

California Customers

Travelers Response to the WCAB Almaraz/Guzman and Ogilvie 9/2009 Decisions

In February, 2009, the Workers' Compensation Appeals Board (WCAB) issued landmark decisions in both the dual case *Almaraz v. Environmental Recovery Systems*; *Guzman v. Milpitas Unified School District*, and *Ogilvie v. City and County of San Francisco*. You can find a history of the cases and the WCAB's initial rulings [here](#). The parties in each case timely filed Petitions for Reconsideration, which the WCAB granted and issued its findings on September 3, 2009.

How Did the Workers Compensation Appeals Board Rule?

In its Opinion On Reconsideration in *Almaraz/Guzman*, the WCAB:

- Upheld the finding that the AMA Guides and the Schedule for Rating Permanent Disabilities are rebuttable.
- Rescinded its standard of *"inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability"* for rebutting the American Medical Association (AMA) Guides for Rating Permanent Impairments. Instead, one can now rebut only the rating by a preponderance of evidence, statutorily defined as *"that evidence, when weighed with that opposed to it, has more convincing force and the greater probability of truth."* Ultimately, a Workers' Compensation Appeals Board Judge makes this determination.
- Held that any evidence rebutting the AMA Guide's Whole Person Impairment (WPI) is limited to the AMA Guides themselves. Known as "rating by analogy," physicians may resort to another chapter, section or table of the AMA Guides if it is believed to more accurately reflect the injured worker's impairment. For example, an ankle injury that impairs the ability to ambulate might normally rate a 6% impairment under the Lower Extremity chapter, but receive a 15% impairment based on the Central and Nervous System chapter for Gait Disorders, if it is found to more accurately reflect the impairment. The deviation must, however, constitute substantial evidence – the physician must *"set forth the facts and reasoning which justify it."* This is somewhat of a retreat from its earlier decision, which allowed *any* evidence to rebut the AMA Guides.

In its Opinion On Reconsideration in *Ogilvie*, the WCAB:

- Upheld all aspects of its earlier ruling.
- Clarified that any rebuttal to the diminished future earning capacity (DFEC) factor listed in the state Schedule for Rating Permanent Disabilities (PDRS) must conform with both the Labor Code and the RAND studies used to develop the PDRS
- Where post-injury earnings are not an accurate indicator of diminished future earning capacity (DFEC), the parties can agree at settlement to stipulate to the initial DFEC factor as indicated in the Schedule for Rating Permanent Disabilities (PDRS) and, within five years from the date of injury, reopen the case for reevaluation of the DFEC factor and the permanent disability award.

What Do These Rulings Mean?

Our initial review suggests that the amended rulings appear to do little to reverse the impact of the prior decisions. While both the removal of the subjective standard for rebutting the AMA Guides (*"inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent*

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disability”) and the elimination of evidence outside of the AMA Guides are positive actions, the allowance of other sections of the AMA Guides to rebut the relevant section discredits the validity of the Guides as written and adversely affects the ability to predict with any consistency. Furthermore, this “rating by analogy” has been the most popular method for rebutting the Guides since the initial rulings, with very few attempting to introduce non-AMA Guides evidence. As to how the WCAB will rule on the “preponderance of evidence standard” remains unknown, but historically, the WCAB has been very lenient to injured workers, relying on the liberal construction mandate under the current Labor Code. Since the ruling in *Ogilvie* tends to result in a greater impact at the lower disability levels, some have tried to take advantage by adding multiple body parts (each injury to a part of the body is rated separately then combined for a total disability). Consequently, we anticipate:

- Increased challenges to the AMA Guides and DFEC factors
- Amended filings to include additional parts of the body
- Increased use of Qualified Medical Examiners (QMEs) and Agreed Medical Examiners (AMEs) by both sides to support or counter challenges to the AMA Guides
- Increased use of subject matter experts such as economists and vocational experts by both sides to defend or refute the DFEC factors as calculated in the PDRS
- Finally, longer court dates and settlement delays due to the above

What Is Travelers Doing?

Travelers is proud to have been the only insurance company to submit *amicus* briefs to the WCAB following the initial rulings:

- As a member of the defense industry’s “Amicus Committee,” we fully intend to participate in the development of *amicus* briefs, should the parties appeal and the court solicit additional briefs. It is our understanding that the parties in all three cases intend to appeal.
- If, in fact, additional *amicus* briefs are sought, we will consider once again filing our own briefs.
- We continue to work with groups such as the California Workers’ Compensation Institute to provide and interpret industry data affected by these decisions, as well as the American Insurance Association (AIA) to promote a more consistent, uniform, and objective method for measuring permanent disability – whether by judicial, regulatory, or legislative means.
- As always, our approach to such challenges continues to be based on the facts of the individual case, the anticipated litigation costs, and the probability of success. Where warranted, we will solicit supplemental medical reports, conduct depositions, or employ subject matter experts.

What can I do?

Join in the effort. Consider working with your own trade associations to advocate to the Legislature and submit briefs. You may also want to contact your state representative and voice your concerns, especially if there are no appeals or the appeals are unsuccessful. The impact of these revised rulings continues to affect the ability to predict loss exposures and may affect your financial planning.