


# **“Change on the Way?”**

An Analysis of the Give and Take by the WCAB and 1<sup>st</sup> DCA in their Recent Decisions of Almaraz/Guzman, Ogilvie and Benson



---

Presented by  
Mullen & Filippi, LLP

Anne E. Hernandez, Senior Partner, Santa Rosa Office  
Bruce K. Wade, Senior Partner, Bakersfield Office



# Almaraz/Guzman

---

## Facts

- Mario Almaraz injured his back working as a truck driver. Following surgery he was evaluated by an AME. PD was determined to be 17% as rated under the AMA Guides, or 58% if rated under the 1997 schedule.
- Joyce Guzman suffered bilateral carpal tunnel syndrome from working as a secretary. The AME reported her PD at 12% under the AMA Guides, or 39% if her work restrictions were rated.



# Almaraz/Guzman

---

## Procedural History

- Both cases were tried and the WCJ awarded PD as required by the AMA Guides. Both cases were appealed to the WCAB with the argument the AMA Guide rating was too low, unfair to the employee, and an inadequate description of permanent disability. The WCAB issued an en banc decision holding the AMA Guides were rebuttable in describing permanent disability. The cases were remanded to the WCJ for a fair and accurate award of PD.
- The cases will be appealed to the Court of Appeals.



# Almaraz/Guzman

---

## Summary of Decision

### Labor Code Sections:

- Labor Code §4660(c) Provides that the schedule “shall be prima facie evidence of the percentage of disability to be attributed to each injury covered by the schedule”.
- Labor Code § 4660(b)(1) For the purposes of this section, the nature of physical injury or disfigurement shall incorporate description and measures of physical impairment in accordance with the percentages of impairment published in the American Medical Association (AMA Guides).
- Labor Code § 4660(d) The schedule “shall promote **consistency, uniformity and objectivity**”.



# Almaraz/Guzman

---

## Summary of Decision

### Analysis:

- Prima facie evidence is evidence that is sufficient until contradicted by other evidence.
- The 2005 schedule and AMA Guide rating portion of the schedule are rebuttable.
- Other jurisdictions utilizing the AMA Guides allow alternate descriptions of permanent disability where necessary to achieve fairness.



# Almaraz/Guzman

---

## Arizona

- A hod carrier's fractured tibial condyle rated 50% under the AMA Guides, 70% awarded based on labor market information
- Meat Wrapper developed meat wrapper asthma, no PD under the AMA Guides, PD awarded based on loss of earning capacity.
- Truck driver with chronic thoracic strain. No PD under the AMA Guides. Higher PD awarded based on inability to participate in the labor market.
- Bilateral CTS not ratable under the Guides, work preclusion provided PD rating.



# Almaraz/Guzman

---

## Florida

- Knee rated under the American Academy of Orthopedic Surgery Guides.
- Two dermatitis cases – plaster's allergy to wet cement, machinist allergy to oil base coolant, both rated outside the Guides.

## New Hampshire

- Snow blower with shoulder injury 15% WPI under the Guides, 28% work preclusion rating.

## Hawaii, New Mexico and South Dakota

- Also utilize the Guide ratings, but allow alternate ratings when "fair".



# Almaraz/Guzman

---

## Analysis of MD Opinion to Rebut the Guides

- I. Have the AMA Guides been rebutted.
  - A. Does the rating under the Guides result in PD that is inequitable, disproportionate, and not a fair and accurate measure of PD.
  - B. The Guides do not accurately reflect the true disability.
  - C. Most likely this will occur when the PD is low and employee cannot return to work.



# Almaraz/Guzman

---

## Analysis of MD Opinion to Rebut the Guides

### II. Evidence used to rebut the AMA Guides.

- A. Evidence is most often a medical opinion, based on training, medical expertise, and experience that the AMA Guide impairment is an inadequate description of permanent disability.
- B. The MD may analogize to other tables, methods, and chapters within the Guides as evidence the strict AMA Guide rating is inaccurate.
- C. The MD may point to generally accepted medical literature in describing permanent disability as evidence the AMA Guides are inadequate.



# Almaraz/Guzman

---

## Analysis of MD Opinion to Rebut the Guides

- D. The MD cannot deviate from the AMA Guides for simply a “more desirable result”. The analysis must:
  1. Explain the rationale in detail as to why the AMA Guides are inadequate
  2. Describe alternate methodology that supports a different description of permanent disability.



