

2009 DWC CONFERENCE

REBUTTING A 2005 PDRS RATING: A REVIEW OF ALMARAZ-GUZMAN AND OGILVIE WCAB EN BANC DECISIONS

OR IS IT CALLED, "MASS CHAOS AND ALGEBRA 101?"

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ALMARAZ-GUZMAN CASE

- THE ALMARAZ-GUZMAN CASE
 - WHY DISCUSS IT HERE, NOW?
 - "THE AMA GUIDES PORTION OF THE 2005 PDRS IS REBUTTED IF IT IS ESTABLISHED THAT THE AMA GUIDES IMPAIRMENT RATING DOES NOT ACCURATELY REFLECT THE EMPLOYEE'S TRUE DISABILITY; IF THE AMA GUIDES RATING IS INEQUITABLE, IS SO DISPROPORTIONATE TO THE DISABILITY AND THE OBJECTIVES OF REASONABLY COMPENSATING AN INJURED WORKER AS TO BE FUNDAMENTALLY UNFAIR AND IT DOES NOT PROVIDE JUST AND FAIR COMPENSATION; IF THE AMA GUIDES RATING IS NOT RATIONALLY RELATED TO THE EMPLOYEE'S PERMANENT DISABILITY; OR IF THE AMA GUIDES IMPAIRMENT RATING IS NOT COMMENSURATE WITH THE DISABILITY THAT THE EMPLOYEE HAS SUFFERED."

ALMARAZ-GUZMAN CASE

- ALMARAZ-GUZMAN
 - DOES A JUDGE OR PHYSICIAN DETERMINE THAT “PURE” AMA GUIDES RATING “WOULD RESULT IN A PERMANENT DISABILITY AWARD THAT WOULD BE INEQUITABLE, DISPROPORTIONATE, AND NOT A FAIR AND ACCURATE MEASURE OF THE EMPLOYEE’S PERMANENT DISABILITY?”
 - YOU SHOULD DEVELOP THE RECORD BEFORE A JUDGE GETS THE CASE!

ALMARAZ-GUZMAN CASE

- ALMARAZ-GUZMAN
 - AMA RATING IS REBUTTED IF
 - IW’S INJURY HAS NO PERMANENT EFFECT ON ADL FUNCTIONS **OR** THE INJURY IS NOT COVERED BY THE AMA GUIDES **OR**
 - “PURE” AMA RATING EXISTS BUT IS NOT ADEQUATE FOR THE IW’S INJURY **AND**
 - THE INJURY SERIOUSLY IMPACTS THE IW’S ABILITY TO PERFORM HIS OR HER USUAL OCCUPATION AND THEREFORE SIGNIFICANTLY AFFECTS HIS OR HER FUTURE EARNING CAPACITY.

ALMARAZ-GUZMAN CASE

■ ALMARAZ-GUZMAN

- A "PURE" AMA GUIDES RATING CAN BE REBUTTED IF IT WOULD RESULT IN A PD AWARD THAT IS INEQUITABLE AND NOT COMMENSURATE WITH THE DISABILITY THE IW HAS SUFFERED.
- "ORDINARILY, THIS SHOWING WILL BE ACCOMPLISHED THROUGH THE OPINIONS OF TREATING OR EVALUATING PHYSICIANS WHO...CONCLUDE THAT THE IW'S IMPAIRMENT IS GREATER OR LESSER THAN THE ["PURE"] AMA GUIDES RATING."
- "IN ARRIVING AT AN IMPAIRMENT OPINION THAT DIFFERS FROM THE ["PURE"] IMPAIRMENT RATING CALLED FOR BY THE AMA GUIDES, A PHYSICIAN MAY INVOKE HIS OR HER JUDGMENT BASED UPON HIS OR HER EXPERIENCE, TRAINING AND SKILL."

