

COA – April 2015

Medical Legal Compliance with PD Rebuttal Issues



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Role of Medical Evidence in Rebuttal of PD



I. Case Law that Set the Stage

II. Methods of PD Rebuttal

III. Guzman Sets the Standard

IV. Ratings Based on “Loss of Function”

V. Injuries not in the Guides

I. Case Law That Set the Stage



True or False:

Since use of the A M A Guides is mandatory for rating P D , it is no longer possible for an I W 's impairment to rate 100% P D .

I. Case Law That Set the Stage

True or *False*:



Since use of the A M A Guides is mandatory for rating P D , it is no longer possible for an IW 's impairment to rate 100% P D .

There is a plethora of case law and LC sections which set forth certain conditions where an IW may rate 100% PD.

I. Case Law That Set the Stage

- 2.3.09 *Almaraz v. Environmental Recovery / Guzman v. Milpitas Unified (Almaraz /Guzman I)*, (2009) 74 CCC 201; WCAB en banc – rebuttal of strict AMA rating.
- 2.3.09 *Ogilvie v. City and County of SF, (Ogilvie I)* (2009) 74 CCC 248; WCAB en banc – rebuttal of DFEC.
- 9.3.09 *Almaraz v. Environmental Recovery / Guzman v. Milpitas Unified (Almaraz II/Guzman II)*, (2009) 74 CCC 1084; WCAB en banc – rebuttal of strict AMA rating
- 9.3.09 *Ogilvie v. City and County of SF, (Ogilvie II)* (2009) 74 CCC 1127; WCAB en banc – rebuttal of DFEC.

I. Case Law That Set the Stage



6.3.10 *Blackledge v. BofA*, (2010) 75 CCC - 613 (WCAB en banc) WCAB defined the roles of Dr, WCJ & rater in determining PD.

8.19.10 *Milpitas Unified v. WCAB (Guzman III)*, (2010) 75 CCC 837; **(6th DCA affirmed the decision of the WCAB w/opinion.)**

I. Case Law That Set the Stage

6.16.11 - *SCIF v. WCAB (Almaraz III)*,
(2011) 76 CCC 687 (**5th DCA - writ
denied**)

7.29.11 - *Ogilvie v. WCAB*, (2011) 76 CCC
624; 1st DCA – rebuttal of DFEC
(10.26.11 Petition for Review denied by
S.Ct.)

12.26.13 – *City of Sacramento v. WCAB
(Cannon)*, (2013) 79 CCC 1 (Pub status
chgd from non-pub to pub on 1.15.2014.)



II. Types of Rebuttal of PD



True or False:

There is only one correct way to rebut the strict rating of the A M A Guides.

II. Types of Rebuttal of PD

True or False:



There are many ways to rebut the strict rating of the AMA Guides:

- A. LC 4662 “in accordance with the fact.”**
- B. Diminished Future Earning Capacity (DFEC) Rebuttal (*Ogilvie*)**
- C. Unable to return the labor market (*LeBoeuf*)**
- D. *Guzman* Rebuttal**

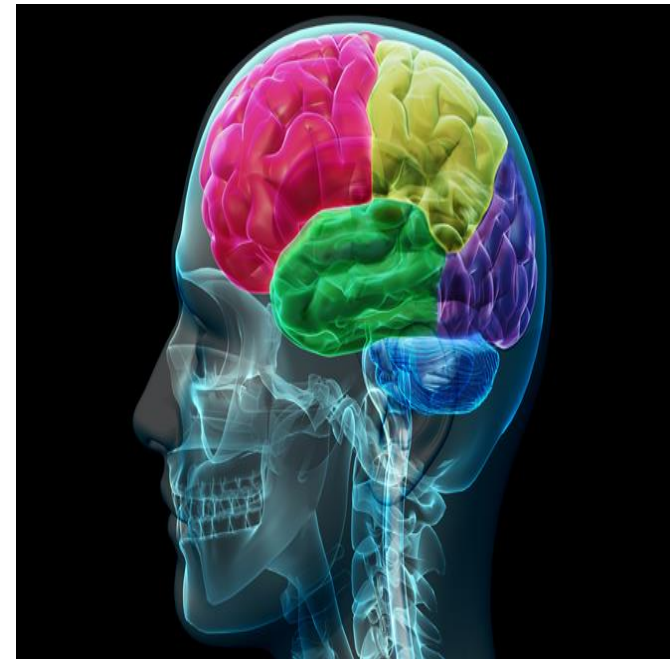
II. Types of Rebuttal of PD

A. A **LC 4662** rating is **NOT** a **LC 4660**
“*Guzman*” rebuttal of the 2005 PDRS.

LC 4662: Any of these shall be conclusively presumed to be total in character:

- (a) Loss of both eyes or the sight thereof.
- (b) Loss of both hands or the use thereof.
- (c) An injury resulting in a practically total paralysis.
- (d) An injury to the brain resulting in incurable mental incapacity or insanity.

