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Impact of Recent WCAB *En Banc D*ecisions on California Employers

I. What Are These Cases About?

In *Almaraz v. Environmental Recovery Systems*, claimant Almaraz suffered a post-reform back injury while at work. The issue centered on Almaraz' level of disability:

- 17%, or $15,050, under the AMA Guides and the 2005 Permanent Disability Rating Schedule, or
- 58% ($70,000) based on work restrictions under the 1997 Permanent Disability Rating Schedule.

The Judge issued a 14% PD Award after apportionment, believing that reform-enacted Labor Code section 4660 bound him to the AMA Guides. Almaraz petitioned for reconsideration, arguing that the AMA Guides were not conclusive. The petition went unanswered by defendants and was granted by the Workers Compensation Appeals Board (WCAB).

In *Guzman v. Milpitas Unified School District*, claimant Guzman sustained a compensable post-reform cumulative trauma to her upper extremities. Guzman's physician calculated 3% impairment for each extremity under the AMA Guides, but also noted a 25% loss of pre-injury capacity for pushing, pulling, grasping, gripping, keyboarding and fine manipulation. In a supplemental report, he restricted Guzman from "no very forceful prolonged repetitive and forceful repetitive work activities," believing her impairment to be 15% for each extremity, but conceding that this was "not a method sanctioned by the AMA Guides." The Disability Evaluation Unit rated the report at:

- 12% disability ($8,415), based on the 3% impairment for each extremity, but stated it would be
- 39% disability ($34,265) if the 15% impairment for each extremity were allowed.

The Judge issued an award of 12% permanent disability, finding the AMA Guides applicable and the physician's explanation of the 15% for each extremity inadequate. Guzman timely appealed, also arguing that the AMA Guides were not conclusive.

The WCAB consolidated and granted both petitions, and determined the AMA Guides can be rebutted if it is shown that its use would be *"inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability."* The Board did not address what constituted "inequitable," "disproportionate," or "not a fair and accurate measure,*"* but did state that the physician can rely on his or her judgment, and consider other generally accepted medical literature. The physician can also consider medical and non-medical information, including a vocational expert's opinion. However, reliance on the 1997 Schedule alone is insufficient to support a finding that the rating under the AMA Guides is unfair or inequitable.

Finally, in *Ogilvie v. City and County of San Francisco*, claimant Ogilvie injured her right knee, low back and neck at work. The parties stipulated to a compromise, based on their respective physicians, that Ogilvie's permanent disability rating was 28% ($27,000). At trial:

- Ogilvie presented vocational expert testimony that indicated Ogilvie lost $186,000 (51%) of her earning capacity for life as a result of her industrial injury.
- Defendants' vocational expert testified that Ogilvie lost $158,000 (51% to 53%) of her future earning capacity for life.

Based upon the expert opinions and Ogilvie's testimony, the judge concluded that the 28% was not fair, adequate, or proportionate to Ogilvie's Diminished Future Earning Capacity (DFEC). The judge issued a 40% ($36,000) permanent disability award after apportionment.

This document is intended to provide general information about recent California WCAB *en banc* decisions, and should not be construed as providing legal advice or legal opinions. You should consult an attorney for an specific legal questions.

The WCAB partially overturned the award, but found the DFEC factors within the 2005 Permanent Disability Rating Schedule (PDRS) to be, in fact, rebuttable. However, it found the method used by the judge to be incorrect, and presented a mathematical formula, based on the employee's proportional earnings loss compared to a control group of similarly situated employees. The Board noted that the formula may not be appropriate under certain circumstances (such as when the employee retires or the actual earnings exceed the control group) and then an alternative method must be used. (The Board gave no alternatives other than manipulating the control group or using a broader control group.)

II. What Do These Cases Mean?

The decisions in both *Almaraz-Guzman* and *Ogilvie* were issued *en banc*. "*En banc*" is a Latin term meaning "from the bench." An *en banc* ruling is binding upon all of the boards in the state unless and until overturned by a higher court.

As a result of the ruling in *Almaraz-Guzman*, applicant attorneys are now requesting physicians to take the decision under consideration when evaluating disability. This has begun to cause delays and continuances on existing cases in order to determine if the decisions apply. In addition, closed cases are being reopened at some venues for reconsideration under these rulings—all in an effort to maximize disability values.

In *Ogilvie*, the Board's view was that estimates of post-injury earnings for similarly-situated employees can be obtained from various government Web sites. Still, it is more likely that parties will use vocational rehabilitation experts to establish credibility. When coupled with the decision in *Almaraz-Guzman*, increases in the frequency of vocational and medical expert testimony and cross-testimony are likely. The result is the likelihood that indemnity, medical, and expense costs will increase. The extent of the increase is unknown, but the Workers' Compensation Insurance Rating Bureau (WCIRB) conservatively estimated a 25% increase in permanent disability and frictional costs on affected cases.

The reaction from key state officials (especially Governor Schwarzenegger and DIR Director Duncan) and various employers, insurers, and claims administrators, has prompted the WCAB to grant reconsideration on its own. This means that the WCAB will review their decisions. However, until they reverse their decisions (or a higher court overturns them), they remain binding on all of the state workers' compensation boards.

III. What Is Travelers Doing in Response to These Cases?

Travelers is taking several actions. Although we are not a party to either case, we are:

- Actively participating with the American Insurance Association toward legislative reform and mandating the application of the AMA Guides in accordance with the original legislative intent
- Actively working with the California Workers' Compensation Institute (CWCI) in assessing the soundness and impact of these decisions
- Submitting Amicus Briefs in both the Almaraz-Guzman and Ogilvie cases at the WCAB's request
- Assisting others in the industry in the preparation of their Amicus Briefs

IV. What Can I Do about This?

Join in the effort. Consider working with your own trade associations to submit amicus briefs. Also, you may want to contact your state representative and voice your concerns, especially if the WCAB and the courts do not overturn these decisions during reconsideration or appeal. The impact of these rulings weakens the ability to predict loss exposures and may affect your corporate financial planning.

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