ADMIN

- Check the Chat for links to your Course Materials
- Use “Right Click” …..”Open Link in New Tab”….to keep link open during ZOOMinar
- During ZOOMinar Keep Microphone muted
- Put any questions/comments in the “Chat” and we will discuss at the conclusion – Please Participate
- Answer Questions on Course Exam for Immediate Certificate of Completion

UPCOMING SESSIONS

- THANKSGIVING WEEK – NO ZOOMINAR
- 12/01/21 - THE "ANYTHING GOES" RULES OF APPORTIONMENT
- 12/08/21 - STATS/TRENDS/AND DISTURBING FACTS IN CA. WORK COMP
- 12/15/21 - YOUR FINAL REPORT IS TERRIBLE AND YOU SHOULD NOT SIGN IT
- SPRING ZOOMINAR SERIES –
  - 3X PER MONTH DWC APPROVED CEU DISCUSSION
  - 1X PER MONTH *QME PRACTICE BUILDING SUCCESS* SERIES – NO CE CREDITS!

- Today's (11/10/21) Discussion – HEADS AND TAILS ON PERMANENT IMPAIRMENT RATINGS

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ESTABLISHING PERMANENT DISABILITY LABOR CODE 4660

- **THE "SCHEDULE"**
- Labor Code 4660(a) In determining the percentages of permanent disability, account shall be taken of:
- 1) the nature of the physical injury or disfigurement,
- 2) the occupation of the injured employee, and
- 3) his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity (DFEC adjustment factor).
- DFEC = "diminished future earning capacity"

ESTABLISHING PERMANENT DISABILITY LABOR CODE 4660

- Labor Code 4660(b)(1):
- For purposes of this section, the “nature of the physical injury or disfigurement” *shall incorporate* the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the AMA Guides.”

ESTABLISHING PERMANENT DISABILITY LABOR CODE 4660

- Labor Code 4660 (c) - the schedule shall be *prima facie evidence* of the percentage of permanent disability to be attributed to each injury covered by the schedule.
- Prima Facie - based on the first impression; accepted as correct until proved otherwise.
- Labor Code 4660(d) - (d) The schedule shall promote consistency, uniformity, and objectivity.

ALMARAZ GUZMAN KEY 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 WPI under the AMA Guides
- A physician may utilize any chapter, table, or method in the AMA Guides that *most accurately* reflects the injured employee's impairment

ALMAREZ GUZMAN

- A consideration of Almaraz Guzman alternative impairment ratings is *required* in EVERY case involving Permanent Impairment – and is part of a "complete medical evaluation."
- Guzman: …"To accommodate those complex or extraordinary cases, the AMA Guides calls for the physician's exercise of clinical judgment to evaluate the impairment most accurately, even if that is possible only by resorting to comparable conditions described in the Guides"
- "MOST ACCURATE"

SINEATH vs. WELLS FARGO BANK 2014

- A consideration of Almaraz Guzman alternative impairment ratings is *required* in EVERY case involving Permanent Impairment – and is part of a "complete medical evaluation."

- QME replaced for refusing to consider an alternative rating under Almaraz Guzman
- "In regard to the question of Almaraz/Guzman, I am of a mind with Dr. REDACTED in that Almaraz/Guzman is basically a legalistic ploy that attempts to insinuate subjective complaints as a factor in impairment rating. Like Dr. REDACTED, I use the AMA Guides and do not, and never will, use Almaraz/Guzman."

ALTERNATIVE IMPAIRMENT RATING UNDER ALMARAZ GUZMAN

- When the strict rating IS the "most accurate" rating:

- "In my opinion and within reasonable medical probability, the above Permanent Impairment rating under the *strict* application of the AMA Guides is the most accurate description of Ms. Smith's Impairment. I do not find a need to consult with other Charts, Tables, or Chapters within the four corners of the AMA Guides to more accurately describe the Impairment."

