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Almaraz-Guzman II WCAB Decision

Providing a WPI that is the Most Accurate Reflection of the Impairment

On September 3, 2009, the WCAB provided Almaraz-Guzman II. This article will discuss how the AME/QME/Treating physician might respond when queried about Almaraz-Guzman II. I urge you to read the full Almaraz-Guzman II WCAB Decision, which can be obtained at **http://tinyurl.com/Almaraz-Guzman-II** on my web site.

Summary of Almaraz-Guzman II

The physician is charged with providing a whole person impairment (WPI) rating utilizing any chapter, table, or method in the AMA Guides 5th Edition that most accurately reflects the injured employee's impairment. The opinion must be substantial evidence.

WCAB Conclusions

- A permanent disability rating established by the Schedule is rebuttable;
- The burden of rebutting a scheduled permanent disability rating rests with the party disputing it;
- One method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's WPI under the AMA Guides;
- When determining an injured employee's WPI, it is not permissible to go outside the four corners of the AMA Guides; however,
- A physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment.

WCAB Caveats

- The WCAB has rejected their prior 2/3/09 opinion and standard regarding "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability."
- The WCAB emphasizes that their "decision does not permit a physician to utilize any chapter, table, or method in the AMA Guides simply to achieve a desired result, e.g., a WPI that would result in a

permanent disability rating based directly or indirectly on any Schedule in effect prior to 2005."

- The WCAB emphasizes that "A physician's opinion regarding an injured employee's WPI under the Guides must constitute substantial evidence; therefore, the opinion must set forth the facts and reasoning which justify it. Moreover, a physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence."

When to Apply Almaraz-Guzman II

The evaluating physician needs to first provide a WPI using a "strict" approach the AMA Guides. This means a standard or traditional approach.

There is some question as to whether the evaluating physician should address Almaraz-Guzman II with the initial visit absent a subsequent letter of rebuttal from either the applicant or defense.

The WCAB in Almaraz-Guzman II states that *"… permanent disability rating established by the Schedule is rebuttable" and "… the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating" and "… one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's whole person impairment (WPI) under the AMA Guides…" Also, "Once a treating physician, AME, or QME has offered an opinion regarding the injured employee's WPI under the AMA Guides, then the injured employee or the defendant may seek to challenge that opinion through rebuttal evidence."*

Thus, it is the permanent disability (PD) resulting from the 2005 Permanent Disability Rating Schedule (PDRS) which is rebuttable by either party.

It is important to remember that the physician only provides the WPI, which is only one part of the final permanent disability rating. The WPI is the starting point as the final permanent disability may increase per Ogilvie II after consideration of the DFEC (Diminished Future Earning Capacity), age and occupation. It is the WCAB and not any particular physician that is the ultimate trier-of-fact on medical issues.

The argument against addressing Almaraz-Guzman II in the initial report is that since it is unknown what the permanent disability rating will be when all factors are considered, the physician should await further query from the parties, and address it either in deposition or a supplemental report, if there are any concerns that the AMA Guides WPI does not lead to an accurate representation of permanent disability.

While on the surface it seems that the physician should not be addressing Almaraz-Guzman II in the initial report until the concerned parties have had a chance to review that report, and also consider the effects of the DFEC, age and occupation, the reality is that from a practical standpoint, attorneys may ask for Almaraz-Guzman II to be addressed up front.

How to Apply Almaraz-Guzman II

<u>Activities of Daily Living (ADL)</u>

The AMA Guides states that "Impairment percentages or ratings developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the

impairment decreases an individual's ability to perform common activities of daily living (ADL), *excluding* work."

In regards to actually addressing Almaraz-Guzman II, it is critical to analyze the injured workers activities of daily living (ADLs). If a "strict" AMA Guides WPI does not take into account the absence or presence of ADL deficits, then this may be a justification for applying Almaraz-Guzman II. Remember, it can go both ways; an impairment rating can be raised or lowered via Almaraz-Guzman II.

The issue surrounding ADLs is problematic as activities of daily living are subjective in nature and are not something the physician actually measures. The astute physician will compare what the patient reports in regards to ADL deficits/losses from what is expected from the objective findings and pathology.

To put it another way, while the physician should respect the patient's report regarding functional limitations in ADLs, the physician must determine if this report is consistent with the objective medical findings.

Objective Medical Findings

There are situations where the "strict" AMA Guides WPI does not provide the most accurate impairment when considering the pathology and the objective medical findings. In other words, if the strict WPI does not adequately address legitimate objective medical factors/pathology, then this may constitute substantial evidence to justify an alternate Almaraz-Guzman II WPI.

What Does Most Accurate Impairment Rating Mean?

The term "accurate" is not given in any context by the WCAB. While we can assume that the term "accurate impairment rating" refers to a relationship between the industrial injury and the permanent effects an objective medical condition has on the injured employee's ability to perform ADLs, the question becomes which ADLs we are talking about.

The defense may argue that the AMA Guides clearly does not account for work and that the impairment rating should be based on the activities of daily living as listed in the AMA Guides 5th Edition as follows:

- Self-care & personal hygiene: Urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating
- Communication: Writing, typing, seeing, hearing, speaking
- Physical activity: Standing, sitting, reclining, walking, climbing stairs
- Sensory function: Hearing, seeing, tactile feeling, tasting, smelling
- Non-specialized hand activities: Grasping, lifting, tactile discrimination
- Travel: Riding, driving, flying
- Sexual function: Orgasm, ejaculation, lubrication, erection
- Sleep: Restful, nocturnal sleep pattern

The applicant may argue that since the goal is to provide an accurate permanent disability award, the impairment rating should bear some resemblance and have some relationship with the effects of that impairment rating on the injured worker's ADLs with respect to functioning/activities at work (e.g. work ADLs).

Below I have listed work activity ADLs. In this context, there must also be consideration for pacing

(speed of activity), repetition (repetitive activities), time (prolonged activity), and positioning (static or awkward posturing) factors:

- Overhead work
- Work at or above shoulder level
- Work below shoulder level
- Torquing
- Lifting & Carrying,
- Reaching, Pushing & Pulling
- Grasping / Gripping
- Feeling / Fingering
- Pinching
- Handling / Holding
- Fine manipulation
- Keyboarding
- Balancing
- Working at heights
- Climbing ladders / stairs
- Walking on uneven terrain
- Standing / Walking
- Crouching
- Sitting
- Twisting
- Bending
- Squatting, Kneeling, Stooping
- Working around moving machinery
- Driving
- Spine flexing, extending, bending, and rotating

Conclusion

Almaraz-Guzman II is relatively new and the defense and applicant community differ on how to interpret it. As physicians, our responsibility is to provide a thoughtful and balanced opinion that provides a WPI which is accepted as substantial evidence and which most accurately reflects the injured worker's impairment.

It may be best in this continued period of uncertainty, to provide different "scenarios" that address the concerns of both the applicant and the defendant - thus leaving the final decision about what is substantial evidence to the WCAB.

Remember, it is the WCAB and not any particular physician that is the ultimate trier-of-fact on medical issues.

I would appreciate your comments and critique via email to stevenfeinberg@hotmail.com.

Sincerely,

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