ALMARAZ-GUZMAN CASE

■ ALMARAZ-GUZMAN CASE

- SECTION II-E CRITERIA – THE PHYSICIAN MAY:
 - DRAW ANALOGIES TO THE AMA GUIDES' OTHER CHAPTERS, TABLES OR METHODS OF EVALUATING IMPAIRMENT **OR**
 - CONSIDER OTHER GENERALLY ACCEPTED MEDICAL LITERATURE OR CRITERIA INCLUDING "ANY AND ALL COMPETENT AND RELEVANT EVIDENCE MAY BE USED TO ESTABLISH AN ACCURATE RATING OF FUNCTIONAL IMPAIRMENT."
 - USE MEDICAL AND NON-MEDICAL INFORMATION SUCH AS RFC AND REHAB REPORTS

ALMARAZ-GUZMAN CASE

■ ALMARAZ-GUZMAN

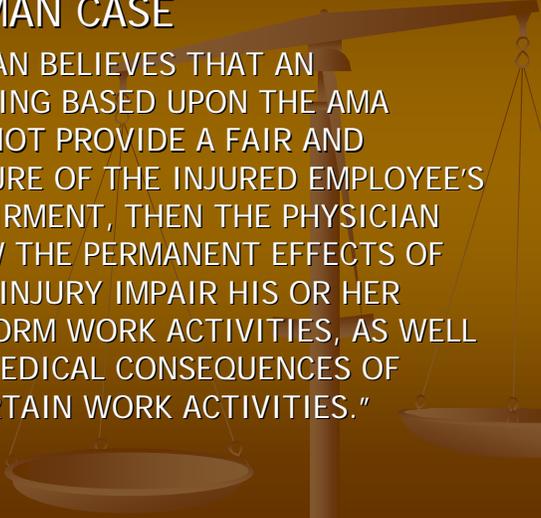
- "IN EVALUATING IMPAIRMENT OUTSIDE OF OR IN ADDITION TO THAT PRESCRIBED BY THE AMA GUIDES, THE PHYSICIAN MAY CONSIDER OTHER GENERALLY ACCEPTED MEDICAL LITERATURE OR CRITERIA...SUCH AS OTHER AMA PUBLICATIONS OR THE PUBLICATIONS OF OTHER ESTABLISHED MEDICAL ORGANIZATIONS."
- FN 19 "WE DO NOT NOW DECIDE IF IMPAIRMENT GUIDELINES OF OTHER STATES MAY BE A "RELEVANT FACTOR" WHICH A PHYSICIAN MAY CONSIDER."

ALMARAZ-GUZMAN CASE

■ ALMARAZ-GUZMAN CASE

- WE NEED TO BECOME FAMILIAR WITH OTHER GENERALLY ACCEPTED MEDICAL LITERATURE:
 - OTHER AMA PUBLICATIONS
 - AMERICAN ACADEMY OF ORTHOPEDIC SURGEONS
 - OFFICIAL DISABILITY GUIDELINES
 - (HOW ABOUT RESIDUAL FUNCTIONAL CAPACITY ASSESSMENTS UNDER FEDERAL SSA REGS?)
 - VOC REHAB FUNCTIONAL CAPACITY REPORTS

