

ALMARAZ/GUZMAN II and OGILVIE II ISSUE WITH SOME ANSWERS, BUT MANY QUESTIONS REMAIN

The WCAB was thoughtful enough to issue its long-anticipated rewrites of *Almaraz/Guzman* and *Ogilvie* just before Labor Day to give the workers' compensation community a few extra days to absorb its pronouncements on how to rate and how to rebut ratings under the 2005 Schedule and the *AMA Guides* (5th ed.).

ALMARAZ/GUZMAN II

While the initial decision in *Almaraz/Guzman* issued in February was unanimous, the current *en banc* decision shows a deep division in the Board, with three Commissioners deciding that there was nothing wrong with the initial decision and that it should have been kept in place rather than revised.

The four commissioners who voted for change (Chairman Miller, Commissioners Cuneo, Lowe and Aghazarian) took seriously the amicus briefs which argued that the completely subjective rebuttal standard created in *Almaraz/Guzman I* of ignoring/rejecting the *Schedule* and the *Guides* when an award would be "inequitable, disproportionate, and not a fair and accurate measure of [an injured worker's] true disability" was incompatible with the mandate that the *AMA Guides* "shall" be incorporated into the 2005 *Schedule* (*sec.4660(b)(1)*) and that the *Schedule* "shall promote consistency, uniformity, and objectivity" (*sec.4660 (d)*).

The majority observes that creating a subjective "unfair and inequitable" standard for rebutting a rating under the Schedule was essentially creating no standard at all.

The Commissioners did not waiver from their initial decision that the rating schedule was rebuttable. However, it is the nature of that rebuttal which needs to be clarified. "We depart from [our earlier decision] only to clarify that it is the permanent disability *rating* resulting from the application of the Schedule that is rebuttable (emphasis in original)." The Schedule is *not* rebuttable. In other words, the baby and the bathwater cannot be simultaneously discarded.

The way to achieve this result is to indicate that an ultimate impairment rating must come from the *AMA Guides* alone, though not necessarily from any particular chapter or section. As the majority states, "We... modify our prior opinion to hold that *all* WPI evidence--including but not limited to rebuttal evidence--must be within the four corners of the *AMA Guides*, although a

physician may utilize any chapter, table, or method in the Guides to assess WPI, provided that his or her opinion constitutes substantial evidence (emphasis in original)."

This time around, the majority mercifully leaves out its lengthy citation to multiple out-of-state cases, which all emphasized inequities in the use of the *AMA Guides* and suggested alternative rating analyses to deal with these inequities. The Board is silent on its earlier concern that the *AMA Guides* do not deal specifically with work impairment and therefore they must be transcended when necessary (though there is no bright line to tell us when such necessity rears its ugly head).

The Commissioners shorten the leash on rebuttal evidence when they emphatically state that the *Labor Code* "mandates that the WPI component of any scheduled permanent disability rating *must* be based on *AMA Guides*, i.e., the WPI component cannot be predicated on the opinion of a physician who has gone outside the four corners of the Guides to make an impairment determination (emphasis in original)."

The majority rejects the notion that only the impairment percentage measurement system in the *Guides* is to be used. Rather, "the entire *AMA Guides* is part of the Schedule."

The evaluating physician can use any part of the *AMA Guides*. "Therefore, based upon the physician's judgment, experience, training, and skill, each reporting physician (treater or medical-legal evaluator) should give an expert opinion on the injured employee's WPI using the chapter, table, or method of assessing impairment of the *AMA Guides* that *most accurately reflects the injured employee's impairment (emphasis added)*." The doctor cannot arbitrarily assess an injured employee's impairment but must explain his impairment conclusions. "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."

The majority advises that any rebuttal evidence should be obtained either through deposing the physician or through a supplemental report. In some instances, rebuttal might be through a "medical report or medical-legal report of another physician--if permissible under the *Labor Code*." This cryptic remark may come back to bite the Board someday.

Re-emphasizing its main point, the Board indicated that "the rebuttal evidence may, for example attempt to establish that a different chapter, table, or method of assessing impairment of the *AME Guides* more accurately reflects the injured employee's impairment than the chapter, table or method used by the physician being challenged." As to the disposition of the cases, the Board sent *Almaraz II* back to the trial judge with PD deferred, but in *Guzman II*, it also sent the case back to the trial judge but seemingly let stand the "almarazed" rating by Dr. Feinberg, without further explanation.