In all other cases, permanent total disability shall be determined in accordance with the fact.



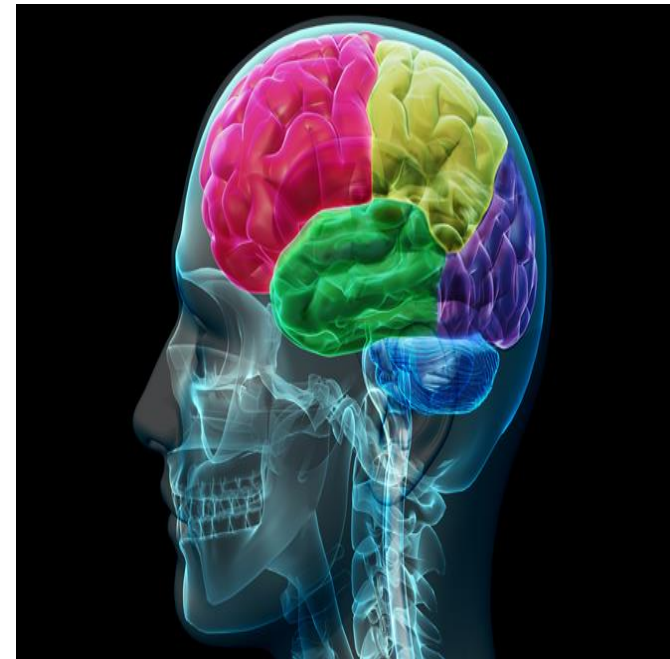
II. Types of Rebuttal of PD

A. LC 4662 finding:

**LC 4662 “finding” IS ALIVE AND WELL
AND LIVING IN CALIFORNIA per
SB863...**

LC 4660.1:

(g) Nothing in this section shall preclude a finding of permanent total disability in accordance with Section 4662.



II. Types of Rebuttal of PD

B. DFEC Rebuttal (*Ogilvie*)

Pre SB863 DOI < 1.1.2013:

LC 4660. (a) In determining the percentages of permanent disability, account shall be taken of:

1. the nature of the physical injury or disfigurement,
2. the occupation of the injured employee, and
3. his or her age at the time of the injury,
- 4. consideration being given to an employee's diminished future earning capacity (DFEC).**



II. Types of Rebuttal of PD

B. DFEC Rebuttal (*Ogilvie*)

Pre SB863 DOI > 1.1.2013:

LC 4660.1(a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of:

1. the nature of the physical injury or disfigurement,
2. the occupation of the injured employee, and
3. his or her age at the time of injury.

(b) WPI x “an adjustment factor of 1.4.”



II. Types of Rebuttal of PD



Parties proposed rating string for 40 year old pantry worker with stand alone for head pain.

DFEC and/or 40% increase in [brackets]:

PRE-SB863 - DOI < 1.1.2013:

13.01.00.99 – 3 [6] – 4 – 322F – 4 – 4%

POST-SB863 – DOI > 1.1.2013:

13.01.00.99 – 3 [1.4] – 4 – 322F – 4 – 4%

II. Types of Rebuttal of PD

C. Guzman Rebuttal

Post SB863 DOI > 1.1.2013:

LC 4660.1(a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of:

- 1. the nature of the physical injury or disfigurement,**
 2. the occupation of the injured employee, and
 3. his or her age at the time of injury.
- (b) WPI x “an adjustment factor of 1.4.”



II. Types of Rebuttal of PD

C. Guzman Rebuttal

**Guzman rebuttal IS ALIVE AND WELL
AND LIVING IN CALIFORNIA per
SB863...**

LC 4660.1:

(h) In enacting the act adding this section, it is not the intent of the Legislature to overrule the holding in *Milpitas Unified School District v. WCAB (Guzman)* (2010) 187 Cal.App.4th 808.



III. *Guzman*

Issues for *Guzman* rebuttal trial:

1. What is the **strict** AMA Guides rating?
2. Is strict rating accurate?
3. If not, why not? (*Example: IW = 0% WPI, but physician has stated IW is unable to return to his usual and customary job because of the injury **OR** other adequate explanation.*)
4. **Does the physician's report constitute substantial evidence?**



III. *Guzman*



Milpitas Unified v. WCAB (Guzman III), (2010)
75 CCC 837; (6th DCA) (S. Ct. denied writ.)

