Almaraz/Guzman II: Incorporating the *AMA Guides* Philosophy and Methods in Accurate Impairment Rating

By the AMA Committee of the
California Applicants Attorneys Association

In 2004 the California Legislature enacted Senate Bill 899,[1] an omnibus workers' compensation reform that, among other changes, overhauled the process by which compensation is determined for individuals who suffer permanent disability from a work injury. In the almost six years since passage of this legislation, the Workers Compensation Appeals Board ("Board") has endeavored to define the methods by which an Award of Permanent Partial Disability is quantified under the new statutory plan.

One of the most important Board decisions in this process is the recent *en banc* decision in the joint cases of *Mario Almaraz v. Environmental Recovery Services (aka Enviroserve)* and *Joyce Guzman v. Milpitas Unified School District*, 74 Cal. Comp. Cases 1084 ("*Almaraz/Guzman II*"). This decision, which was "a clarification and modification" of the Board's earlier *en banc* decision in these same cases ("*Almaraz/Guzman I*"), was not well received by employers and insurers.

Unfortunately, that reaction is based on a misunderstanding of both the historical background which led to the 2004 omnibus reform and the specific mandates included therein. This article will review those factors and will explain why the Board's holdings in *Almaraz/Guzman II* are harmonious with both the letter and the spirit of the 2004 reform legislation.

I. The Historical Context

Several appellate courts have cited the "urgency clause" language in SB 899 (the bill was needed "to provide relief to the state from the effects of the current workers' compensation crisis," see Stats. 2004, ch. 34, §49) as evidence that the fundamental purpose of that bill was to reduce employers' costs. However, particularly with regard to the changes to Labor Code §4660 and the Permanent Disability Rating Schedule ("PDRS") that section refers to, the goal of controlling employers' costs was only one part of the basis for these statutory changes.

The genesis for revising the PDRS was a series of studies conducted by the RAND Institute for Civil Justice between 1995 and 2003.[2] The fundamental conclusion of those studies was that California's unique permanent disability rating system "fails both employers and injured workers."[3] The system failed employers, RAND found, because costs were high, but the system also failed workers because permanent disability indemnity benefits were inadequate.

---

[1] Chapter 34, Statutes of 2004.

[2] Four RAND studies were conducted under the auspices of the California Commission on Health and Safety and Workers' Compensation. These studies are available at: http://www.dir.ca.gov/chswc/PermDisabilityPage1.html

[3] Reville, Robert T., Seth Seabury, Frank Neuhauser, Evaluation of California's Permanent Disability Rating Schedule, Interim Report, RAND Institute for Civil Justice, DB-443-ICJ, December 2003 ["RAND Interim Report"], p. 6.

In light of these findings, RAND offered a series of reforms intended to "provide a roadmap for revising the [permanent disability rating] schedule."[4] The objective was to revise the rating system "to improve outcomes for injured workers and employers in California."[5] Thus, the recommendations from RAND had two goals – one was to reduce employers' costs but the other equally important goal was to improve the adequacy of compensation for disabled workers.

The amendments to §4660 in SB 899 were predicated on those RAND recommendations. In fact, the Legislature specifically adopted the RAND "roadmap" directly into the statute, mandating that the rating schedule be adjusted "based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies."[6]

RAND's principal recommendation was adoption of an *empirically based* rating schedule. The empirical basis recommended by RAND, and adopted by the Legislature, is diminished earning capacity. Linking permanent disability ratings to objective empirical data on lost earning capacity helps both employers and workers by assuring that each disabled worker is assigned a rating that accurately reflects his or her permanent disability.

