



**BLACKLEDGE V. BANK OF AMERICA (JUNE 3, 2010, WCAB En Banc),**

*Prepared by Anastasia Wright of the San Jose office*

In this case, the Board unanimously clarified the respective roles of the evaluating physician, the workers' compensation administrative law judge (WCJ), and the disability evaluation specialist (rater) in determining whole person impairment (WPI) under the AMA Guides, with 6 specific holdings as follows:

**(1) The role of the *physician* is to *assess* the injured employee's whole person impairment percentages by a report which sets forth facts and reasoning to support its conclusions and that comports with the AMA Guides case law.**

In this context, the Board goes on to clarify that "It is essential for a medical report to state the physician's actual WPI rating for each medical condition," noting that the AMA Guides cannot be "mechanically" applied. Without commenting on Almaraz / Guzman I/ II, the Board here seems to acknowledge and incorporate those holdings.

**(2) The role of the *WCJ* is to *frame instructions*, based on substantial evidence (i.e., a proper physicians' report, see (1) ) and *fully describe* the whole person impairment to be rated. Note the *WCJ may ask a rater* to offer an opinion on what whole person impairment should or should not be rated.**

**(3) The role of the *rater* is to *issue a recommendation* which is based solely on the WCJ's formal rating instructions. Unless specifically instructed to do so (by whom?) a rater has *no authority to issue a rating based on the rater's own assessment of whether the whole person impairment rating referred to in the WCJ instructions are based on substantial evidence or are consistent with the AMA Guides*.**

Read in conjunction, these portions of the case have significant practical ramifications. A recent case was litigated by a Mullen & Filippi attorney wherein the WCJ gave the following instructions to the rater: "*Please rate for disability to the back as follows: Please rate per AMA Guides the opinion of Dr. Smith, MD.*" At Trial, the attorney objected to the instructions based on the holding in Blackledge, in that it is the Judge's responsibility to frame the rating instructions and these left too much illegal discretion up to the rater. The WCJ rescinded and reworded the rating instructions. Although this specific case did not result in a decreased permanent impairment rating, it is foreseeable that this could be a result of the finding.

**(4) A WCJ is *not bound* by a rater's recommended permanent disability rating and a WCJ may elect to independently rate an employee's permanent disability; however a WCJ's rating still must be based on substantial evidence.**

The Board cited the WCJ's specialized experience and deferred to the WCJ as an appropriate party to provide a rating.

**(5) Potential AMA Guides rating problems may be minimized by the *early and proper use of non-formal ratings*; and**

Noting the 3 types of non-formal ratings: Summary rating determinations, consultative rating determinations and informal rating determinations, the Board noted the use of these vehicles could “facilitate the determination of permanent disability,” and instructs the rater to utilize the WPI percentages specified in the physician’s report, and to use his expertise to annotate any errors that would result in a different WPI if the AMA Guides was correctly applied.

**(6) In the context of a formal rating *there must be no ex parte communication between the WCJ and the assigned rater.***

The Board goes on to clarify that informal consultation with a rater is not always prohibited, and specifically states that a Judge may informally consult with a rater for example, on a case for which she is reviewing a proposed settlement for adequacy, or at an MSC or Rating MSC. The ultimate purpose of obtaining non-formal ratings is to help ensure the reports upon which the WCJ is relying to frame rating instructions (see #1) are substantial evidence and to obviate the delays and additional expense caused by challenges to the rating instructions or ratings.

All told, this case can be read as a detailed roadmap of a case and the respective roles of the parties at Trial. As shown above, the case has significant teeth, and can be used to ensure that ratings are based on substantial evidence, and not left to the discretion of the rater or even the WCJ.