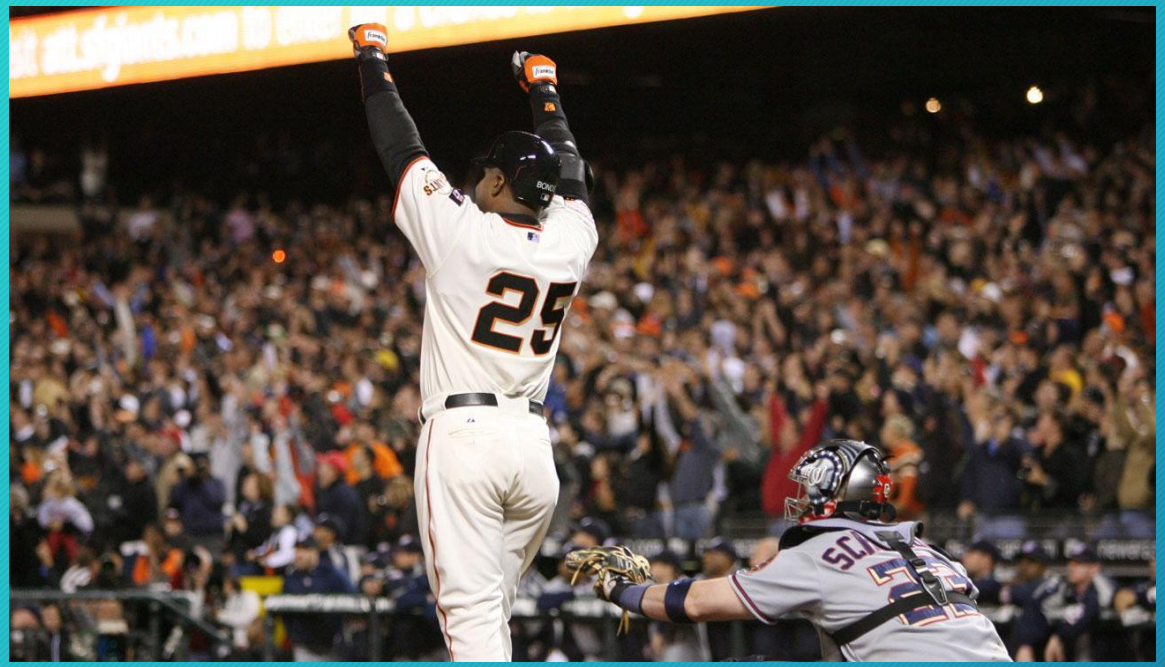
SUBSTANTIAL MEDICAL EVIDENCE ALMAREZ GUZMAN

- *"SUBSTANTIAL MEDICAL EVIDENCE"*
- *Guzman III* – this decision "does *not* allow a physician to conduct a fishing expedition through the Guides "simply to achieve a desired result", the physician's opinion must constitute substantial evidence of WPI and therefore…must set forth the facts and reasoning that justify it."
- Simply presenting a view contrary to an established rating in the Guides, however, would not be sufficient to rebut the PDRS rating….an impairment rating that is inadequately supported by evidence and reasoning – and unquestionably, a rebuttal position arrived at by hunting through the Guides for a more favorable rating – will result in an opinion the WCJ will necessarily reject as insufficient evidence.

SUBSTANTIAL MEDICAL EVIDENCE ALMAREZ GUZMAN

- *Martinez vs. City of Bakersfield* – "In order to support a case for rebuttal, the physician must 1) *explain why* a departure from the impairment percentage is necessary, and 2) how he or she arrived at a different rating.
- Without a complete presentation of the supporting evidence on which the physician has based his or her clinical judgment, the trier of fact may not be able to determine whether a party has successfully rebutted the scheduled rating or, instead, has manipulated the Guides to achieve a more favorable impairment assessment. "

ALMAREZ GUZMAN ALTERNATIVE IMPAIRMENT RATINGS



- Purpose: To provide for ACCURATE Permanent Impairment Ratings for Examinees
- Almarez Guzman allows for doubling, tripling, quadrupling, etc. of Permanent Impairment ratings that are found under the *strict* application of the AMA Guides
- Therefore, the use of an alternative impairment rating has to follow some exacting rules!

SUBSTANTIAL MEDICAL EVIDENCE ALMAREZ GUZMAN

- *Cramer vs. County of Sonoma – To properly rate using Almaraz Guzman the doctor is expected to:*
  1. *Provide a strict rating per the AMA Guides*
  2. *Explain why the strict rating does not accurately reflect applicant's disability*
     1. *Reason #1*
     2. *Reason #2*
     3. *Reason #3*
  3. *Provide an alternative rating using the four corners of the AMA Guides*
  4. *Explain why that alternative rating most accurately reflects applicant's level of disability*
     1. *Reason #1*
     2. *Reason #2*
     3. *Reason #3*

PERMANENT IMPAIRMENT HOMES RUNS… AND STRIKE-OUTS

- *Home Run:*
  - *Espinosa vs. Executive Staffing*
- *Strike Outs:*
  - *Moten vs. City of Los Angeles*
  - *Porter vs. Ridi Home Care*

