

This Firm Means Business (SM)

Dear Subscriber,

**The Wild West Has Returned To California!**

The recent WCAB en banc decision in the consolidated cases of *Almaraz v. SCIF* and *Guzman v. Milpitas Unified School District*, Permissibly Self-Insured (Almaraz/Guzman) has blown the doors open for California applicant attorneys to argue that the American Medical Association Guides for Rating Permanent Impairment (AMA guides) are rebutted in a given case, and virtually no limits are placed on what can be substituted in place of the AMA guides.

At a recent seminar with over 300 in attendance in Southern California, applicant attorneys and prominent Agreed Medical Examiners discussed the effect of the Almaraz/Guzman decision. Though no defined approach was given to rebutting the AMA guides, and no agreement was reached on exactly what could be used to substitute for the AMA guides, there was no doubt from the discussion that a wave of litigation can be expected in the months ahead.

The *Almaraz/Guzman* Opinion confirms the existing statutory and case authority to the effect that the PDRS and by incorporation the AMA Guides 5th Edition is only prima-facie evidence of permanent impairment that can be rebutted according to the language which has been present in Labor Code 4660(c) since it was codified in 1937. The case provides guidance on when this is and is not appropriate.

It is expected that this decision will be appealed by one or both of the defendants, and it is uncertain what the California Court of Appeal might say. However, at this time, and unless there is a stay order, the decision is now binding on all trial ALJs and on the panel members of the Appeals Board. For this reason, it is mandatory that the case be followed unless and until it is overturned by subsequent tribunals.

The consensus of the speakers was that the decision is not an open invitation to just throw out the AMA Guides in every case, or just because a physician does not like the AMA Guides in general. It should still be applicable and reasonable in the majority of industrial cases. It would be prudent for the examining physician to start with an Impairment Rating using the AMA Guides, and then discuss in detail the reasons and rationale for using a method other than what is specified by the Guides. There were different points of view expressed about what would or would not be such an appropriate case based upon various interpretations of the language in the Opinion.

The *Almaraz/Guzman* Opinion according to the view of all presenters

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clearly allows the physician in an appropriate case to specify an impairment rating that is either higher or lower than what the Guides suggests. Hence, this is not necessarily an Opinion favorable only for the applicants. The Defendants can just as well argue that the AMA Guides provides unreasonably high ratings.

There was much discussion among the panelists as to exactly how or in what manner a physician may go about the task of rating impairment within the mandates of this Opinion. The Opinion suggested a number of options.

"In arriving at an impairment opinion that differs from the impairment rating called for by the AMA Guides, a physician may invoke his or her judgment based upon his or her experience, training, and skill." (Pg 46, L 12)

"Therefore, a physician may depart from the specific recommendations of the AMA Guides and draw analogies to the Guides' other chapters, tables, or methods of assessing impairment." (Pg 46, L23)

"Also, in evaluating impairment in a manner outside of or in addition to that prescribed by the AMA Guides, the physician may consider other generally accepted medical literature or criteria. Such additional or alternative literature could include, but would not necessarily be limited to, other AMA publications or the publications of other established medical organizations." (Pg 47, L4)

"Moreover, in reaching an impairment opinion that is not based on a strict application of the AMA Guides, a physician may consider a wide variety of medical and non-medical information. For example, the AMA Guides analyzes whether an injured employee's injury impairs his or her ability to perform activities of daily living, excluding work. (AMA Guides, §§ 1.2a, 1.2b, 1.8, at pp. 4, 9, 13.) Therefore, when a physician believes that an impairment rating based on the AMA Guides would not provide a fair and accurate measure of the injured employee's degree of impairment, then the physician may assess how the permanent effects of the employee's injury impair his or her ability to perform work activities, as well as assess the medical consequences of performing certain work activities." (Pg 47, L20)

"Finally, if the employee has been evaluated by a vocational rehabilitation expert, the physician may review and consider the vocational specialist's opinion regarding what jobs the employee might be able to perform and what effect the injury may have on his or her ability to earn." (Id., § 1.9, at p. 14.) (Pg 48, L15).

The deviation from the AMA Guides by any physician however needs to be carefully explained to meet the standards of substantial evidence.

If this issue arises in any of your cases, immediately contact your attorney for a strategy to properly defend against this new expected wave of litigation.

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Sincerely,

**The FSK Newsletter Team**

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