropriate chapter of the *Guides* does not adequately reflect the true impairment of the injured worker, and in the doctor's judgment

another approach under the *Guides* would be more appropriate. No studies. No texts. No supporting evidence. It is merely a subjective anecdotal opinion. Occasionally we find these conclusions strengthened somewhat by reference to the applicant's self-reported impairments of Activities of Daily Living, with the doctor noting that, given the reported interference with his or her quality of life, the applicant would be better evaluated under (for example) the hernia chapter than the more conservative DRE method for an admitted back injury.

What is an appropriate response for the defendant, and when and where is the best opportunity to base the defenses? That depends on the overall quality of the medical report, the response of applicant's counsel, and the size of the potential exposure. There are several different potential strategies to consider when faced with an Almaraz/Guzman opinion, and adjusters are well advised to seek advice of counsel before determining how best (or if) to proceed.

The first thought is usually to depose the doctor who expressed the opinion. The WCAB acknowledged in Almaraz: "Generally, to reduce costs and to expedite proceedings (see Cal. Const., art. XIV, § 4), this rebuttal evidence initially should be obtained either through deposing the physician or through a supplemental report. (Cf. McDuffie v. Los Angeles County Metropolitan Transit Auth. (2002) 67 CCC 138, 142." However, there is nothing inexpensive about deposing a physician. The doctor's expert fee, the court reporter costs, and fees of skilled defense counsel in preparing for and taking the deposition can be significant. There is a usually a substantial delay occasioned by the doctor's schedule, often requiring parties to wait six months or longer for an available date and time. And, because both sides get to ask questions of the

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doctor, there is always a not-insignificant risk that the disability may end up higher than it was before the doctor's testimony was obtained. Therefore, the cost and associated risk of proceeding with a doctor's deposition must be balanced against other potential alternatives.

If the medical report is substantially flawed in that it does a poor job of explaining how and why alternative methodology should be employed, serious consideration should be given to avoiding a deposition of the doctor. In such instances, a deposition will not only have the risks enumerated above, but will also give the doctor ample opportunity to strengthen the opinion and obliterate the flaws, making bad evidence good. A better strategy might well be to proceed to trial (absent a favorable settlement, of course) on the flawed report. Defense counsel can prepare and offer at trial a brief pointing out to the judge why the Almaraz/Guzman portion of the medical opinion is not substantial evidence, and why the more orthodox rating should be utilized. Since the applicant has the burden of proof, if the burden is not met, then the strict application of the Guides remains the best evidence of the nature and extent of impairment.

If the report seems well-written, a cross-examination of the doctor may be the best avenue available to the defense. However, before that is undertaken, it should be understood that cross-examination merely to argue with the doctor is a waste of everybody's time and money. Just as the doctor needs to rely on evidence to support the opinion, so does the defendant need evidence with which to confront the doctor to either demonstrate that the opinion is flawed or, in the rarer instance, to get the doctor to modify the previous opinion. "A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, incorrect legal theories, or on surmise, speculation, conjecture, or guess." Hegglin v WCAB (1971) 36 CCC 93. If there is documentary information which the doctor

either did not have or did not adequately take into account, confronting the doctor with that evidence may go a long way toward accomplishing the goal of the defense. Sometimes, the documentation becomes available after the doctor wrote the report. Sometimes there is documentation obtained through discovery which does not appear to be discussed in the doctor's report or conclusions but which is felt to be highly germane to the issue of extent of impairment. These situations, especially in higher exposure cases, may well justify taking the doctor's deposition.

With regard to those Almaraz-style opinions which rely on the applicant's report of ADL impairments, *sub rosa*, if successful, can go a long way toward showing that the alternative rating method should not be used. So can current work activities if they are inconsistent with the reported limitations. However, keep in mind that film must be disclosed and should then be tendered to the doctor for review either as part of, or (if agreed upon by the parties and the doctor) prior to a deposition of the doctor. To be successful, the investigator should be given details with regard to the activities of daily living which the applicant has described as significantly impaired, and use of the film should only be considered if it clearly impeaches the applicant's professed limitations.

The fact that the Guzman case was upheld by the Court of Appeal (and we think Almaraz likely to be as well) is clearly not the end of the story. Like the battles over apportionment, these cases are merely the beginning. Over time, there will be more published opinions defining just how far a doctor may go in departing from strict application of the Guides. These cases will also help define what is and what is not, substantial evidence in support of alternative application of the Guides. As these cases come down, we will continue to keep our readers abreast of the latest interpretations.

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MPN Rules Changes Pending

There are important rule changes which take effect 10/8/10 regarding MPNs and the MPN notices. Invoking the existence of an MPN as a defense to self procured treatment liens is a “gotcha” situation filled with many technical pitfalls for a defendant, and failure to strictly comply with notice rules is just one of many ways an MPN defense may overcome. Employers and insurers are required to revise employee notices to comply with the regulations. The rules require employers to provide an updated version of the workers' compensation new-hire pamphlet to all employees hired, on or after Oct. 8, post revised workers' compensation employee posters, provide an updated version of the DWC-1/Notice of Potential Eligibility to injured workers and post new medical provider network (MPN) notices.

The DWC has updated information on its website at: [Click here for Calif. DIR MPN Info](#) or

copy/paste to your browser address window:

http://www.dir.ca.gov/dwc/mpn/DWC_MPN_Main.html

Revised Poster, NOPE and DWC-1 Claim Form

The Division of Workers' Compensation (DWC) has also posted the revised workers' compensation poster and the “DWC Claim Form 1” with the notice of potential eligibility (NOPE) to reflect recently amended regulations on employee information that go into effect on Oct. 8, 2010. Employers and insurers are required to revise workers' compensation posters and update the employee information provided to workers.

These new versions of the workers' compensation poster and the DWC claim form with the NOPE become effective Oct. 8, 2010.

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