PERMANENT IMPAIRMENT HOMES RUNS… AND STRIKE-OUTS

- *Home Run - Espinosa vs. Executive Staffing (May 2018)*
  - *WCJ denied AME's Almaraz Guzman alternative impairment rating as not substantial medical evidence*
  - *WJC awarded 29% WPI for the lumbar spine*
  - *Applicant Attorney appealed the case arguing for the alternative impairment rating*
  - *Appeals Board found AME's opinion to be substantial and applicant was awarded 45% WPI for the lumbar spine*

PERMANENT IMPAIRMENT HOMES RUNS… AND STRIKE-OUTS

- ***Espinosa vs. Executive Staffing***

10, 2012, p. 10.) By using the range of motion method for determining applicant's WPI regarding his lumbar spine, the doctor concluded that applicant had 29% WPI. (Joint Exh. 7, pp. 10 - 11.) However, he then stated: — —

> "Mr. Espinoza's lumbar impairment, in my opinion, is under-represented by a strict use of the AMA Guides. An alternative manner of arriving at his impairment, still within the four corners of The Guides, by analogy, would be to consider the spine as a whole, and to calculate Whole Person Impairment as an appropriate fraction of the whole. Taking all things into consideration, including the patient's history, clinical presentation, the medical records, his overall decrease in level of function and his midrange responses to the AMA Guides 5th Edition Visual Analogue Pain Questionnaire, an inventory which does cover some 16 categories of non-work activities of daily living, it is my opinion that Mr. Espinoza's

impairment is more accurately described as 50% decrease in his overall lumbar function. Understanding that the authors of The Guides have affixed a maximum derived value for the lumbar spine as 90% Whole Person, Mr. Espinoza's impairment is most 'accurately' described as 50% of 90% or 45% Whole Person Impairment (Figure 15-19)."]
(Joint Exh. 7, p. 11.)

On August 5, 2014, Dr. Silbart's deposition was taken. (Def. Exh. H, Steven B. Silbart, M.D. deposition transcript, August 5, 2014.) He explained that his opinion that applicant had a fifty percent decrease in his lumbar function was based on applicant's

"…performance on physical examination as well as the level of discomfort he has. The described impact that his injury and his level of pain has on his activities of daily living, I took that as a whole."
(Def. Exh. H, p. 20.)

WEAK

When asked about how he reached his conclusion that applicant had 45% WPI regarding his lumbar spine, the doctor testified that:

"…[T]he authors of the Guides have affixed a maximum derived value of impairment for the lumbar spine as being 90 percent and my making a reasonable and well-founded estimate of the patient's overall loss of function as being 50 percent, to then take 50 percent of the 90 percent as being 45 percent …." (Def. Exh. H, pp. 21 – 22.)

PERMANENT IMPAIRMENT HOMES RUNS… AND STRIKE-OUTS

- ***Strike Outs:***
  - ***Moten vs. City of Los Angeles***
  - ***Porter vs. Ridi Home Care***

PERMANENT IMPAIRMENT HOMES RUNS… AND STRIKE-OUTS

- *Moten vs. City of Los Angeles (September 2015)*
- *WCJ found Permanent Disability of both lumbar spine and left hip (19% PD)*
- *Both Applicant and Defense appealed*
- *Applicant contested the WCJ's rejection of Almarez Guzman rating*
- *Defense contested that even the strict rating was incorrect*

FACTS

Applicant was employed by defendant as a police officer from June 19, 1999 to June 12, 2012, and suffered a cumulative injury to her low back and left hip through June 15, 2012.

Applicant was examined by AME Mark Greenspan, M.D., who authored a total of three reports and was deposed by the parties. Dr. Greenspan diagnosed applicant with left meralgia paresthetica, left femoral neuralgia, left inguinal region strain, lumbar spine strain, multilevel lumbar spondylosis, and degenerative arthritis of the left hip. In his ratings report, Dr. Greenspan assigned 2% whole person impairment (WPI) to applicant's low back solely as a pain rating, 2% WPI to applicant's left hip based on loss of range of motion, 1% WPI to left thigh muscle atrophy, and 1% WPI for pain. (Exhibit C, Report of Mark Greenspan, M.D., February 17, 2014, pp. 5-6.)

The parties deposed Dr. Greenspan on September 15, 2014. (Exhibit D, Deposition Transcript of Mark Greenspan, M.D.) Dr. Greenspan testified that applicant lost 20% of the function of her lumbar spine; thus, he changed his impairment rating of the lumbar spine from 2% to 20%. Dr. Greenspan explained his reasoning as follows:

> Well, one, if you look at the actual MRI, she does have degenerative changes. She has bulges rated as mild bulges and some minimal bulges. I'd have to go back and read it, but -- and I think that Dr. Kim, when he saw her, felt that the work restrictions were, you know, were no sitting, prolonged sitting, prolonged standing, lifting 20 and then 25 pounds, respectively. I think that that kind of would be a preclusion -- let me just go to the first report. So I think when we look at her ability to function, I think that 20 percent loss I think is reasonable. So that's why I think the 20 percent for the regional impairment is reasonable.

