LEGAL PERSPECTIVE

CRPS: RATING AND APPORTIONMENT ISSUES

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California Orthopaedic Association
Annual Meeting/QME Course
Terranea Resort – Rancho Palos Verdes
April 18, 2013

About the Presenter

- Practicing applicant attorney in Southern California since 2000
- Founding member of the AMA Guides Committee of the California Applicants' Attorneys Association
- Reviewer, AMA *Guides* Sixth Edition
- Frequent lecturer regarding AMA *Guides*-related issues for applicant and defense attorneys, employer groups, the DWC and the California Orthopaedic Association

Accuracy and Substantial Evidence

CRPS: RATING ISSUES

CRPS: RATING ISSUES

Accuracy and Substantial Evidence

In *Almaraz-Guzman II*, the WCAB stated:

"When determining an injured employee's WPI … a physician may utilize any chapter, table or method in the AMA Guides that **most accurately** reflects the injured employee's impairment."

74 Cal. Comp. Cas. 1086 – 1087 (2009)(en banc)

CRPS: RATING ISSUES
Accuracy and Substantial Evidence

In *Almaraz-Guzman II*, the WCAB also stated:

"[A] physician's WPI opinion must constitute substantial evidence upon which the WCAB may properly rely, **including setting forth the reasoning behind the assessment**."

74 Cal. Comp. Cas. 1084 (2009)(en banc)

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In *Williams*, the WCALJ stated:

"There is nothing in [Labor Code Section 4660] that requires physicians to use the AMA Guides 5th Edition for establishing a diagnosis. The statute only requires that the physician use the AMA Guides 5th Edition to find the corresponding impairment based on their clinical findings."

75 Cal. Comp. Cas. 656, 658 (2010)(writ denied)

RATING CRPS:
Accuracy and Substantial Evidence

Therefore, when providing an impairment rating for CRPS, the physician may:

- Use **any generally-accepted criteria** for confirming CRPS diagnosis, even if an upper extremity is involved.
- Use **any table, method or chapter** "within the four corners" of the AMA Guides 5th Edition that **most accurately reflects the injured worker's impairment**.

RATING CRPS:
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To date, neither the WCAB nor the courts have provided any specific guidance as to how rating accuracy is to be determined. In the *Guzman III* decision, the Court of Appeal stated: "[T]he WCAB majority did not explain how far the physician may go in relying on the 'four corners' when the descriptions, tables, and percentages pertaining to an injury do not accurately describe the injured employee's impairment."

***Milpitas Unified School District v. WCAB (Guzman),* 75 Cal. Comp. Cas. 837, 854 (2010)**

Therefore, until we receive judicial guidance, a method of determining rating accuracy must be derived from the *Guides* itself.

RATING CRPS:
Accuracy and Substantial Evidence

The *Guides* states: “Impairment percentages or ratings developed by medical specialists are consensus-derived estimates that reflect **the severity of the medical condition** and **the degree to which the impairment decreases an individual's ability to perform common activities of daily living (ADL), *excluding* work.** Impairment ratings were designed to reflect functional limitations and not disability. The whole person impairment percentages listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work,* as listed in Table 1-2.”

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The *Guides* also states: "[A]n individual who receives a **30% whole person impairment** due to pericardial heart disease is considered from a clinical standpoint to have a **30% reduction in general functioning as represented by a decrease in the ability to perform activities of daily living**."

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Therefore, the factors to be considered when providing an impairment rating are:

- **Severity of the condition** being rated
- Degree to which that condition **functionally limits the injured worker's ability to perform ADL's**

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Example 17-18: Illustration of Rating Accuracy Analysis

"Table 13-15 rates this individual's impairment at 20% to 39% impairment of the whole person. **Since her pain is severe and functional ADL are compromised, a 39% impairment rating is appropriate.** & The leg is totally nonfunctional; **thus [the individual] is similar to an amputee and should be rated at 39% whole person impairment**."

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RATING CRPS:
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Labor Code Section 4662: Permanent Total Disability

- Section 4662 provides that in all cases which **do not involve a presumption of permanent total disability** (i.e., loss of sight in both eyes, loss of use of both hands, "practical paralysis", or "incurable mental incapacity or insanity"), the disability determination shall be made **"in accordance with the fact"**.

- The (current) 2005 Permanent Disability Rating Schedule defines **permanent total disability as "a level of disability at which an employee has sustained a total loss of earning capacity."** (Pages 1-2 – 1-3)

- If an injured worker has **lost the ability to work** due to an injury, they are **permanently totally disabled "in accordance with the fact."** *American Safety Insurance Company v. WCAB (Chavez)*, 77 Cal. Comp. Cas. 360 (2012)(writ denied).

- Where permanent total disability exists pursuant to Section 4622, the trial judge **may disregard any non-industrial factors of apportionment**. *County of Los Angeles v. WCAB (LeCornu)*, 74 Cal. Comp. Cas. 645 (2009)(writ denied).

