



Almaraz v. SCIF/Guzman v. Milpitas U.S.D (2009 En Banc) 37 CWCR 46

Since the adoption of the 2005 permanent disability rating schedule, the first step in assessing permanent disability has involved a relatively straightforward application of the AMA Guides to calculate whole person impairment. In this consolidated case, the WCAB held that the AMA Guides based rating can be rebutted by evidence showing that it “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”.

The Board found that the AMA Guides is only a starting place for assessing permanent disability. Relying on language in the AMA Guides, and an exhaustive discussion of cases from other states which use the AMA Guides to assess permanent disability, the Board found that the AMA Guides was never intended as the “ultimate determinant of industrially-caused impairment.” Instead, the Board found, where the impairment rating under the Guides does not accurately reflect the worker’s ability to perform work activities, it may be rebutted by medical evidence which relies on other criteria for assessing disability including the doctor’s “judgment based upon his or her experience, training and skill.” It is then left to the trier of fact (Workers’ Compensation Judge) to determine the impairment rating.

While the Board stated that it did not intend its opinion to be interpreted as a return to any prior permanent disability rating system, this decision sounds remarkably like a return to assessing permanent disability based on work restrictions. Also, since this opinion authorizes medical evaluators to rely on unspecified criteria other than the AMA Guides, and leaves the ultimate decision to the judge, it is going to be much more difficult to accurately assess anticipated permanent disability. We foresee that the use of the AME/QME process to resolve disputes will increase.

As an example of how far reaching the Almaraz/Guzman case is, in Guzman, the AME gave a 3% WPI to each upper extremity for a typical carpal tunnel syndrome which precluded her from returning to her secretary job, which resulted in an adjusted 12% rating at \$8,415. Using a 25% loss of capacity, the AME said there would be a 15% WPI to each upper extremity based on the loss of ADLs, which translated to a 39% adjusted rating at \$42,680, over five times what the AMA Guides rating produced. Although the matter has been remanded to the judge, we expect the AME will provide his reasoning for the 15% ADL figure, and the final permanent disability award will be significantly higher than the prior award. This demonstrates how dramatically the permanent disability ratings will probably be affected.

Where The Additional Work Will Arise. The Almaraz/Guzman and the recent Ogilvie decision do not abandon the 2005 Permanent Disability Rating Schedule based on the AMA Guides. To the contrary, they confirm that the AMA Guides based calculation of whole person impairment with the standard DFEC adjustment is correct unless it is rebutted. We do not expect these decisions to generate prolonged litigation in every case. We do anticipate that, where the rating under the 2005 schedule is significantly lower than under the old PDRS, or the worker has work restrictions that appear disproportionate to the rating, applicant’s lawyers will seek to rebut the rating through whichever method they find most useful, thus providing more work for doctors, vocational rehabilitation counselors, and themselves.

We also anticipate that, since rebuttal of the rating is focused primarily on assessing an injured worker’s ability to work, employers may be more strongly motivated to provide work for these employees to counter their claims of reduced earning capacity.

More Work Defending Claims. As a result of these decisions, evaluation of claims now requires

paying increased attention to a worker's claimed inability to perform work tasks. As one commentator has suggested, there may be an increase in the need to use surveillance video to evaluate claims. Obtaining accurate job descriptions from employers also becomes more important. Closer review of medical reports finding permanent disability will also be necessary, particularly when the doctor relies on criteria other than the AMA Guides to calculate the worker's impairment.

These decisions call for a return to basics. Taking an applicant's deposition will be much more critical, where we want to thoroughly question a worker about their activities of daily living (ADLs) instead of simply allowing the QME/AME to determine a large percentage of permanent disability based purely on an applicant's self-reported and unsupported ADLs. Further, obtaining a worker's past medical records may be very helpful, not simply for apportionment but to show substantial pre-existing limitations in ADLs due to non-industrial conditions (the old schedule concept of overlapping disability is back). We will need to also depose QME/AMEs more often when they do not adequately explain their non-AMA Guides opinions on permanent disability.