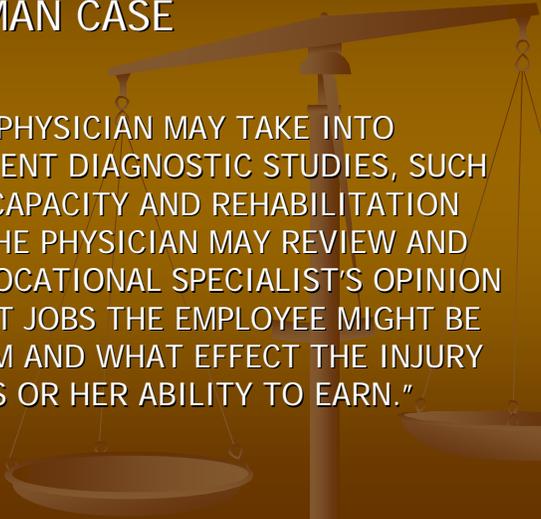
ALMARAZ-GUZMAN CASE

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- ALMARAZ-GUZMAN CASE

- WHEN A PHYSICIAN BELIEVES THAT AN IMPAIRMENT RATING BASED UPON THE AMA GUIDES WOULD NOT PROVIDE A FAIR AND ACCURATE MEASURE OF THE INJURED EMPLOYEE'S DEGREE OF IMPAIRMENT, THEN THE PHYSICIAN MAY ASSESS HOW THE PERMANENT EFFECTS OF THE EMPLOYEE'S INJURY IMPAIR HIS OR HER ABILITY TO PERFORM WORK ACTIVITIES, AS WELL AS ASSESS THE MEDICAL CONSEQUENCES OF PERFORMING CERTAIN WORK ACTIVITIES."

ALMARAZ-GUZMAN CASE

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- ALMARAZ-GUZMAN CASE

- "IN ADDITION, A PHYSICIAN MAY TAKE INTO ACCOUNT PERTINENT DIAGNOSTIC STUDIES, SUCH AS FUNCTIONAL CAPACITY AND REHABILITATION EVALUATIONS...THE PHYSICIAN MAY REVIEW AND CONSIDER THE VOCATIONAL SPECIALIST'S OPINION REGARDING WHAT JOBS THE EMPLOYEE MIGHT BE ABLE TO PERFORM AND WHAT EFFECT THE INJURY MAY HAVE ON HIS OR HER ABILITY TO EARN."

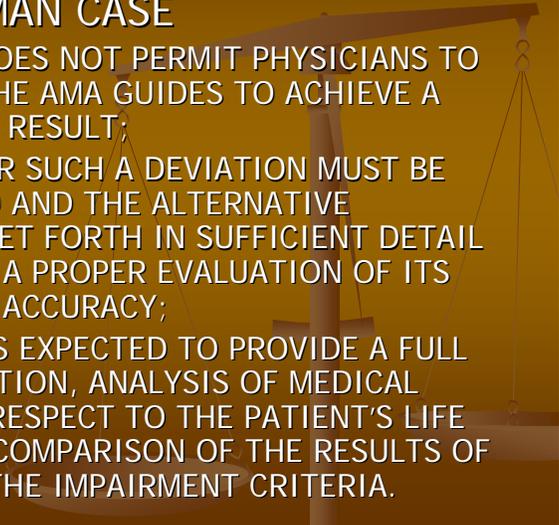
ALMARAZ-GUZMAN CASE

	NEVER	OCC	FREQUENTLY	CONSTANTLY
	0%	0-33%	33-75%	>75%
SIT				
STAND				
WALK				
BEND				
STOOP				
LIFT/CARRY 0-5#				
LIFT/CARRY 6-10#				
LIFT/CARRY 11-15#				
LIFT/CARRY 16-20#				
LIFT/CARRY 21-25#				
LIFT/CARRY 26-30#				
LIFT/CARRY 31-50#				
LIFT/CARRY >51#				
OVERHEAD WORK				
GROSS MANIPULATION				
FINE MANIPULATION				

SAMPLE RFC CHART – IF IW IS MMI, CAN HE/SHE PERFORM WORK ACTIVITIES?