The dissenting Commissioners (Brass, Caplane and Moresi) felt there was nothing wrong with the "disproportionate/inequitable" rebuttal standard of *Almaraz/Guzman I* and it was the only way to account for exceptional circumstances which the *AMA Guides* may not cover.

The majority decision limits to some degree what rebuttal evidence can be presented. It does away with the entirely subjective "inequitable" standard of Almaraz/Guzman I. However, Almaraz/Guzman II will not do away with abundant permanent disability litigation. It restricts the battlefield to a surprisingly heavy, dense, rectangular green tome aka the AMA Guides (5th edition). Further, the 4-3 split in the Commissioners is more than likely to encourage further appellate action in the next 45 days to the Court of Appeal.

OGILVIE II

The new decision in *Ogilvie II* follows closely the Board's prior holding. Therefore, it is not surprising that the same 6-1 vote occurred here, with Commissioner Caplane dissenting as she did earlier. The Board states that it modified *Ogilvie I* only to clarify that "it is the permanent disability rating resulting from the application of the Schedule that is rebuttable." In other words, the Schedule is not being challenged with its reliance on two RAND studies and the mandate that the administrative director create a *Schedule* using this data. You can challenge the specific, individual rating but not the underlying statistical foundation for the DFEC factor. That was tried in *Boughner v. Zurich* (2008) 36 *CWCR* 111, 73 *CCC* 854, and rejected *en banc*.

The Board goes to great lengths to explain and justify the way in which the DFEC adjustment factor component of the Schedule was created. Since compensation benefits are supposed to be delivered expeditiously and without encumbrance, the Board rejected "any rebuttal method that would require a party to present evidence that aggregates empirical data regarding large numbers of injured employees with multiple types of injuries." In other words, there will be no lengthy battle of economic experts in trials on the DFEC factor.

Further, merely presenting evidence of an injured worker's loss of earning capacity by comparing his projected future earnings against those of "similarly situated" employees is not permissible. The Board states that "an injured employee's percentage of permanent disability does not equate to his or her percentage of diminished future earning capacity." To do so would do away with the legislative mandate that loss of future earnings is *only* one component to go into a permanent disability rating and would make it the sole factor for issuing a rating. In essence, that is the position of the dissenting commissioner.

Injured workers who have the same percentage loss of earning capacity will *not* get the same rating. Rather, that loss of earning capacity has to be mediated through the rating Schedule which considers other factors including the whole person impairment standard arrived at from the *AMA Guides*, as well as applicant's occupation and age. The majority observes that "injured workers with the same individualized DFEC adjustment factor will receive the same ratings for

different types of impairments, *if those impairments result in the same WPI* (emphasis added)." If different injuries result in different whole person impairment standards, then the overall rating will obviously be different, even if the loss of earning capacity factor is the same.

The troublesome aspect of *Ogilvie I* continues in this case. The Board continues to insist that it is easy to come up with information on both the worker's loss of earning capacity and data on earnings for "similarly situated" employees. This is easier said than done and could lead to a significant amount of litigation.

For example, the Board stands by its earlier pronouncement that the first three years of post-injury earnings should "ordinarily" be used to calculate the injured worker's loss of earnings. However, "[i]n cases of individual injured workers,... a longer or shorter period of post--injury earnings may be appropriate." [That is not much help.] The Board recognizes the problem of a worker who gets two years of temporary disability after the injury and is cut off further benefits. The Commissioners acknowledge that in this case, "it may be difficult to assess the employee's actual earning capacity for a three-year period." What about workers who drag their feet and resist going back to work?

The Board's suggestion is that the *scheduled* DFEC factor be used in such instances and that a worker or the employer has up to five years from the injury date to *reopen* the case if it "becomes clear that the worker's individualized proportional earnings are significantly higher or lower than anticipated." [If this is not a clarion call to further litigation, we don't know what is].

The Board does not comment in *Ogilvie II* on who exactly "similarly situated" employees may be. For example, if the worker is over 50 years old, should they be all workers in the same industry over 50? If the worker does not speak English, should similarly situated workers be workers in the same industry who do not speak English? This aspect of the formula is ripe for further litigation.

Ogilvie II spends most of its time responding to the challenge to *Ogilvie I* but does not add practical guidance to the rebuttal method the Commissioners came up with in *Ogilvie I*.

Almaraz/Guzman II and Ogilvie II, newly armored and launched, await their next stops--the courts of appeal and very possibly the Supreme Court sometime next decade.

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