Dr. Feinberg diagnosed Joyce Guzman, a sec'y,
with CTS, a CT ending on April 11, 2005.

Strict rating determination

CTS instructions on p.495:

5% for each UE = 3% WPI

16.01.02.02 – 3 – [4]4 – 112H – 6 – 6 PD

6 C 6 = 12% FINAL PD

III. *Guzman*



Milpitas Unified v. WCAB (Guzman III),
(2010) 75 CCC 837; (6th DCA) (S.
Ct. denied writ.)

**Rebuttal Rating (Dr. Feinberg used Fig
16-2 - Loss of Function.):**

“Based on her ADL losses, (“25% loss of
function”) each upper extremity
would have a 15% WPI (25% of
60%).”

III. *Guzman*

True or False:

- Physicians may utilize “**F**igures” in the A M A Guides as well as “**t**ables” and “**m** easurements” to calculate an alternative ratings.



Milpitas Unified v. WCAB (Guzman III), (2010) 75 CCC 837; (S. Ct. denied writ.)

The 6th DCA looked at the statutory language of **LC 4660(b)(1)** and stated, it “recognizes the variety and unpredictability of medical situations by requiring **incorporation** of the descriptions, **measurements**, and corresponding percentages in the Guides for each impairment, not their mechanical application without regard to how accurately and completely they reflect the actual impairment sustained.”

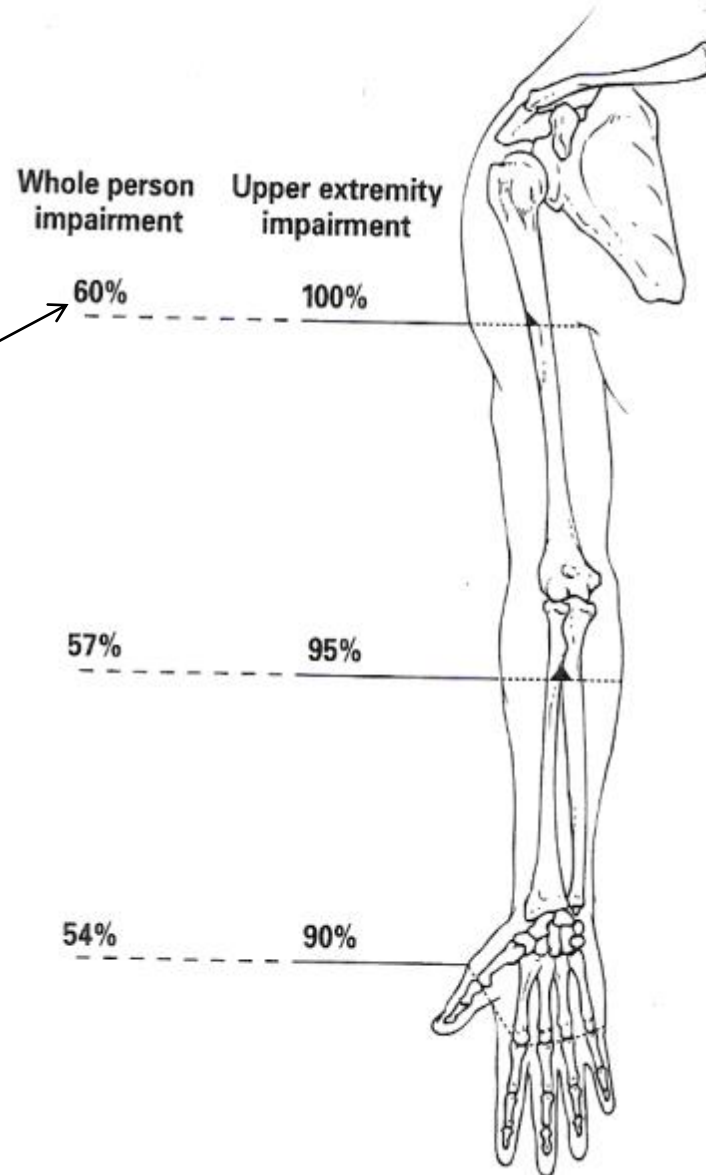
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True:

Doctor Feinberg used Figure 16-2 to rate WPI based on “limitation of ADLs”.

**60% would be 100% loss
But Ms. Guzman had 25%
Loss of Function:
25% of 60% = 15% WPI**

Figure 16-2 Impairment Estimates for Upper Extremity Amputation at Various Levels



III. *Guzman*

True or False:

There is **no** specific guidance on what constitutes substantial evidence for a *Guzman* rebuttal.