Achieving rating accuracy – matching the assigned rating to the individual worker's permanent disability – has long been a mandate of California law. The courts have consistently held that an injured worker's assigned rating must accurately reflect his or her permanent disability.[7] In one pertinent discussion of the need for rating accuracy, an appellate court held that "[t]he Board may not rely upon alleged limitation in the Rating Schedule to deny the injured worker a permanent disability award which accurately reflects his true disability."[8] And importantly, case law confirms that the goal of rating accuracy exists whether the more accurate rating is higher *or lower* than the generic schedule rating.[9]

II. Permanent Disability Rating

The critics of *Almaraz/Guzman II* largely focus on the use of the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition* in the rating process. As amended by SB 899, §4660(a) requires that a permanent disability rating take account "of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity." In addition, new §4660(b)(1) provides, "For purposes of this section, the 'nature of the physical

---

[4] *Id.*, p. 9.

[5] *Id.*, Preface, p. v.

[6] Labor Code §4660(b)(2).

[7] See, *e.g.*, *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 ("a permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market"); and *General Foundry Service v. Workers' Comp. Appeals Bd.* (1986), 42 Cal.3d 331, 339, ("[w]e share [the applicant's] concern that his permanent disability rating accurately reflect his diminished ability 'to compete in an open labor market.' (§ 4660.)").

[8] *Glass v. Workers' Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297, at 307.

[9] *Universal Studios, Inc. v. Workers' Comp. Appeals Bd.* (*Lewis*) (1979) 99 Cal.App.3d 647 at 657, 658-659, 662-663.

injury or disfigurement' shall incorporate the descriptions and measures of physical impairments in the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)."

In order to understand the Legislature's integration of the *Guides* into the permanent disability rating process, two other subdivisions of §4660 are relevant. First, new language in §4660(d) provides that "[t]he schedule shall promote consistency, uniformity, and objectivity." Second, as noted by the Board in *Almaraz/Guzman I*, "SB 899 did *not* amend the language of section 4660 which provides that the Schedule 'shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.' (Lab. Code, § 4660(c) [formerly, § 4660(b)].)" [Emphasis in original.]

Critics of *Almaraz/Guzman II* argue that a physician is bound by the generic ratings offered by the *Guides*, regardless of the totality of the clinical findings and the judgment of the physician. If the physician determines, based upon all clinical findings and his or her experience and judgment, that a generic rating in the *Guides* does not accurately reflect the true level of impairment experienced by the patient, these critics argue that the generic rating must nevertheless be assigned. In short, critics argue that the Board was wrong when it held in *Almaraz/Guzman II* that: "when determining an injured employee's WPI, it is not permissible to go outside the four corners of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment."[10]

The reasons why this criticism is misplaced are found in both the *AMA Guides* itself and the statutory language of §4660.

III. The Guides Approach to Evaluating Permanent Impairment

One of the most misunderstood concepts underlying the *AMA Guides* is its intended, and stated, application and use. The Board described it this way – "the Guides does not relegate a physician to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI [whole person impairment] that is based on a rigid and standardized protocol and that is devoid of any clinical judgment. Instead, the AMA Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill in assessing WPI."[11]

In fact, the *Guides* admit that the suggested ratings in various tables are neither "scientific" nor an "objective" measure of the actual impairment in any particular case. Instead, those impairment percentages are "consensus derived estimates" that do not reflect age and gender differences. (See p. 4) Furthermore, the text confirms that "[r]esearch is limited on the reproducibility and validity of the Guides."(See p. 10)

Thus, it is the physician[12] that supplies the required elements of judgment and experience

---

[10] *Almaraz/Guzman II*, p. 2.

[11] *Id.*, p. 22.

[12] Only a physician, rather than a non-medical expert, is legally authorized to determine an impairment rating. (See page 1-3 of the 2005 Permanent Disability Rating Schedule – " A final permanent disability rating is obtained only after the impairment rating obtained from an evaluating physician...." (Emphasis added); see also Labor Code Section 4061 which states in relevant part: "With the exception of an evaluation or evaluations prepared by the treating

to establish the accurate impairment rating. Objectivity is not achieved by simply applying the estimated percentages from the tables in the *Guides* in a cursory manner, ignoring all relevant clinical findings. The opposite is true.