ALMARAZ-GUZMAN CASE

- ALMARAZ-GUZMAN CASE
 - OUR DECISION DOES NOT PERMIT PHYSICIANS TO DEVIATE FROM THE AMA GUIDES TO ACHIEVE A MORE DESIRABLE RESULT;
 - THE REASONS FOR SUCH A DEVIATION MUST BE FULLY EXPLAINED AND THE ALTERNATIVE METHODOLOGY SET FORTH IN SUFFICIENT DETAIL SO AS TO ALLOW A PROPER EVALUATION OF ITS SOUNDNESS AND ACCURACY;
 - THE PHYSICIAN IS EXPECTED TO PROVIDE A FULL MEDICAL EVALUATION, ANALYSIS OF MEDICAL FINDINGS WITH RESPECT TO THE PATIENT'S LIFE ACTIVITIES AND COMPARISON OF THE RESULTS OF ANALYSIS WITH THE IMPAIRMENT CRITERIA.
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ALMARAZ-GUZMAN CASE

- **ALMARAZ-GUZMAN CASE**
 - THE PHYSICIAN SHOULD STATE HIS OR HER BEST OPINION REGARDING THE EMPLOYEE'S PERCENTAGE OF IMPAIRMENT AND EXPLAIN HOW AND WHY THIS IMPAIRMENT PERCENTAGE WAS DETERMINED.
 - THE WCAB MAY ACCEPT THE OPINION OF A SINGLE PHYSICIAN OR IT MAY MAKE A FINDING WITHIN THE RANGE OF THE MEDICAL EVIDENCE PRESENTED.
 - A PHYSICIAN'S ESTIMATE OF THE PERCENTAGE OF THE EMPLOYEE'S IMPAIRMENT MAY BE ACCEPTED EVEN THOUGH THIS ESTIMATE IS NOT EXACT, PROVIDED THAT THE PHYSICIAN'S OPINION IS ADEQUATELY EXPLAINED AND IS BASED ON THE FACTORS SET FORTH IN SECTION II-E, INCLUDING THE PHYSICIAN'S JUDGMENT, EXPERIENCE, TRAINING AND SKILL.

OGILVIE CASE

- **OGILVIE CASE – A GLOSSARY**
 - "INDIVIDUAL'S PROPORTIONAL EARNINGS LOSS" – MAY REBUT THE DFEC SCHEDULED RATING
 - "E/E's ACTUAL EARNINGS" - THREE YEARS OR OTHER PERIOD POST DATE OF INJURY
 - "EARNINGS OF SIMILARLY SITUATED EMPLOYEES" – SAME PERIOD AS APPLICANT POST INJURY, WHAT THE APPLICANT WOULD HAVE EARNED HAD THERE BEEN NO INJURY. BASED ON EDD OR OTHER WAGE DATA

OGILVIE CASE

■ OGILVIE CASE – GLOSSARY

- “EMPLOYEE’S ESTIMATED EARNINGS LOSS” –
FORMULA OF SAME OR SIMILAR EMPLOYEE’S WAGES
MINUS INJURED EMPLOYEE’S POST INJURY WAGES:
 $SS\ E/E - INJURED\ E/E\ POST\ INJURY\ WAGES$
- “EMPLOYEE’S PROPORTIONAL EARNINGS LOSS” –
INJURED E/E WAGES DIVIDED BY SS E/E WAGES:
 $\frac{INJURED\ E/E\ WAGES}{S/S\ E/E\ WAGES} = ?$
- “INDIVIDUAL’S RATING TO LOSS RATIO” – USE THIS
NUMBER TO SEE IF YOU CAN REBUT THE 2005 PDRS
DFEC:

$$\frac{WPI}{ESTIMATED\ PROPORTIONAL\ LOSS} = ?$$

OGILVIE CASE

■ OGILVIE CASE – GLOSSARY

- “INDIVIDUALIZED RATING TO
PROPORTIONAL EARNINGS LOSS RATIO”
ALSO KNOWN AS “ILR” – USE THIS NUMBER
TO COMPARE TO TABLE A OF THE 2005
PDRS. IF THE ILR IS HIGHER OR LOWER
THAN RANGE OF TABLE A THEN YOU CAN
REBUT THE 2005 DFEC ADJUSTMENT; IF ILR
IS WITHIN RANGE OF ANY CATEGORY THEN
YOU CANNOT REBUT AND YOU MUST USE
THE 2005 PDRS DFEC ADJUSTMENTS