(*Id.*, p. 11, lines 5-17.)

Additionally, the AME assigned 4% WPI due to peripheral nerve impairment to the femoral and lateral femoral cutaneous nerves. The AME opined that the 20% rating for applicant's low back was the most accurate rating.

The WCJ issued ratings instructions on May 14, 2015, which instructed the rater to issue a rating based on the AME's ratings report (Exhibit C) and the AME's addition of a peripheral nerve rating in deposition. (Formal Rating and Instructions, May 27, 2015.) The WCJ instructed the rater to ignore the 20% WPI rating to applicant's lower back. (*Ibid.*)

The rater issued the formal rating on May 27, 2015. The rater noted a mathematical error in the rating for left thigh atrophy, which the rater corrected to 2% WPI. Additionally, the rater corrected the rating to the peripheral nerves to 2% WPI and issued the following rating:

FORMULA:

PERIPHERAL NERVES:	17.01.04.00 - 4 - [5]5 - 4901 - 8 - 9 PD (A) 2 WP ADD-ON INCLUDED FOR PAIN
LHIP:	17.03.04.00 - 2 - [5]3 - 4901 - 5 - 6 PD (A)
L KNEE:	17.05.01.00 - 3 - [2]3 - 4901 - 5 - 6 PD (A) 1 WP ADD-ON INCLUDED FOR PAIN

(A) 9 C 6 C 6 = 19 FINAL PD

(*Ibid.*)

On June 4, 2015, applicant objected to the rating instructions and rating and reserved her right to cross-examine the rater after seeking reconsideration. On June 10, 2015, the WCJ issued the F&A, which awarded applicant 19% permanent disability relying on the above rating.

I.

As detailed below, both the AME's strict AMA Guides rating and his *Almaraz-Guzman* rating are defective and do not constitute substantial medical evidence. Without substantial evidence supporting applicant's permanent disability rating, we must rescind the findings as to the permanent disability level and return the matter for further development of the record.

Defendant argues that the permanent disability rating should not include a rating to applicant's left knee and that the rater improperly combined ratings for applicant's loss of range of motion to the hip with muscle atrophy. The rating string provided by the rater notes a rating to applicant's left knee; however, it is clear from examining the record that this was actually the rating for atrophy to applicant's left thigh with the 1% pain add-on.

The AMA Guides specifically state: "Atrophy ratings should not be combined with any of the other three possible ratings of diminished muscle function (gait derangement, muscle weakness, and

peripheral nerve injury)." (AMA Guides, p. 530.) Thus, it was error to combine applicant's muscle atrophy and peripheral nerve injury into the same rating under a strict AMA Guides approach.

Furthermore, the AME never completed a proper analysis of applicant's peripheral nerve injury. Per chapter 17.2l, page 550 of the AMA Guides, the evaluator must first assign a classification of the severity of the motor deficit using Table 16-11. Then, the evaluator must assign a percentage of sensory deficit using Table 16-10. Then, the evaluator must multiply the percent of motor deficit and sensory deficit against the maximum value for the nerve deficit and combine the results. Here, the AME never assigned a percentage of severity of either the sensory or motor deficit for applicant's peripheral nerve injury. The AME never multiplied the sensory or motor deficit percentages against the maximum value for the nerve. The AME did not combine the results of this calculation. The AME's opinion on peripheral nerve impairment is not substantial medical evidence. Without a substantial opinion assigning applicant's disability using a strict AMA Guides analysis, we cannot affirm the WCJ's assignment of 19% permanent disability.

II.

For the reasons stated in the WCJ's Report and Recommendation dated June 26, 2105, which we adopt and incorporate, we also find that the AME's opinion regarding an *Almaraz-Guzman* analysis is not substantial evidence. The AME did not properly analogize applicant's lifting restriction to the loss of use of her entire lumbar spine. For this reason, we cannot assign a permanent disability rating based on the AME's proffered *Almaraz-Guzman* rating.