III. *Guzman*

False:

*There is P L E N T Y
of Guidance on
what constitutes a
valid Guzman
rebuttal.*



III. *Guzman*

In most cases, per *Guzman*, **the physician should:**

- Begin with a **strict** AMA Guides rating found in the **chapter** addressing the body part injured.
- Note which specific **facts** require an alternate rating. (*Example:* complicated objective factors, failed back surgery, disfiguring facial scar.)
- Set forth “**how** the physician arrived at an alternate rating,” (Physician must “show their work.”)
- Provide an **analysis** as to “**why** departure rating from the WPI is necessary” (why it’s more **accurate**), which may include “standard texts or recent research data.”
- State their conclusion is based on **reasonable medical probability**.



III. *Guzman*

Milpitas Unified v. WCAB (Guzman III),
(2010) 75 CCC 837; (S. Ct. denied
writ.)



The DCA stated, “As a result, the Board concluded, ‘**the entire AMA Guides is part of the Schedule.**’ Given the comprehensiveness and precision attendant in the chapters pertaining to each system, in most cases a **WCJ will credit ratings based strictly on the chapter** devoted to the body part, region, or system affected.”

III. *Guzman*



“The physician must...explain why departure from the WPI is necessary and how he or she arrived at a different rating. That explanation necessarily takes into account the physician's skill, knowledge, and experience, as well as other considerations unique to the injury at issue.

“...a physician's explanation of the basis for deviating from the percentages provided in the applicable Guides chapter should not a priori be deemed insufficient merely because his or her opinion is derived from, or at least supported by, extrinsic resources.”

III. *Guzman*



Milpitas Unified v. WCAB (Guzman III), (2010) 75 CCC 837; (S. Ct. denied writ.)

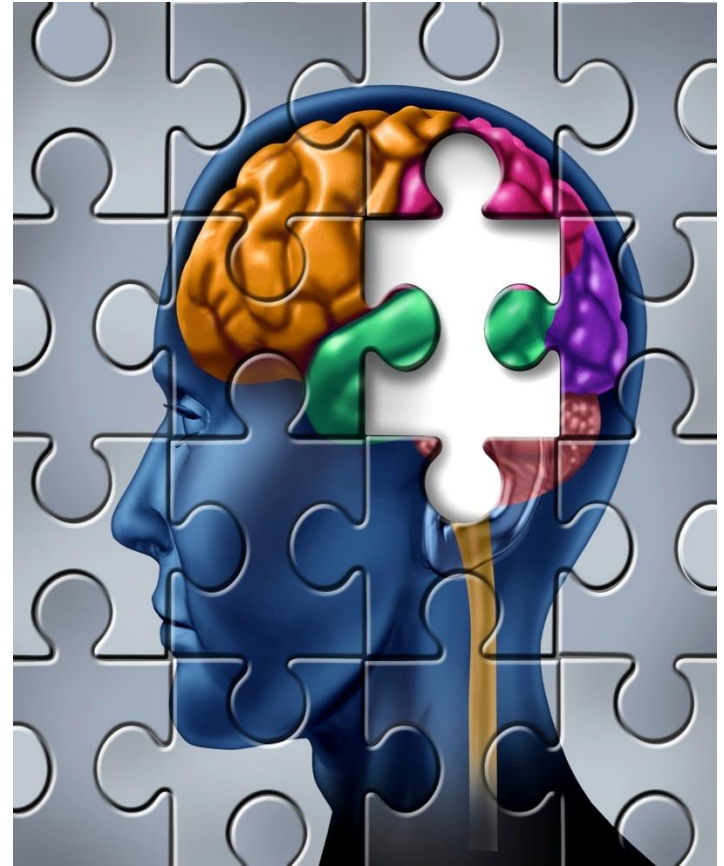
“The physician should be free to acknowledge his or her reliance on **standard texts or recent research data** as a basis for his or her medical conclusions, and the WCJ should be permitted to hear that evidence.”

III. *Guzman*

Milpitas Unified v. WCAB (Guzman III),
(2010) 75 CCC 837; (S. Ct. denied writ.)

The “decision does **not** allow a physician to conduct a fishing expedition through the Guides “simply to achieve a desired result”; the physician's medical opinion “must constitute substantial evidence” of WPI and “therefore . . . must set forth the **facts and reasoning** [that] justify it.”

“In order to constitute substantial evidence, a medical opinion must be predicated on **reasonable medical probability.**”



III. *Guzman*

True or False:

In order to rebut a strict A M A Guides rating, the physician must find that the injury is “**complex**” and “**extraordinary**.”



