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A Legal Update for the Claims Professional

ALMARAZ/GUZMAN: REBUTTING THE 2005 PDRS, THE CONTINUING SAGA . . .

By Jerry Rempel, Managing Attorney, Chico Office

In a surprise move that rocked the workers' compensation community, the WCAB has now issued Orders Granting Reconsideration of its original en banc decisions in Almaraz/Guzman and Ogilvie and allowing amicus briefs to be filed by anyone. We, of course, have no idea what the subsequent rulings will be. Pending the next set of determinations by the WCAB, these decisions appear to remain the law of the land. GLSR&T hopes that this article helps to further your understanding of Almaraz/Guzman.

In *Almaraz/Guzman*, the Board held that the 2005 PDRS is *prima facie* evidence of PD, and by definition, is rebuttable. However, the Board stated that while the AMA Guides' WPI component can be rebutted, doing so requires a showing that the PD level under the AMA Guides would be "**inequitable, disproportionate, and not a fair and accurate measure**" of the employee's true level of PD. Note the Board used "and", meaning the doctor must demonstrate that applying the Guides is: (1) inequitable, (2) disproportionate, (3) unfair, **and** (4) inaccurate.

This is not a wholesale abandonment of the AMA Guides. Rather, the language used suggests that limited factual circumstances will support rebuttal. Such a conclusion is bolstered by Labor Code 4660(d), which states that "the schedule shall promote consistency, uniformity, and objectivity." It can be anticipated, however, that rebuttal issues will predominate in cases where the employee cannot return to work and the permanent disability under the 2005 PDRS is low or nonexistent.

In its decision, the Board noted that a doctor can use other chapters of the Guides and other medical treatises to rebut the Guides, but the decision expressly precludes using criteria from the pre-2005 PDRS (i.e., work restrictions). Thus, this is not a return to the 1997 PDRS. The decision requires the doctor to explain **how and why** the Guides are inadequate and **how and why** some other method is more appropriate. To be substantial evidence, the doctor must provide the requisite **analysis**.

Recent seminars have provided insights into where the AMA Guides may be challenged by applicant attorneys. Defendants can expect efforts to increase carpal tunnel impairment using grip loss. It is likely that attempts will be made to combine various measures of lower extremity impairment, though the AMA Guides precludes such combination. Applicant attorneys may argue that ratings for pre-surgical knee or hip impairments should be comparable to impairment for joint replacements where the effects on the activities of daily living are similar. Also, defendants can expect applicant attorneys to push for greater use of impairment based upon gait derangement, such as limps or other lower extremity impairments that may require the use of canes or braces.

Additionally, look for reports discussing "work impairment" in terms of a percentage loss of function in a body region. For instance, the maximum WPI value of an upper extremity is 60%. A doctor could opine, for example, that a 50% loss of use of an arm constitutes a 30% WPI. The same approach could be used for a leg which has a maximum impairment of 40% WPI, or for the spine which arguably has a maximum impairment of 100% WPI. A doctor may attempt to use subjective complaints to arrive at the loss of function in a region, thereby bootstrapping subjective complaints back into the PDRS.

The limits placed upon rebuttal of the 2005 PDRS should not usher in a return to the days of subjective complaints rendering substantial levels of disability. However, when combined with the *Ogilvie* decision (rebutting the FEC component of the schedule), the *Almaraz/Guzman* decisions increase the danger of 100% cases. On the other hand, there may be circumstances where defendants can rebut the 2005 PDRS to reduce exposure, particularly in upper extremity and heart cases. Stay tuned for the effect, if any, on psychiatric disability under the GAF.

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Quarterly Review

This newsletter is prepared for the benefit of our clients as a general review of recent developments in workers' compensation, subrogation, civil and labor law. These articles should not be construed as legal advice or opinion, and are not meant as a substitute for the advice of counsel in individual cases.

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The Saga of Almaraz/Guzman (Continued from Page 1)

Clearly, apportionment now becomes more critical than ever. Under the recent Court of Appeal decision in *Benson*, separating disability among all injuries, specific and cumulative, is essential for the defense of claims, as is developing evidence of pre-existing and subsequent factors causing disability. In this article, we have only begun to explore the implications of these new decisions.

However, if you would like additional information about these decisions, we offer a power point presentation exploring ways to counter them. If your organization is interested in a presentation on these issues, please contact us. Rest assured that the GLSRT team of creative and aggressive attorneys is well prepared to fashion arguments opposing circumvention of the current system.

The Things We Did Last Quarter . . .