According to the *Guides*, the impairment percentages in the various tables attempt "to take into account all relevant considerations in rating the severity and extent of permanent impairment and its effect on the individual's activities of daily living...."(See p.19) However, common sense dictates that the true functional impacts and clinical findings in every case cannot have been considered by the *Guides*. In the majority of cases the *Guides* tables and supporting criteria will be consistent with the physician's findings and should be used. But in cases where the tables and/or criteria do not align with the clinical findings, then according to the rules of the *Guides* itself the evaluating physician has the duty to explain how and why a different table or methodology within the *Guides* is a more accurate measure of this individual's accurate level of impairment.

Critics allege that placing the responsibility for determining the accurate impairment ratings on the physician – as opposed to requiring the physician to blindly and unthinkingly apply impairment percentages from tables – will result in ratings that are "not objective" and "not reproducible." However, the *Guides* provide a clear response to this concern. According to the *Guides*, consistency is achieved by providing "a standardized method for physicians to use to determine medical impairment."(See p. 4) "An appropriate and reproducible assessment . . . of clinical impairment" will be the end result when the physician uses his or her judgment, based on experience, training, skill, thoroughness in clinical evaluation, and ability to apply the *Guides* criteria as intended. (See p. 11)

Thus, using a standardized assessment process, thoroughly documenting all clinical findings (which vary from person to person), and explaining how the rating was determined is the proper methodology to produce an "appropriate and reproducible" impairment. The Board recognized this when it held that whether the physician assigns an impairment percentage directly from a generic table or assigns a different percentage that utilizes the *Guides* as an evaluation tool, "[a] physician's opinion regarding an injured employee's WPI under the Guides must constitute substantial evidence; therefore, the opinion must set forth the facts and reasoning which justify it."[13] By mandating that physicians "show their work," consistency, uniformity and objectivity are achieved.

The requirement to fully consider and integrate the facts of each case into the assigned rating is also consistent with California case law. The California Supreme Court has held that a report that is based on an inadequate medical history or examination is not substantial evidence (*Place vs. WCAB*, 35 CCC 525); and in order to qualify as substantial evidence, a report must set forth the reasoning behind the physician's opinion, not merely conclusions. (*Granado vs. WCAB*, 33 CCC 647.)

Case law also requires that there be proportionality between the disability award and the facts of each case. In *Universal Studios, supra*, the defendant challenged a permanent disability award that was in excess of what the facts in the case supported. In striking down the award, the Court agreed, citing the Supreme Court in *Hale v. Morgan*, 22 Cal.3d 388 [149 Cal.Rptr. 375,

---

physician or physicians, no evaluation of permanent impairment and limitations resulting from an injury shall be obtained, except in accordance [with the panel QME process].")

[13] *Id*, p. 4.

584 P.2d 512]:

> "Nonetheless, even where undisputed operative facts meet the statutory basis of entitlement, a court of review must, as a part of the review in light of the entire record, examine other facts which may seem statutorily irrelevant or inoperative. Such facts may well be relevant and important when the result is examined for fairness, reasonableness and proportionality in the overall scheme of the law and the purposes sought to be accomplished by that law. This is not our own peculiar view of the scope of review applicable here. It is the historic inherent equitable duty of a court of review in circumstances as at present. We are guided in its application by the teaching of our Supreme Court in *Hale* v. *Morgan, supra*, 22 Cal.3d 388. Although there the court was considering a punitive statute allowing recovery of personal damages by a nonpaying tenant against a landlord, the nature, basis and the result of appellate review there described is equally applicable here. In *Hale* v. *Morgan, supra*, the court explains that even a lawful statute may be subject to unconstitutional application. "

In summary, the Legislature's "incorporation" the *AMA Guides* into Labor Code §4660 can be fully understood only by first recognizing that both the *Guides* and the law require that there be a relationship between the actual clinical and medical findings by the physician, the assigned impairment percentage, and the ultimate permanent disability award.