Guzman court used the terms “complex” and “extraordinary:”

“The authors repeatedly caution that notwithstanding its “framework for evaluating **new or complex** conditions,” the “range, evolution, and discovery of new medical conditions” preclude ratings for every possible impairment...”

“To accommodate those **complex or extraordinary** cases, the Guides calls for the physician's exercise of clinical judgment to assess the impairment most accurately.” (Emphasis added.)

III. *Guzman*



False: A finding of *complex or extraordinary* is not a prerequisite. (See *City of Sacramento v. WCAB (Cannon)*, (3rd DCA) (2013) 79 CCC 1.)

3rd DCA said, “Thus, the Sixth District was using the term “complex or extraordinary cases” to describe “syndromes that are ‘poorly understood and are manifested only by subjective symptoms,’” which the AMA Guides do not, and cannot, rate.”

IV. Ratings Based on “Loss of Function”

True or False:

Physicians may **not** assign an impairment rating to a diagnosed ailment that ends in “... itis,”

...like **tendinitis**, **fasciitis**,
and **epicondylitis**



IV. Ratings Based on “Loss of Function”

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False:

The AMA Guides refers to **“itis” ailments** in the discussion of tendinitis, fasciitis, at p. 507 as follows:

“Although these conditions may be persistent for some time, **they are not given a WPI** unless there is some other factor that must be considered.”



IV. Ratings Based on “Loss of Function”

Lino v. Macy’s, 2014 Cal Wrk Comp PD LEXIS 433, the AME stayed within the UE Chapter 16 and used **Table 16-34** to rate **epicondylitis**.

AME determined strict rating = 3%.

The AME explained that strict rating of 3% was not accurate because of **the injured worker’s “objective factors of atrophy in the upper extremity, symptoms, and decreased grip strength.”**



IV. Ratings Based on “Loss of Function”



But wait, isn't this rating WPI based on “loss of function?”

True or False:

Physicians may rate impairments based on “loss of function.”



True: Loss of Function is a viable rating method. The AME in *Lino* wrote,

“I guide you to page 509, Table 16–34, in which IW has lost approximately 50% grip strength, which brings 20% upper extremity impairment and translates to 12% WPI.”

Table 16-34 Upper Extremity Joint Impairment Due to Loss of Grip or Pinch Strength

% Strength Loss Index	% Upper Extremity Impairment
10- 30	10
31- 60	20
61-100	30

50% loss of grip strength
= 20% UE
= 12% WPI

→

←

See also the case, *Lobdell v California Department of Corrections & Rehabilitation*, 2014 Cal Wrk Comp PD LEXIS 65

AME, stated, “**the most accurate measurement of the IW's WPI is obtained by using Table 13–22, page 343, Class I, dominant extremity = 9% WPI.**”

Table 13-22 Criteria for Rating Impairment Related to Chronic Pain in One Upper Extremity

Class 1 ***		Class 2		Class 3		Class 4	
Dominant Extremity 1%-9% Impairment of the Whole Person	Nondominant Extremity 1%-4% Impairment of the Whole Person	Dominant Extremity 10%-24% Impairment of the Whole Person	Nondominant Extremity 5%-14% Impairment of the Whole Person	Dominant Extremity 25%-39% Impairment of the Whole Person	Nondominant Extremity 15%-29% Impairment of the Whole Person	Dominant Extremity 40%-60% Impairment of the Whole Person	Nondominant Extremity 30%-45% Impairment of the Whole Person
Individual can use the involved extremity for self-care, daily activities, and holding, but is limited in digital dexterity		Individual can use the involved extremity for self-care and can grasp and hold objects with difficulty, but has no digital dexterity		Individual can use the involved extremity but has difficulty with self-care activities		Individual cannot use the involved extremity for self-care or daily activities	

IV. Ratings Based on “Loss of Function”

For Ch 16 UE WPI - Ok to use **Table 13-17** from Chapter 13 which deals with the **central nervous system** **if the physician explains how it is the more accurate metric:**

Table 13-17 Criteria for Rating Impairments of Two Upper Extremities

Class 1 1%-19% Impairment of the Whole Person	Class 2 20%-39% Impairment of the Whole Person	Class 3 40%-79% Impairment of the Whole Person	Class 4 80%+ Impairment of the Whole Person
Individual can use both upper extremities for self-care, grasping, and holding, but has difficulty with digital dexterity	Individual can use both upper extremities for self-care, can grasp and hold objects with difficulty, but has no digital dexterity	Individual can use both upper extremities but has difficulty with self-care activities	Individual cannot use upper extremities

CAUTION!!! Note description after % range – Is it WPI or something else like motor deficit? Sensory deficit?