PERMANENT IMPAIRMENT HOMES RUNS… AND STRIKE-OUTS

- *Porter vs. Ridi Home Care*
- *WCJ found 8% WPI under the DRE Method plus 3% add-on for pain for a total of 11% WPI for the cervical spine*
- *WCJ rejected QME's alternative impairment rating under the direct estimate method as not substantial medical evidence*
- *DRE Category II 5-8% WPI*

DRE Cervical Category II
5%-8% Impairment of the Whole Person

Clinical history and examination findings are compatible with a specific injury; findings may include muscle guarding or spasm observed at the time of the examination by a physician, asymmetric loss of range of motion or nonverifiable radicular complaints, defined as complaints of radicular pain without objective findings; no alteration of the structural integrity

or

individual had clinically significant radiculopathy and an imaging study that demonstrated a herniated disk at the level and on the side that would be expected based on the radiculopathy, but has improved following nonoperative treatment

or

fractures: (1) less than 25% compression of one vertebral body; (2) posterior element fracture without dislocation that has healed without loss of structural integrity or radiculopathy; (3) a spinous or transverse process fracture with displacement

The WCJ correctly rejected Dr. Shaw's *Guzman* analysis. In his April 29, 2015 report, Dr. Shaw wrote:

> This case is felt to be complex and extraordinary because the patient's pain and symptomatology are greater than what one would find related to a simple and straightforward diagnosis.
>
> It is my opinion that strict whole person impairment (WPI) rating would not be an accurate measurement of this patient's permanent disability based on my clinical experience and in consideration of the effects of the residuals of the work injury on the patient's activities of daily living.
>
> In this case, the patient would fall into a cohort of patients whose level of whole person impairment (WPI) is greater than that obtained using a strict interpretation of the American Medical Association (AMA) Guides for the Evaluation of Disability, Fifth Edition.
>
> It should be acknowledged that the lumbar spine has two different primary functions. The first is a "levering" function in which the back is utilized to lift, stoop, bend, and carry object placed outside the center of gravity of the body. The lumbar spine function is that of "support", in which the upper body, head, and upper extremities are supported while the individual is a weight bearing position such as standing and walking.

> In considering these functions in combination, it is my reasonable medical opinion, to a degree of medical probability, that the patient exhibits a 20-percentage loss of function of the lumbar spine. Pursuant to Figure 15-19 on page 427, the maximum whole person impairment represented by a total impairment (WPI) 0.9 multiplied by 20% corresponds to a[n] 18% whole person impairment referable to the lumbar spine pursuant to [*Guzman*] before apportionment.
>
> The functional loss of support, and levering within the biomechanical envelope has lead [sic] to a persistent lumbar myofascial pain syndrome impact a wide range of functioning as determined by our history, examination, self reporting, and my experience of managing, and evaluating similar to same cases.

(April 29, 2015 report at p. 19.)

At his January 28, 2016 deposition, Dr. Shaw explained his *Guzman* opinion, in part, stating, "And you're talking about somebody being dislocated from her job and you're going to give her an eight percent. It doesn't add up. And then her clinical presentation does not either. And I'm not allowed to,

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[1] A WCJ who did not issue the underlying decision filed a Report and Recommendation on Petition for Reconsideration referring us to the original WCJ's Opinion on Decision.

because of the AMA guides, to give her three percent for pain. It's disallowed. So I can't mix that with the eight percent." (January 28, 2016 deposition transcript at p. 25.) At a subsequent August 1, 2017 deposition, Dr. Shaw was asked, "Why is it that Ms. Porter for her lumbar spine could not fit into the DRE for her lumbar spine?" Dr. Shaw responded, "Well, from a strict standpoint she can, but from a [*Guzman*] standpoint where you're actually evaluating someone for their functional loss, it doesn't match up." (August 1, 2017 deposition transcript at p. 14.)

As explained by the WCJ in her Opinion on Decision, Dr. Shaw's is not a proper rebuttal of the scheduled rating in the Guides. The Court of Appeal explained in *Guzman* that, "[i]n order to support the case for rebuttal, the physician must … explain why departure from the impairment percentages is necessary and how he or she arrived at a different rating." (*Id.* at p. 828.) As the WCJ correctly states in her Opinion on Decision, Dr. Shaw does not adequately explain his conclusion that strict application of the AMA Guides does not accurately reflect the applicant's impairment, or why strict application of the Guides is not warranted because of the peculiarities of this particular case. Additionally, as also noted by the WCJ, it appears that Dr. Shaw's alternate analysis was based upon the incorrect assumption that a pain add-on is not allowed with the DRE method. Finally, Figure 15-19 of the AMA Guides is not a "table or method." Figure 15-19 provides information on how to convert a whole person impairment to a regional estimate of spinal impairment. (AMA Guides, § 15.13, p. 427.) The figure is not intended to be used as a rating mechanism and neither applicant nor Dr. Shaw specify where the rating method utilized (multiplying Dr. Shaw's assessment of the percentage of loss of function in the body part by the body part's maximum impairment) is outlined in the AMA Guides.