IV. Interpreting the New Statutory Language

Understandably, introducing an entirely new impairment rating guide into the nearly century-old workers' compensation system initially caused enormous confusion. Few system participants, including evaluating physicians, had sufficient expertise in application of the *AMA Guides,* and as a consequence the accuracy of many early ratings was highly questionable.

However, physicians quickly recognized that they play an integral and essential role in assuring that the assigned impairment rating accurately describes the full extent of the anatomical and functional limitations experienced by each patient. Consequently, in conformance with long established case law which requires the correction of a generic scheduled rating in appropriate circumstances, physicians began to provide a more accurate alternative rating in a few cases where the impairment experienced by a worker was not accurately described by the generic rating under an *AMA Guides* table.

For example, in a case that was a prelude to *Almaraz/Guzman*, both the Trial Judge and Board upheld the impairment rating in a wrist injury case where the physician assigned a rating in rebuttal to the rating table in the *AMA Guides*, holding:

> " ...if the examiner believes the individual's loss of strength represents an impairing factor that has not been considered adequately by other methods in the Guides, the loss of strength may be rated separately." (*Cortez vs. Zurich North America* (2007) 36 CWCR 41)

In another pre-*Almaraz/Guzman* case also involving a wrist injury, the California Court of Appeal left undisturbed the determination of both the Board and Trial Judge when it rejected the defendant's contention that the *Guides* mandated a "zero" rating, holding that:

"Defendant's argument is flawed for two separate reasons. First, allowing a zero disability rating for an injured worker who has significant grip loss and is unable to resume his occupation contradicts the contention that 'the applicant's condition has been adequately and specifically considered by the AMA Guides.' Second, defendant's argument is misplaced because defendant contends that only a tendon rupture or surgery on the epicondyle provides basis for rating grip loss. This is contradicted by the information in Section 16.8(a) (at pg. 508) which indicates that a muscle tear (which is a distinctly different condition than a tendon rupture) is another example of the type of condition which allows grip loss impairment." (*Hyatt Regency Hotel v. WCAB* (Foote), (2008) 73 CCC 524.

In order to effectuate a statewide and uniform application of the *Guides* by both physicians and Judges in California, the Board issued its *en banc* decision in *Almaraz/Guzman I* in February 2009. According to the Board, its decision was needed in order to resolve "the important legal issue as to whether and how the AMA Guides portion of the 2005 Schedule for Rating Permanent Disabilities . . . may be rebutted, and to secure uniformity of decision in the future."[14] Thereafter, the Board invited and considered briefing from all participants to the workers compensation system, and issued its "clarified and modified" *en banc* decision *Almaraz/Guzman II* in September, 2009.

The key holdings in the September decision were that (1) retention of the *prima facie* language in §4660 "unambiguously means that a permanent disability rating established by the Schedule is rebuttable," (2) "one method of rebutting a . . . rating is to successfully challenge . . . the injured employee's whole person impairment (WPI)," and (3) "it is not permissible to go outside the four corners of the AMA Guides; however a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment."[15]

Critics assert that the addition of the new sentence in §4660(d) that the schedule "shall promote consistency, uniformity, and objectivity" was an implicit mandate to give a "conclusive presumption" to the generic impairment ratings suggested in the *Guides*. However, as discussed above such an interpretation actually conflicts with the unambiguous language of the statute itself, and with the stated principles, philosophy and purpose of the *AMA Guides*. In fact, the *Almaraz/Guzman II* holdings actually promote consistency, uniformity and objectivity because integration of all of the clinical information by a physician who uses the *Guides* as an evaluation tool assures that similarly impaired workers will be assigned similar permanent disability awards.

The argument that the generic ratings have a "conclusive presumption" is also inconsistent with Legislative intent, as expressed in the statutory mandate to base the revised schedule on empirical data and findings from the RAND Interim Report which were incorporated into the statute.