IV. Ratings Based on “Loss of Function”



In *Guzman*, Dr. Feinberg determined an alternate rebuttal WPI rating based on **“loss of function”** using Figure 16-2 rather than a “Table” or other metric from the AMA Guides.

IV. Ratings Based on “Loss of Function”

Issue was addressed in the *Davis* case:

Davis v. Walt Disney Company, (2014)
2014 Cal Wrk Comp PD LEXIS 52

Ron Davis injured his **cervical spine** pulling a heavy file cabinet on 1/3/2008. He had two spine surgeries.

The parties agreed to use Dr. Sohn as the AME who first provided a strict AMA Guides rating:

Table 15 – 5 at page 392 = Cervical Spine AME - Mr. Davis falls in Category IV



IV. Ratings Based on “Loss of Function”

STRICT RATING Table 15-5, page 392 of the AMA Guides – Cervical Spine

AME, Dr. Sohn in *Davis* case stated,
“Under DRE Category IV, [Mr. Davis]
would have a 26% WPI, plus 3%
for chronic pain producing a 28% WPI.”
Dr. Sohn determined this WPI was NOT
the most accurate rating for this
impairment.

DRE Cervical Category IV
25%-28% Impairment of
the Whole Person

Alteration of motion segment integrity or bilateral or multilevel radiculopathy; alteration of motion segment integrity is defined from flexion and extension radiographs as at least 3.5 mm of translation of one vertebra on another, or angular motion of more than 11° greater than at each adjacent level (Figures 15-3a and 15-3b); alternatively, the individual may have loss of motion of a motion segment due to a developmental fusion or successful or unsuccessful attempt at surgical arthrodesis; radiculopathy as defined in cervical category III need not be present if there is alteration of motion segment integrity

or

fractures: (1) more than 50% compression of one vertebral body without residual neural compromise

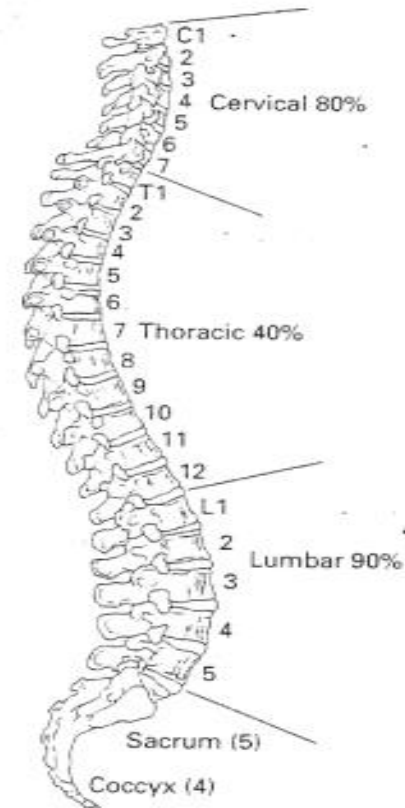
IV. Ratings Based on “Loss of Function”

Dr. Sohn used Figure 15-19 to rate the spinal injuries.

At first glance, Figure 15-19 looks similar to Figure 16-2 used by Dr. Feinberg in *Guzman* as a basis for an alternate rating for the UE.

BUT the instructions set forth in the AMA Guides for use of each Figure are very different.

Figure 15-19 Side View of Spinal Column



The whole spine divided into regions indicating the maximum whole person impairment represented by a total impairment of one region of the spine. Lumbar 90%, thoracic 40%, cervical 80%.

IV. Ratings Based on “Loss of Function”



When all else fails, read the instructions.

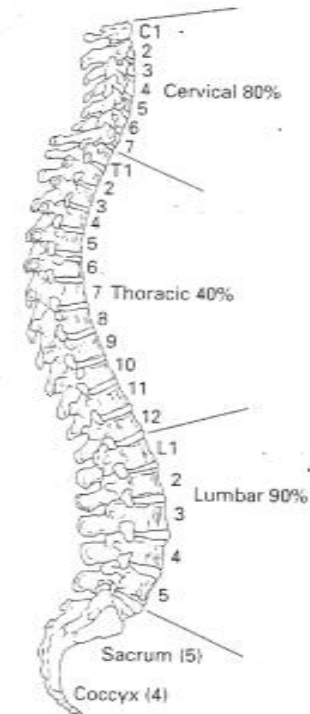
IV. Ratings Based on “Loss of Function”

Davis v. Walt Disney Company, (2014) 2014
Cal Wrk Comp PD LEXIS 52

Instructions for Figure 15–19 @ p. 427
appear to be a sort of “conversion
table” for spinal impairments:

“...the doctor may be asked to rate a WPI in terms of the spinal region rather than the whole person. If using DRE method, “ a regional estimate would be divided by 0.35 for the cervical spine...Under the ROM, a WPI... should be divided by 0.80 for the cervical spine.”