CRPS: RATING ISSUES
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***Peet* Case: Illustration of Difficulties in Rating CRPS**

Panel QME rated CRPS involving one of the injured worker's upper extremities using Table 13-22 stating: "The patient has permanent impairment related to chronic pain in the right upper extremity, resulting in **60% Impairment of the Whole Person**, since the right upper extremity is her dominant upper extremity and **she cannot use the right upper extremity for self-care or daily activities**."

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***Peet* Case: Illustration of Difficulties in Rating CRPS**

At deposition, the Panel QME endorsed his prior reporting that: "[The patient] remains independent with respect to bathing and toiletry activities. She is able to operate a motor vehicle. The patient indicated that she is able to dust, make a bed and perform some laundry activities."

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***Peet* Case: Illustration of Difficulties in Rating CRPS**

Defense counsel then asked: “How is that consistent with not being able to use or not being able to perform self-care or daily activities?”

To which the Panel QME answered: “Well, some of her activities, she cannot do. That’s specifically what that says. She can do bathing and toilet [sic]. She can operate a vehicle, but there are things she – has not performed [sic] vacuuming, sweeping, mopping, scrubbing or extensive cooking.”

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Defense counsel followed up by asking: "But under Class 4 it advises 'Individual cannot use the involved extremity for self-care or daily activities.' So again, how is that consistent?"

To which the Panel QME responded: "She didn't – okay. She cannot use the right arm for a lot of activities, okay. **That doesn't mean she can't use the left arm.** Says,'Individual cannot use the involved extremity for self-care or daily activities.' **In other words, she can't use the right arm**."

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***Peet* Case: Illustration of Difficulties in Rating CRPS**

At trial, the injured worker testified that **the Panel QME's characterization of her general functional abilities was accurate**, that she was able to bath, use the toilet, dress herself, make a bed, do laundry independently, that she could drive a car and that she could go to the grocery store "with help."

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Peet Case: Illustration of Difficulties in Rating CRPS

On reconsideration, the WCAB reversed the trial judge decision awarding a 78% permanent disability rating based upon the Panel QME's WPI opinion stating: "[The Panel QME] states that applicant cannot use her right upper extremity for activities of daily living, but this is not supported by applicant's trial testimony. **At trial, applicant was not asked about her right versus left upper extremity capabilities.** She testified that she is independent with bathing and toiletry, and that she can make a bed, dress herself, do laundry, and drive a car. She further testified that she can put dinner together with limitations and can go to the grocery store with her son or husband. On this record, it does not appear that the 60% WPI is justified."

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Peet Case: Illustration of Difficulties in Rating CRPS

Commissioner Moresi wrote a dissenting opinion in support of the trial judge's decision stating: "The [Panel QME's] rating is consistent with the AMA Guides and the evidence … **[A]t trial, applicant was never asked about any of her right versus left capabilities, and her testimony is consistent with [the Panel QME's] conclusions.** I am persuaded that the WCJ properly relied on the medical opinion of [the Panel QME] which constituted substantial evidence, and that the WCJ's finding on permanent disability meets the standards set forth in *Almaraz/Guzman II*."

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Complex Cases = Complex Analyses

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Complex Cases = Complex Analyses

Labor Code Section4663 provides that:

- Apportionment of permanent disability shall be **based on causation**.
- Any physician who issues a report concerning an injured worker's permanent disability **shall** also in that report address the issue of causation of the permanent disability.
- For his or her report to be considered complete, a physician must provide a opinion as to **what approximate percentage of the permanent disability was caused by the direct result of the industrial injury** and **what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries**.

CRPS: APPORTIONMENT ISSUES

Complex Cases = Complex Analyses

Labor Code Section 4664 provides that:

- The employer shall only be liable for the percentage of permanent disability **directly caused by the industrial injury**.
- If the injured worker has received a prior award of permanent disability, it shall be **conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury**.

CRPS: APPORTIONMENT ISSUES

Complex Cases = Complex Analyses

To obtain apportionment to a prior award of permanent disability pursuant to Labor Code Section 4664, the employer/defendant has the burden of proving:

- The existence of the prior award of permanent disability
- That the permanent disability which resulted in the prior award "overlaps" the permanent disability arising from the current industrial injury.

Kopping v. WCAB, 142 Cal. App. 4th 1099, 71 Cal. Comp. Cas. 1229 (2006)

CRPS: APPORTIONMENT ISSUES

Complex Cases = Complex Analyses

Washington Case: CRPS In a Somatizing Patient

- Injured worker developed CRPS to her right upper extremity.
- Injured worker had a long prior history of "psychosomatic complaints" and prior diagnosis of a somatoform pain disorder.
- Both QME's apportioned 20% of the permanent disability caused by CRPS to prior non-industrial factors.
- The trial judge did not consider the 20% non-industrial apportionment when he issued his award for the permanent disability caused by CRPS.