OGILVIE CASE

- OGILVIE CASE – GLOSSARY
 - “INDIVIDUAL’S DFEC ADJUSTMENT FACTOR”
– IF IW’S IRL DOES NOT FALL WITHIN ANY OF THE RANGE OF RATIOS FOR ANY OF THE EIGHT FEC RANKS THEN YOU USE THE FOLLOWING FORMULA TO CALCULATE THE “INDIVIDUAL’S DFEC ADJUSTMENT”:
$$([1.81/a] \times .1) + 1 = E/E'S DFEC$$
 - “a” IS THE INDIVIDUALIZED RATING TO LOSS RATIO
 - IW’S PD IS WPI x E/E’S DFEC BEFORE ADJUSTMENT FOR AGE AND OCCUPATION

OGILVIE CASE

- OGILVIE FORMULA: PARTIES CAN REBUT THE DFEC COMPONENT OF THE 2005 PDRS:
- STEP 1
 - IW’S POST INJURY EARNINGS FOR 3 YEARS OR OTHER PERIOD
 - “CONTROL GROUP” EARNINGS OVER SAME PERIOD FOR SAME OR SIMILARLY SITUATED EMPLOYEES
 - CONTROL GROUP – IW’S EARNINGS = “EARNINGS LOSS”

OGILVIE CASE

- OGILVIE FORMULA:
- STEP 1
 - EARNINGS OF SIMILARLY SITUATED EMPLOYEES:
 - EDD LABOR MARKET INFORMATION DIVISION (EDD-LMID)
 - www.labormarketinfo.edd.ca.gov (STATEWIDE OR COUNTY BY OCCUPATION)
 - www.labormarketinfo.edd.ca.gov/?pageid=152
 - HOURLY WAGES BY COUNTY ONE QTR PER YEAR
 - LMID OES (OCCUPATIONAL EMPLOYMENT STATS):
 - www.labormarketinfo.edd.ca.gov/article.asp?ARTICLE=1222
 - FOR A FEE

OGILVIE CASE

- OGILVIE FORMULA:
- STEP 1:
 - E.G. IW EARNS \$25,000.00 DURING 3 YEARS POST INJURY; SAME UNINJURED EMPLOYEES EARNED \$150,000.00
 - $\$150,000 - \$25,000 = \$125,000.00$ WHICH IS THE IW'S EARNINGS LOSS ESTIMATE

OGILVIE CASE

- OGILVIE FORMULA:
- STEP 2:
 - IW'S EARNINGS LOSS ESTIMATE DIVIDED BY CONTROL GROUP EARNINGS
 - THIS EQUALS PROPORTIONAL EARNINGS LOSS:
 - $\$125,000 \text{ DIVIDED BY } \$150,000 = .833333$
 - $\$125,000/\$150,000 = .833333$ PROPORTIONATE LOSS RATIO

OGILVIE CASE

- OGILVIE FORMULA:
- STEP 3:
 - WPI DIVIDED BY PROPORTIONAL LOSS RATIO = INDIVIDUALIZED LOSS RATIO
 - $\text{WPI}/\text{FUTURE EARNINGS LOSS RATIO} = \text{ILR}$
 - ASSUME 5% WPI CERVICAL SPINE DRE II
 - $.05 \text{ DIVIDED BY } .833333 = .060000 \text{ (ILR)}$
- STEP 4:
 - SEE TABLE A OF 2005 PDRS – DOES ILR FALL WITHIN RANGE OF RATIOS? IF YES, NO REBUTTAL, IF NO THEN YOU CAN REBUT

OGILVIE CASE

- OGILVIE FORMULA:
- STEP 5:
 - USE FORMULA TO CALCULATE INDIVIDUAL DFEC ADJUSTMENT
 - $([1.81/a] \times .1) + 1 = \text{DFEC ADJUSTMENT FACTOR}$
 - a IS THE INDIVIDUALIZED WPI RATING TO LOSS RATIO FROM STEP 3
 - $([1.81 \text{ DIVIDED BY } .060000 \times .1] + 1.0 = 4.016666$