Figure 15-19 Side View of Spinal Column



The whole spine divided into regions indicating the maximum whole person impairment represented by a total impairment of one region of the spine. Lumbar 90%, thoracic 40%, cervical 80%.

IV. Ratings Based on “Loss of Function”

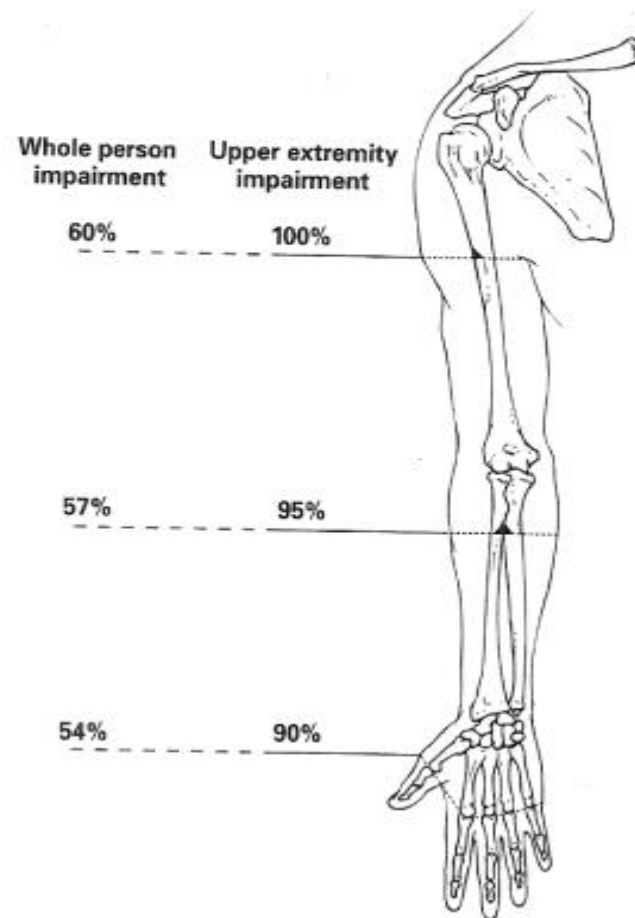
Figure 15-19 is NOT similar to Figure 16-2 at all, especially when you compare the instructions:

Instructions for using Figure 16-2:

Page 441 of the Guides states, “Important factors to consider in evaluating amputations include...pain syndromes and ... restriction or loss of motion...”

“...Amputations through the humerus.... correspond to 100% loss of the limb, or 60% WPI.”

Figure 16-2 Impairment Estimates for Upper Extremity Amputation at Various Levels



IV. Ratings Based on “Loss of Function”

Davis v. Walt Disney Company, (2014) 2014 Cal
Wrk Comp PD LEXIS 52



The WCJ stated, “...the AME **fails to provide sufficient explanation** as to why rating applicant’s WPI using **Figure 15–19** is more appropriate than the ROM or DRE method for rating the WPI under the spinal chapter, other than to achieve a desired result because he views the AMA Guides as not considering work functions.

Nor did Dr. Sohn use Figure 15-19 in conjunction with the ROM or DRE method as required by the instructions.”