# Almaraz/Guzman

---

## Analysis of MD Opinion to Rebut the Guides

- III. In determining the impairment once the AMA Guides have been rebutted:
  - A. MD should describe percentage of impairment and how this percentage was determined (percentage of loss).
  - B. The disability can be based on a single MD opinion or a finding within the range of evidence.
  - C. Calculating impairment combines art and science of medicine. It does not have to be exact, but must be adequately explained.
  - D. The decision does not allow a return to rating under the old PD schedule.



# Almaraz/Guzman

---

## File Handling

1. Read treating, AME, or QME opinions for guide rating, and explanation as to why this may be inadequate.
2. Rate all descriptions of permanent disability.
3. Consider statement or deposition of applicant. Information as to the impairment of ADL is critical.
4. Consider surveillance or subrosa for information as to activity level.
5. **MD deposition is essential to challenge the rebuttal of the AMA Guides and new ratings.**



# Almaraz/Guzman

---

## Impact on Claims

1. Permanent disability will be less predictable and of increased value where the AMA Guide rating is found to be “unfair”.
2. There will be an increased number of represented applicants due to the increased value of permanent disability when the AMA Guides are rebutted.



# Almaraz/Guzman

---

## Impact on Claims

3. Litigation time will increase due to discovery necessary to refute non-AMA Guide ratings.
4. Selection of a QME or AME is critical, given the MD's opinion on fairness determines if the Guide rating is rebutted. The QME or AME then has great freedom in describing permanent disability outside the Guides.
5. There's an increased value in returning employees to work as rebutting AMA Guides will most likely occur with low PD when the applicant cannot return to work.



# Almaraz/Guzman

---

## Impact on Claims

6. There's a possible reduction in PD for internal injuries or psychiatric claims when the employee returns to work. Under the AMA Guides, internal injuries rate particularly high, even when the employee returns to work. The "fairness argument" may be used in reverse to rebut a high AMA Guide rating when the injured worker has returned to work. This may also be true, to a lesser extent, in psychiatric claims.



# Ogilvie

---

## Labor Code §4660 – Permanent Disability Schedule

- A. Schedule must take into account the following factors:
  - 1. Nature of the physical injury or disfigurement
  - 2. Occupation
  - 3. Age
  - 4. Diminished future earning capacity (DFEC)
  
- B. The schedule is prima facie evidence of the percentage of PD to be attributed to each injury covered by the schedule
  - 1. Prima facie evidence is evidence which, if uncontradicted, is sufficient to prove a fact



# Ogilvie

---

- C. DFEC must be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees
- D. The schedule shall promote consistency, uniformity, and objectivity



# Ogilvie

---

*Costa v. Hardy Diagnostics*, 71 CCC 1797 (en banc, 2006) and *Costa v. Hardy Diagnostics*, 72 CCC 1492 (en banc, 2007)

- A. Because the schedule is prima facie evidence of the percentage of PD to be attributed to each injury covered by the schedule, it can be rebutted.
- B. The defense has to pay the applicant's expert's costs when obtaining evidence to rebut the schedule.
- C. We will tell you later how to rebut the schedule.



# Ogilvie

---

## Ogilvie vs. The City and County of San Francisco

### Facts

- Date of injury 4/1/04
- Right knee, low back, neck
- Transit driver for the city of San Francisco
- Parties stipulated that the rating under the 2005 schedule was 28% = \$26,700.00
- Parties stipulated to 25% apportionment to non-industrial factors
- Defense Rehabilitation Consultant Van de Bittner found DFEC = 51.31%-53.77%
- Applicant's Rehabilitation Consultant Jeff Malmuth found DFEC = 51%



# Ogilvie

---

## WCJ Decision

- The DFEC adjustment can be rebutted
- The WCJ examined 3 methods of determining reasonableness of the PD based on the DFEC adjustment



# Ogilvie

---

## Method 1

- PD should be 51%-53% per DFEC opinions
- After 25% apportionment = 38%-40% PD
- 40% PD = \$43,150.00 (somewhat more than \$26,700.00)



# Ogilvie

---

## Method 2

- Lost FEC was \$172,000 – based on range of evidence in rehabilitation consultant's reports
- Compensable earning loss =  $\frac{2}{3}$  of \$172,000 = \$114,667.00
- \$114,667.00 is approximately 71.5% PD
- 71.5% after 25% apportionment = 54% PD
- 54% PD = \$63,600.00 (a lot more than \$26,700.00)