SUMMARY JUDGMENT IN WC: **Medy Beauchane** of the **Chico Office** hit two out of the park on a case in which the applicant, a head chef in a resort, filed multiple claims against multiple carriers. Because the employee could not identify a date of injury, our client delayed the case and turned to Medy for help in the discovery efforts. Using historical earmarks from applicant's personal history, Medy deposed the applicant and painstakingly narrowed the field of possible dates on which the injury might have occurred, prompting applicant to settle on a particular date of injury. Medy then filed a Petition for Dismissal using a Statute of Limitations defense. While applicant objected to the Petition for Dismissal and sought a hearing under §5813, Medy successfully argued that applicant would only require a hearing if he was going to rebut his previous testimony given under oath. The WCJ agreed and issued a Dismissal with Prejudice Order.

If that isn't enough, Medy then swatted away a co-defendant's Petition for Joinder on a small portion of a subsequent CT claim by depositing the AME who agreed that the injurious exposure was outside our client's period of coverage.

RETRO VRMA: **Daniel Hawkes** of our **San Diego Office** went to bat on a claim for over two years of retro-VRMA at the delay rate. Applicant's counsel claimed that the money was owed based on the argument that multiple Notices of Potential Entitlement (NOPE) should have been sent after the original one was sent at the 365-day point consistent with several physician's determination of eligibility. Part of the problem was that the NOPE allegedly did not contain a reply card, and applicant further argued that the NOPE was sent in "bad faith" because the employer later offered temporary modified duty. Fortunately, both the Rehabilitation Unit and the WCJ found that multiple notices were not required nor was there any proof that the original NOPE was fraudulent or sent in bad faith. Both applicant and his attorney took nothing.

SAVINGS: \$75,961 in addition to claimed \$5814 penalties and \$4650 penalties.

HIV CAUSATION: **Seema Savur** of our **San Jose Office** tackled a difficult AOE/COE issue involving a motel manager's claim of industrially contracted HIV as a result of a needle stick. Significant discovery efforts were again the key to this winning decision. While the WCJ acknowledged that it was "*possible*" for applicant to have contracted the disease from the needle-stick, the issue at stake was whether it was "*probable*". Medical records prior to the incident revealed a series of indicators suggesting that applicant was concerned about potential infection and sought tests three different times, then alleged that the medical records were inaccurate. The WCJ found the applicant's testimony not credible and the medical records accurate, resulting in a **Take Nothing** for our client.

RESTITUTION FOR FRAUD: Our client had been diligently working with the District Attorney to obtain a conviction of perjury, computer fraud and WC insurance fraud against the applicant, **Valerie Smith** of our **San Jose Office** went on to discover that the applicant had been working while receiving TTD for his injury and giving falsified smog certificates to unsuspecting motorists. Applicant subsequently pled guilty to all charges and served 8 months for perjury and computer fraud, after which **Valerie** successfully obtained a **Restitution Judgment in the amount of \$38,299** in addition to a civil enforcement provision to allow our client to sweep tax returns and garnish future wages.

NEW CASE NOTES

By Ryan Sapp, Novato Office

Continuing Jurisdiction over Awards – Labor Code Section 5804 – The Court of Appeal upheld a WCAB reversal of a WCJ decision to amend Applicant’s 3/17/97 award of temporary disability because there was no evidence the Applicant filed a petition to reopen for good cause within five years of the date of injury. The WCAB found that its jurisdiction to reopen lapsed, and the “WCJ’s vague recollection ‘that applicant raised the earnings issue around 2000 or earlier’ is not sufficient proof of the filing of a petition to reopen.” The Court of Appeal affirmed, concluding that Applicant’s failure to produce evidence supporting the WCAB’s continued jurisdiction, coupled with her affirmative conduct in leading to the WCJ’s alleged miscalculations in 1997, constituted sufficient evidence for the WCAB to rescind the amended award. *Priest v. WCAB (Michael Housepian) (October 21, 2008) 10 WCAB Rptr. 10,327.*

New vs. Old PD Schedule – Court of Appeal held that the 1997 Schedule for Rating Permanent Disabilities applied to a 4/26/04 industrial injury when Applicant received temporary disability benefits from 4/26/2004 through 9/3/2004, after which defendant discontinued paying temporary disability benefits and issued Labor Code §4061 notice based on applicant's release to return to work. Applicant worked for only one or two weeks, then was placed back on temporary disability by his treating physician and received additional temporary disability benefits from 11/5/2004 through at least 1/2/2005. *Service Rock Products, et al. v. WCAB (Robert Marquis) (September 11, 2008) 73 Cal. Comp. Cas. 1307 (writ denied).*