According to the RAND Report, "the most controversial feature of the [pre-SB 899] California system is the reliance on 'subjective' criteria to measure disability."[16] As noted by the Board, "the AMA Guides itself states that it 'uses objective and scientifically based data'

---

[14] *Almaraz/Guzman I*, p. 1.

[15] *Id.*, p. 2. Emphasis added.

[16] RAND Interim Report, p. 8.

whenever possible (AMA Guides, § 1.5, at p. 10)."[17] Thus, the Board's holding that in determining the percentage of impairment a physician may not go outside the "four corners" of the *AMA Guides* does assure that the final impairment rating will be objectively based.

In addition, it also must be recognized that RAND recommended adoption of "a more objective system (such as the AMA Guides)"[18] because "a more objective system would be beneficial . . . in ensuring the appropriate level of benefits...."[19] In other words, adoption of a more objective impairment rating system was just one component in a rating process designed to assign an accurate, empirically based permanent disability rating to each individual worker.

The statutory mandate that "the schedule shall promote consistency, uniformity, and objectivity" does not require the arbitrary assignment of an impairment percentage that does not accurately measure the true impairment of the disabled worker. Rather, permanent disability ratings will achieve consistency, uniformity and objectivity only by accurately measuring the permanent disability of the worker. It is axiomatic that the first step in the process of developing an accurate disability rating must be the assignment of the most accurate impairment percentage.

Therefore, ironically, to give the generic ratings "conclusive" application would destroy the very goals – "uniformity, consistency and objectivity" – the critics of *Almaraz/Guzman II* assert they want to protect because it would lock in every generic rating even where the evidence clearly shows that rating would be an inaccurate reflection – either lower or higher – of the actual impairment.

V. Conclusion

The Board's decision in *Almaraz/Guzman II* achieves the correct balance of legal and medical principles. The decision recognizes that the Legislature's continued designation of the rating schedule as *prima facie* evidence of the percentage of disability "unambiguously" means that the assigned rating may be rebutted. To hold otherwise would institutionalize rating inaccuracy in some cases and would be the antithesis of an objectively based system.

The decision also recognizes that, as noted in the *AMA Guides*, the assignment of an appropriate and reproducible impairment percentage involves both the "art" and "science" of medicine, and requires that the evaluating physician utilize his or her judgment, experience, training, and skill in order to conduct a thorough clinical evaluation and apply the *Guides* criteria as intended.

Finally, rather than reversing the reforms of SB 899, as alleged by critics, the Board's decision promotes one of the key goals of that legislation by assuring that permanent disability ratings accurately reflect the objective, empirically-based measure of the disabled worker's true disability. The goal of the RAND Interim Report, and of the Legislature in adopting the changes to §4660, is rating accuracy. This is also the goal of the *AMA Guides*, and assignment of the accurate impairment rating percentage is a necessary first step in the assignment of an accurate disability rating. Like the much quoted expression "garbage in, garbage out," the accuracy of the final permanent disability rating is dependent upon the accuracy of each and every rating component. The misuse, and misapplication, of the tools which are designed to aid in the process of determining the accurate disability in each case only promotes delay and adds costs to

---

[17] *Almaraz/Guzman II*, p. 20.

[18] RAND Interim Report, p. 41.

[19] *Id.*, p. 45.

the system.

Ultimately, the Board's decision in *Almaraz/Guzman II* boils down to this simple concept – that the impairment rating assigned under the *AMA Guides* must be an accurate description of the impact of the work injury on the individual's body systems and functions. Nothing in either §4660 or in the *Guides* requires the physician to mechanically assign an impairment percentage from a table without any consideration of the accuracy of that rating. Instead, as stated by the Board, "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."[20]

Thomas Martin, Esq., Santa Ana, Todd McFarren, Esq., Watsonville, and S. Bradley Chalk, Esq., Santa Rosa, contributed to this article.

---

[20] *Almaraz/Guzman II*, p. 23.