OGILVIE CASE

- OGILVIE FORMULA
- STEP 6:
- CALCULATE NEW WPI RATING:
 - $5\% \text{ WPI} \times 4.016666 = 20.083333\% \text{ PD}$
 - ROUND TO NEAREST WHOLE NUMBER AND IW HAS A PD OF 20% BEFORE ADJUSTMENT FOR AGE AND OCCUPATION

OGILVIE CASE

- OGILVIE FORMULA: IF IW HAS NO EARNINGS AND WPI IS 20% WPI:
 - STEP 1: $\$150,000 - \$0 = \$150,000$ LOSS OF EARNINGS (IW HAS 100% LOE)
 - STEP 2: IW LOE ($\$150,000$) DIVIDED BY $\$150,000 = 1.0$ OR 100%: $\$150K/\$150K = 1$
 - STEP 3: WPI DIVIDED BY LOSS RATIO
 - 20% DIVIDED BY 100% = .20000 ILR
 - STEP 4: TABLE A 2005 PDRS? .20000 NOT THERE
 - STEP 5: $([1.81/.20 \text{ ILR}] \times .1) + 1 = 1.905$ ADJUSTMENT FACTOR

OGILVIE CASE

- OGILVIE FORMULA
- STEP 5:
 - $([1.81/.020000] \times .1) + 1 = 1.905000$
- STEP 6:
 - CALCULATE NEW RATING WITH REBUTTED DFEC:
 - 20% WPI $\times 1.905000 = 38\%$ PD BEFORE ADJUSTMENT FOR AGE, OCCUPATION

ALMARAZ-GUZMAN CASE

- ALMARAZ-GUZMAN AND OGILVIE CASES
 - WHY TALK ABOUT THEM NOW?
 - YOU HAVE TO DETERMINE IN EVERY CASE
 - CAN YOU REBUT THE AMA RATING?
 - SHOULD YOU GET DATA FOR SAME OR SIMILAR EMPLOYEES AND IW'S POST-INJURY EARNINGS?
 - WHAT IF IW HAS NO LOSS OF EARNINGS?
 - LOOK AT CURRENT WORK SITUATION AND ASK THE PHYSICIAN
 - WE CAN REBUT THE 2005 PDRS RATING ONE, TWO OR BOTH WAYS

ALMARAZ-GUZMAN AND OGILVIE

- "THERE IS LONG ESTABLISHED CASE LAW THAT AN INJURED EMPLOYEE CAN REBUT THE SCHEDULE BY SHOWING THAT HIS OR HER DISABILITY IS ACTUALLY HIGHER THAN WHAT THE SCHEDULE WOULD PROVIDE AND, CONVERSELY, THAT AN EMPLOYER CAN REBUT THE SCHEDULE BY SHOWING THAT THE EMPLOYEE'S DISABILITY IS ACTUALLY LOWER." THIS IS NOT INCONSISTENT WITH THE MANDATE THAT THE SCHEDULE SHALL PROVIDE CONSISTENCY, UNIFORMITY AND OBJECTIVITY [UNDER LABOR CODE SECTION 4660(d).
- THE COURT OF APPEAL WILL HAVE TO DECIDE THIS CASE ON THE BASIS OF STATUTORY CONSTRUCTION.

ALMARAZ-GUZMAN AND OGILVIE

- SOME MORE FINAL THOUGHTS
 - DEPOSITIONS OF PHYSICIANS EXPAND THE SCOPE OF THE RANGE OF EVIDENCE
 - DEPOSITIONS ALLOW THE PARTIES TO CREATE A RECORD THAT RESULTS IN A MEDICAL REPORT THAT CONSTITUTES SUBSTANTIAL EVIDENCE AND IS BASED UPON REASONABLE MEDICAL PROBABILITY.