IV. Ratings Based on “Loss of Function”

Davis v. Walt Disney Company, (2014) 2014 Cal
Wrk Comp PD LEXIS 52

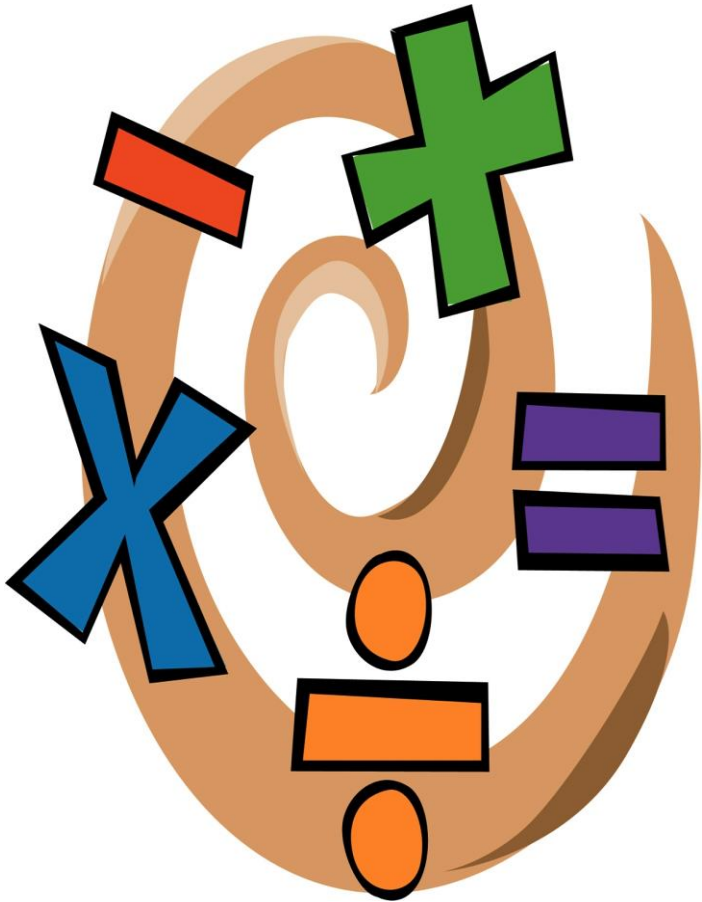
The WCJ stated, “**Figure 15–19** is a pictorial diagram of the side view of the spinal column. **There is no rating methodology described therein.**”

It “is not a '**chapter, table, or method in the AMA Guides.**' It is by definition, neither a chapter nor a table. As noted above, it is also not a method, as there is absolutely no methodology for describing a loss of use of the spine and applying a multiplier to it.”



IV. Ratings Based on “Loss of Function”

Davis v. Walt Disney Company, (2014)



The WCJ stated, “**Using Figure 15–19**, the Dr. Sohn, applied a mathematical approach taking 60 percent loss of function, and multiplied that percentage times 80 percent for a complete loss of function and arrived at a 48 percent impairment rating standard, and adding 3% for chronic pain he arrived at a 50% WPI before adjustment [**which interestingly is the same standard as under the old PDRS for a limitation to light work**].” (Emphasis added.)

IV. Ratings Based on “Loss of Function”

Davis v. Walt Disney Company, (2014)

THAT is a huge issue. Per the WCJ, the physician had a desired result in mind for this IW, a **limitation to “light work” = 50% WPI.**

However, although this was a valid result per the 1997 PDRS, IT is **not** a valid result under the current 2005 PDRS.

The WCJ stated, “[The doctor] is attempting to produce a PD rating based indirectly on the PDRS in effect prior to 2005 to achieve a desired result.”

Physicians are prohibited from calculating an impairment with the AMA Guides in such a way as to indirectly use the 1997 PDRS, rather than the 2005 PDRS.



IV. Ratings Based on “Loss of Function”

Use of Figure 15-19 was affirmed:

- *Valladares v. JAM Ind.*, (NPD) 2011 CWC PD LEXIS 192
- *Laury v. R&W Concrete*, (NPD) 2011 CWC PD LEXIS 77

Use of Figure 15-19 was NOT affirmed:

- *Graham v. Pepsi*, (2011) (NPD) 2011 CWC PD LEXIS 368
- *Leon v. RF Development & Busch Corp.*, (2011) (NPD) 2011 CWC PD LEXIS 123,
- *Wood v. U Haul*, (NPD) 2011 CWC PD LEXIS 535

Figure 15-19 Side View of Spinal Column



The whole spine divided into regions indicating the maximum whole person impairment represented by a total impairment of one region of the spine. Lumbar 90%, thoracic 40%, cervical 80%.

IV. Ratings Based on “Loss of Function”

True or False:

Physicians may not rate impairments that are not scheduled in the AMA Guides.



Milpitas Unified v. WCAB (Guzman III), (2010) 75 CCC 837; (S. Ct. denied writ.):

“The Guides itself recognizes that **it cannot anticipate and describe every impairment that may be experienced by injured employees.**

... The Guides also cannot rate syndromes that are "poorly understood and are manifested only by subjective symptoms."

V. WPIs Not In the Guides



FALSE

Physicians MAY rate impairments that are not scheduled in the AMA Guides.

City of Sacramento v. WCAB (Cannon), (2013) 79 CCC 1 (Pub status chgd from non-pub to pub on 1.15.2014.)

IW, a police officer, had plantar fasciitis. D argued 0% since it was not “complex and extraordinary” **and not listed as WPI in the Guides.**

OK to use “Table 17-5 gait derangement on p. 529 to assess the limited extent of IW”s WPI.” This results in 7% WPI.