# Ogilvie

---

## Method 3

- Multiply the DFEC by a “more appropriate” DFEC factor
- The actual FEC adjustment factor used is unknown
  - Knee = 1.14
  - Low Back = 1.27
  - Average per WCJ = 1.18 = 18% increase in WPI
- \$114,667 “compensable earning loss” is 4.29 times greater than \$26,700.00
- 18% increase in WPI times 4.29 = 77% (or 1.77 adjustment factor)
- 77% less 18% = 49% ??
- 28% times 1.49 = 42% = \$45,950.00



# Ogilvie

---

WCJ held:

Considering all 3 methods, 40% is  
“the most fair and adequate rating in  
light of the evidence of actual  
diminished future earnings in this case.”



Ogilvie

---

**Help!!**

Petition for Reconsideration  
Filed by Defendant



# Ogilvie

---

## Opinion and Decision after Reconsideration (en banc)

### En Banc

- Decision of all seven commissioners – 6-1
- More weight than a panel decision
- Can be appealed to the Court of Appeal
- Next stop – Supreme Court of the State of California



# Ogilvie

---

## Holding 1

The 2005 PD Schedule is rebuttable

- Reason: It has always been rebuttable
- Result: The DFEC adjustment is rebuttable



# Ogilvie

---

## Holding 2

The DFEC adjustment is not rebutted by Method 1.

The PD is not 51% because the DFEC is 51%.

- If that's what the legislature wanted, they would have said it
- This method doesn't fit the legislature's definition of DFEC: a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees.
- The 2005 schedule was intended to reduce administrative cost.
- The 2005 schedule was intended to promote consistency, uniformity, and objectivity with respect to PD determinations.



# Ogilvie

---

## Holding 3

The DFEC adjustment can not be rebutted by Method 2.

- It doesn't conform to the definition of DFEC.
- It doesn't save in costs.
- It doesn't promote consistency, uniformity and objectivity in PD determinations.
- The Legislature could have made this a "wage loss" state if they wanted.
- PD doesn't equal the \$\$, it is dependent on AWE.



# Ogilvie

---

## Holding 4

The DFEC adjustment is rebutted by taking into consideration Labor Code §4660 and the RAND data.



Ogilvie

---

**HOW??**

Just use our handy, simple method.



# Ogilvie

---

## Step 1

Determine applicant's individualized  
proportional earnings loss  
(IPEL)



# Ogilvie

---

1. Determine the applicant's post injury earnings.
  - The WCAB suggested 3 years of post injury earnings
  - We might need a vocational expert for this
2. Get wage data for similarly situated employees
  - EDD's Labor Market Information Division (LMID) website or
  - LMID's Occupational Profile website or
  - LMID's Occupational Wages Data Search Tool website or
  - Get customized empirical wage information from EDD or
  - Hire a vocational expert to obtain empirical wage data or
  - Public employment cases – including Workers' Compensation Cases or
  - Collective Bargaining Agreements or
  - Voluntary disclosure of wage information
3. Determine applicant's estimated earnings loss (2 minus 1)
4. Determine applicant's proportional earnings loss (3 divided by 2)



# Ogilvie

---

Example of calculation of a hypothetical applicant's individualized proportional earnings loss:

1. Applicant earned \$25,000 in 3 year period following the injury.
2. EDD-LMID wage data shows similarly situated employees earned on average \$150,000 in the same 3 year period.
3.  $\$150,000 - \$25,000 = \$125,000$  lost earnings
4.  $\$125,000$  divided by  $\$150,000 = 83\%$



# Ogilvie

---

## Step 2

Determine the applicant's Individualized Ratio  
of Rating over Proportional Earnings Loss

Do this by dividing the WPI by the  
proportional earnings loss



# Ogilvie

---

Example continued:

Assume our injured worker's WPI is 5%

The "Ratio" is 5% WPI divided by 83% IPEL

$$0.05/0.83 = 0.06024$$



# Ogilvie

---

## Step 3

Check the Ratio of Rating over Proportional Earnings loss against Table A in the 2005 Schedule

- If the Ratio of Rating over Proportional Earnings loss is inconsistent with Table A, then the DFEC adjustment has been rebutted and the new ratio is used instead of the schedule.

