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Update: Controversial WCAB *En Banc D*ecisions Affecting California Employers

In 2004, major legislation enacting workers' compensation reform was passed. A part of that reform was the adoption of the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th edition for rating permanent impairments. Additionally, a new component known as the Diminished Future Earning Capacity (DFEC) factor was added to the Department of Workers' Compensation (DWC) 2005 Schedule for Rating Permanent Disabilities. The latter was developed by the DWC, based on the RAND Institute's Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003).

Litigation surrounding both ensued, and the predominant cases affecting both are *Almaraz v. Environmental Recovery Systems*, *Guzman v. Milpitas Unified School District*, and *Ogilvie v. City and County of San Francisco*. Since both *Almaraz* and *Guzman* dealt with applications of the AMA Guides, for purposes of their decision, the WCAB consolidated both and issued an en banc ruling, finding that physicians, though limited to the AMA Guides, 5th Ed. for assessing permanent impairments, were free to apply other tables, sections, and chapters of the Guides to determine impairment, if doing so was determined to be more accurate. This has given rise to impairment ratings based on other parts of the Guides in what is known as "rating by analogy." In *Ogilvie*, the WCAB also issued an en banc ruling, allowing individual DFEC factors based on the worker's own post-injury earnings. En banc rulings are binding on all California Workers' Compensation Appeals Boards. You can read more about these cases and the WCAB en banc decisions here.

What Is the Current Status of These Cases?

In *Guzman*, the Sixth District Court of Appeal in San Jose essentially affirmed the WCAB en banc decision, allowing physicians to continue applying other tables, sections, and chapters found in the 5th Edition of the AMA Guides than those directly associated with the injured part of the body if it yields a more accurate and reliable impairment evaluation. The court emphasized the importance of the physician's clinical judgment, citing several areas of the Guides themselves. Still, the court noted deviations from the Guides as written must be supported by reasonable explanation. Otherwise, the medical opinions cannot be considered substantial evidence. Interestingly, the court felt such explanations need not solely rest with the Guides, but could include extrinsic resources. Finally, the court seemed to say that the exercise of clinical judgment beyond the Guides as written would only need to be applied to "complex and extraordinary" cases, though these were not defined.

Defendant's appeal to the California Supreme Court has since been denied and *Guzman* is now citable law.

In *Almaraz*, the Fifth District Court of Appeal waited for over a year before issuing its denial of writ of review. Consequently, defendants have since filed for review before the California Supreme Court. Should the Supreme Court deny review, both *Almaraz* and *Guzman* will stand as is. If the Supreme Court grants review, *Almaraz* will not be citable until a decision is rendered. A Supreme Court decision favorable to the defense would also invalidate the appellate ruling in *Guzman*. Whether the Supreme Court grants review is unknown, though it would appear unlikely, given its actions in *Guzman*.

In *Ogilvie*, the First District Court of Appeal granted review. During the course of oral arguments, and in an unusual twist, defense counsel for the City and County of San Francisco resigned to accept employment with applicant counsel's firm. Facing possible disqualification as a result of the move, applicant attorney also withdrew from the case. Both parties obtained new counsel and, following oral arguments, the appellate court reversed the WCAB ruling. The appellate court found the WCAB overstepped their authority by creating an alternative method for calculating the DFEC. Since the DFEC in *Ogilvie* was partly based on non-industrial factors, the court overturned the finding, noting that the employer is only responsible for the industrial portion of the disability.

Still, the court held that both the DFEC factor and the overall disability rating are rebuttable. It cited three areas where one could rebut the DFEC:

- *By showing a factual "error in the earning capacity formula [DFEC]," or "that the rating was incorrectly applied..."* This can be a simple error such using the wrong DFEC number or corresponding adjustment factor, or erroneously including disabilities not attributable to the industrial injury. Such rebuttals are rare but are generally not challenged, as they are nothing more than corrections of obvious errors.
- *By showing an "error…in the data or result derived from the data in forming the earning capacity adjustment…"* This form of rebuttal has yet to occur, as it requires a showing that the RAND report used to formulate the DFEC factor is inadequate. The court cited several examples of how this might occur, such as faulty assumptions found within the RAND report, RAND's reliance on a pre-reform rating schedule that did not include a cross-walk with the AMA Guides for Rating Permanent Impairments, 5th ed., or by showing that RAND's sampling of similar injuries used to develop the report omit a more complex, or severe injury attributed to the injured worker. This rebuttal strategy appears to be a "high risk/high reward" one, as it would likely require extensive and costly research of the RAND report that could well reveal no inadequacies within the report. Conversely, any inadequacies found might not only effectively rebut the scheduled DFEC for the case at hand, but provide fodder for other cases and future rebuttals.
- *By showing that "the disability reflected in the rating schedule is inadequate in light of the effect of the employee's industrial injury."* Here, the court cited the 1983 Supreme Court finding in LeBoeuf v. WCAB, thought by many to have been rendered moot by the 2004 reforms. *LeBoeuf* dealt with the effect of an inability to benefit from vocational rehabilitation against an injured worker's permanent disability. Relying on the statutory phrase, "diminished ability of such injured employee to compete in the open labor market," the *LeBoeuf* court found the injured worker's inability to benefit from vocational rehabilitation to be good cause

for reopening an award for reassessing permanent disability. Consequently, and in practice, an inability to compete in the open labor market finding by a vocational rehabilitation expert generally resulted in a permanent total disability award.

Unlike *LeBoeuf*, the *Ogilvie* case is a post-reform case where vocational rehabilitation benefits no longer exist and the statutory phrase "diminished ability…to compete in the open labor market" has been replaced with "an employee's diminished future earning capacity." Still, the court held the two phrases as being synonymous and having no legal difference. This type of rebuttal will require the use of vocational experts to show that an individual's diminished future earning capacity is greater than the scheduled DFEC. It also suggests that defendants might consider attempting rehabilitation in an effort to show that *LeBoeuf* is not applicable. On a more positive note, the appellate court did limit any basis for a *LeBoeuf* argument to factors solely attributable to the industrial injury. Non-industrial disability factors cannot be considered when assessing the diminished ability to compete in the open labor market. While we may see new attempts to rebut the DFEC by raising *LeBoeuf* or challenging the RAND study, both would appear to be high thresholds to overcome.

Unfortunately, while rejecting the WCAB's mathematical alternative for calculating an injured worker's DFEC, the appellate court gave no direction as to how the WCAB might accurately calculate it. The case is currently on remand to the WCAB for a determination as to whether applicant successfully rebutted the scheduled DFEC.

What Is Travelers Doing to Affect Their Outcome?

While we are not a party to any of these cases, we continue to actively participate in both defendants' strategy sessions and their Amicus Committee meetings. We initially filed our own briefs at the board level, and continue to assist defendants in the preparation of industry amicus briefs.

Travelers remains concerned that the *Almaraz* and *Guzman* decisions will continue to erode the reforms and bring uncertainty into the system by complicating and impeding the ability to predict exposures. A legislative recourse is yet another solution that we are prepared to pursue. In the interim, we continue to aggressively assert disability ratings based on the AMA Guides as written.

With respect to the recent *Ogilvie* decision, as of this writing, it is unknown if the parties in *Ogilvie* will appeal to the Supreme Court. If so, we may seek to be involved, to the extent allowed, emphasizing the reform's intent for "consistency, uniformity, and objectivity" within the rating schedule. Achieving this goal will help to better predict disability and loss exposure. Here, too, we continue to aggressively assert the presumption of correctness attributed to the scheduled DFEC factors and the permanent disability rating schedule. Where necessary, we will consider using vocational experts to mitigate exposures.