CRPS: APPORTIONMENT ISSUES

Complex Cases = Complex Analyses

Washington Case: CRPS In a Somatizing Patient

In support of his apportionment opinion, the applicant's QME reasoned:

"[A]s one might expect, the presence of a somatoform disorder does not protect an applicant from developing [CRPS], and, because of the reasons outlined above, Ms. Washington clearly harbors CRPS involving her right upper extremity. The occurrence of CRPS in a clinical setting of a somatoform disorder does bring into question the magnitude and intensity of the symptoms presented by the patient on a subjective basis. The subjective symptoms certainly go into the assessment of a physician and the presence of somatoform disorder must be taken to mean that the patient is perceiving her symptoms through a lens of magnification provided by this psychiatric condition. **As a result, the presence of a somatoform disorder on a likely lifelong basis does not negate a diagnosis of CRPS but it does force assessing physicians to take this magnification into account when offering a permanent disability impairment rating**."

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Washington Case: CRPS In a Somatizing Patient

When asked to clarify the basis for his apportionment opinion, the applicant's QME stated:

"I believe that an accurate reading of the records from the mid I990s ... suggest the picture of a woman who was afflicted by numerous somatizations, excessive physical complaints without pathologic basis, and, as a result, a tendency to true functional depression. We may argue about the precise diagnoses and I personally feel she may well represent an acute somatization disorder, as indicated above. However, **regardless of the diagnosis that existed in the mid-1990s, it is likely a lifelong condition and I would be dumbfounded if the patient to whom these complaints belong in the mid-1990s records functioned in a normal way and without any residual disability. In fact, there are references in the records to an inability to work because of complaints which, in retrospect, had no pathologic basis. I believe it is this disability to which I and Dr. Warbritton ... refer when we apportion 20% of Ms. Washington's overall disability to pre-existent disability which is indicated in the records of the mid-1990s**...."

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Washington Case: CRPS In a Somatizing Patient

In support of its decision to overturn the trial judge decision concerning apportionment, the WCAB stated:

"Dr. Miller's apportionment determination constituted substantial medical evidence and should have been followed by the WCJ. Dr. Miller took applicant's medical history and reviewed voluminous medical records, which Dr. Miller described as being 18 inches thick. Dr. Miller's January 25, 2010 and November 28, 2010 reports contain extensive discussions of Dr. Miller's opinions regarding apportionment to applicant's well-established, non-industrial somatization disorder."

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CRPS: APPORTIONMENT ISSUES

Complex Cases = Complex Analyses

Moran Case: CRPS In a Patient With a Prior Permanent Disability Award

- Injured worker developed CRPS to her right upper extremity with resulting opiate dependency.
- Injured worker had a prior 24% low back and coccyx permanent disability award.
- The trial judge subtracted the 24% prior permanent disability award from the percentage of permanent disability caused by CRPS.

CRPS: APPORTIONMENT ISSUES

Complex Cases = Complex Analyses

***Moran* Case: CRPS In a Patient With a Prior Permanent Disability Award**

In his permanent and stationary/MMI report, the AME made the following comments concerning permanent disability and apportionment:

"The patient is permanently totally disabled. She is unable to return to work due to the combination of her shoulder pain and the continued reliance on heavy doses of multiple narcotics and sedatives … The patient's findings including rotator cuff tear and tendinosis are industrial in nature, a result of her injury or the subsequent multiple surgeries. She has findings of glenohumeral osteoarthritis, which I would apportion fully to her industrial injury and course."

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Complex Cases = Complex Analyses

Moran Case: CRPS In a Patient With a Prior Permanent Disability Award

In further support of his opinions concerning permanent disability and apportionment, the AME testified at deposition:

- That the **"direct cause"** of the injured worker's permanent total disability was **"the shoulder injury and its sequelae which included surgeries and narcotic dependence"**
- That "she would be totally disabled by reason of these conditions **irrespective of any low back injury that she may have sustained**"

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CRPS: APPORTIONMENT ISSUES

Complex Cases = Complex Analyses

***Moran* Case:** **CRPS In a Patient With a Prior Permanent Disability Award**

The trial judge refused to accept the AME's apportionment opinion on the basis that:

- It would be a "leap of faith" to ignore the prior 24% low back permanent disability award because **the pain medications which she was receiving for her right upper extremity condition would help to "blunt" the pain resulting from the low back injury.**
- The injured worker's **use of pain medications** would therefore have to be **attributed to both the right upper extremity condition and the prior low back condition**.
- There would be **overlap between the permanent disability caused by the right upper extremity condition and the prior low back condition**.

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CRPS: APPORTIONMENT ISSUES

Complex Cases = Complex Analyses

***Moran* Case:** **CRPS In a Patient With a Prior Permanent Disability Award**

The WCAB reversed the trial judge's decision stating:

- "Overlap of permanent disability occurs when factors of disability resulting from the current injury duplicate factors of disability from a different injury or condition, regardless of whether the injuries affect different body parts."
- "The WCJ's observation that applicant's narcotic dependence may provide some relief ('blunting') from her low back pain, does not justify apportionment.
- "The medical evidence from the AME establishes that applicant is totally permanently disabled as a consequence of her right shoulder injury, a condition unrelated to her prior low back injury."

(Pages 9-10)

Thank you

THE END