Table A

<b>Range of Ratios</b>			
<b>Low</b>	<b>High</b>	<b>FEC Rank</b>	<b>Adjustment Factor</b>
1.647	1.810	One	1.1000
1.476	1.646	Two	1.1429
1.305	1.475	Three	1.1857
1.134	1.304	Four	1.2286
0.963	1.133	Five	1.2714
0.792	0.962	Six	1.3143
0.621	0.791	Seven	1.3571
0.450	0.620	Eight	1.4000



# Ogilvie

---

- If the ratio falls within the range of one of the FEC ranks, then that rank is used.
- If the ratio falls outside any of the 8 FEC ranks, then you use the formula
  - $([1.81/a] \times .1) + 1$
  - Where  $a$  = the ratio of rating to IPEL
- The DFEC adjustment is then determined by multiplying the resulting number by the WPI



# Ogilvie

---

## Example

Back to our hypothetical applicant with a ratio of .06024 and neck WPI = 5%.

If his ratio had fallen between 0.963 and 1.133, he would have fallen within FEC Rank 5, which is the rank for neck disabilities. The DFEC adjustment is not rebutted. The 5% WPI adjusts to 6%.

Because .06024 doesn't fall within the range for FEC Rank 5, the DFEC adjustment is rebutted.

Because .06024 doesn't fall within the range of any FEC rank, we must apply the formula:  $([1.81/.06] \times .1) + 1 = 4.016666$ .

$5\% \times 4.016666 = 20.083333$  gives us 20% after the adjustment.



# Ogilvie

---

## Example

If our hypothetical applicant had a neck WPI = 25%,  
his Ratio = 25% WPI/83% IPEL =  $0.25/0.83 = 0.301$ .

Because 0.301 doesn't fall within the range for FEC Rank 5, the DFEC adjustment is rebutted.

Because 0.301 doesn't fall within the range of any FEC rank, we must apply the formula:  $([1.81/0.301] \times .1) + 1 = 1.601329$ .

$25\% \times 1.601329 = 40.033222$  gives us 40% after the adjustment.



# Ogilvie

---

## Possible Exceptions to Using the WCAB's Method:

- Where the applicant earns significantly more than her "control group."
- Where the applicant's post injury earnings do not accurately reflect her actual earning capacity.
  - Malingerers
  - Voluntary retirement
  - Economic downturns



# Ogilvie

---

## Dissent

- We should use WCJ's Method 1
  - DFEC = PD.
- The majorities' method is too complicated.
- The majorities' method probably requires expert opinions anyway.



# Summary of Benson v WCAB Court of Appeals, First District

---

Diane Benson was a file clerk for TPMG. Her job required she stand all day. She injured her neck reaching for a plastic bin on 6/3/03. Following a fusion the AME found a specific and a CT to the date of the specific. The WCJ awarded 62% under Wilkinson, stating both DOIs became P & S at the same time.



# Summary of Benson v WCAB Court of Appeals, First District

---

The WCAB issued an “en banc” decision and ruled the enactment of LC 4663 and 4664 impliedly overturned Wilkinson. PD should be awarded separately for each date of injury, regardless of the P&S date. The Court of Appeals agreed, noting the Wilkinson rule required injuries be P & S, with levels of separate permanent disability for each injury to have a separate award. With *LC 4663* and *LC 4664* the P & S dates are irrelevant as there is separate award of PD for each DOI.

The result is with more than one injury to the same body part, employees are entitled to separate levels of disability for each injury, not one overall level of disability.



# Summary of Benson v WCAB Court of Appeals, First District

---

## Practice Tips

1. Overall PD is apportioned or divided between various injuries.
2. Be sure evaluator comments on apportionment to non-industrial, as well as each industrial injury.
3. Does an increase in symptoms or treatment reveal any new injury? An aggravation at work is a new injury if it contributes to disability or need for medical treatment.
4. Is there more than one CT when the employee returns to work? Remember Colthorpe allows dividing a CT with period of medical treatment or disability.



# Summary of Benson v WCAB Court of Appeals, First District

---

## Practice Tips

5. There may be costs in proving an additional DOI:
  - a. Ed Code benefits payable for each injury.
  - b. 4850 benefits payable for each injury.
  - c. Potential for an additional 104 weeks of TD.
  - d. Second period of IDL.
  - e. If excess insurance involved they may require to meet their threshold for each injury.

MULLEN  
& FILIPPI

LAW OFFICES OF  
MULLEN & FILIPPI, LLP