Vocational Rehabilitation – VRMA Credit - Court of Appeal annulled a WCAB decision and reinstated the WCJ's decision, applying the reasoning in *Gamble* to hold that vocational rehabilitation maintenance allowance is not a wage replacement benefit akin to temporary disability or vocational rehabilitation temporary disability. Therefore, there is no credit allowed against vocational rehabilitation maintenance allowance payments for wages earned during same period Applicant received those benefits. *Medrano v. WCAB (Aquabrew, Inc., SCIF) (September 25, 2008) 167 Cal. App 4th 232.*

APPELLATE CASE OF THE QUARTER: The *Aguilar* Factor: *LeBoeuf*, Apportionment & Vocational Rehabilitation

By Teresa Bissner, Los Angeles Office

As the concurring opinion of Justice McAdams surmises, the case of *Hertz Corporation v. WCAB* creates an “Aguilar Factor” to the *LeBoeuf* case. The “Aguilar Factor” clarifies when vocational rehabilitation non-feasibility is based, in part, on pre-existing, non-industrial factors, such as the inability to read and write, the employer is not liable for additional permanent disability predicated upon these pre-existing non-industrial factors.

Mr. Aguilar’s work related injuries produced a 60% PD rating. Although the orthopedic disability did not preclude the employee from participating in the open labor market, the employee’s attorney brought in a vocational rehabilitation expert who testified that the physical disability, combined with Mr. Aguilar’s limited language skills and education, would render him totally non-feasible.

After the Trial Court awarded Mr. Aguilar 100% PD and the WCAB denied the Petition for Reconsideration, the employer filed a Petition for Writ of Review contending that it should not have been held liable for total permanent disability benefits where the determination that the injured worker was not feasible for vocational rehabilitation was due, in part, to completely non-industrial causes. The appellate court gave credence to the employer’s contention that there should be a distinction between a finding of non-feasibility due to the physical effects of a worker’s industrial injury and the inability to benefit from vocational rehabilitation services for reasons unrelated to that injury.

It was also noted by the Court that in *LeBoeuf* the applicant developed an anxiety neurosis as a result of the industrial injury, causing vocational rehabilitation to be non-feasible. In *LeBoeuf*, but for the industrial injury, the applicant would have been capable of participating in vocational rehabilitation. In *Aguilar*, but for the industrial injury, the employee would have remained ineligible for vocational rehabilitation despite the industrial injury. Therein lies the discrepancy and provides the foundation for the future line of defense in similar situations.

(Continued on Page 4)

The case of *Aguilar* is directly supported through current apportionment statutes and case law. The plain language of the newly revised Labor Code Section 4663 and 4664 eliminate the bar against apportionment based on pathology and asymptomatic causes such that now, based on these revised sections and the holdings of *Brodie*, apportionment of permanent disability shall be based on causation.

Further expanding this conclusion is *LeBoeuf* itself which, as summarized by the Court, holds that, where an employee is found non-feasible for rehabilitation due to disability directly caused by an industrial injury or injuries, that fact must be taken into account in the employee's permanent disability rating. However, as *Aguilar* clarifies, *LeBoeuf* does not hold that an employee's permanent disability rating must reflect a finding of non-feasibility where the non-feasibility finding is due in part to **pre-existing non-industrial factors or conditions**. Therefore, the conclusion supported by case and statutory law, and detailed through *Aguilar*, is that an employer may only be found liable for permanent disability directly caused by the injured employee's industrial injury.

In his concurrence, Justice McAdams agreed with the outcome of the holding but cautioned this holding should be read as fact specific. He worries that this case creates issues to be raised based on an applicant's intellectual capabilities, educational opportunities or cultural background. Justice McAdams emphasizes that the holding is narrowly to be "non-industrial factors related to non-feasibility for vocational rehabilitation were not and should not be considered to be a cause of permanent disability".

THE REGULATORY CORNER: *New QME Rules Effective 2/17/09!*

By Peggy Sugarman, GLSR&T Training Director

The DWC has adopted new regulations governing the Qualified Medical Evaluator process, including some new and updated forms. All references to the Industrial Medical Council, eliminated by **SB 228** and whose functions were transferred to the Administrative Director, now bear the name of the DWC Medical Unit.

The medical dispute resolution process for represented workers, enacted in **SB 899**, now have new process requirements for requesting a QME panel. In addition, the regulations include some tools for resolving common problems that can cause delays.

Here are some highlights:

- There are new forms with updated information attachments to request a QME Panel. Use the §105 form for unrepresented cases and §106 form for represented cases.
- The rules provide for a definite preference for selecting a QME in the same specialty as the treating doctor. For example, if in a represented case the Medical Unit receives a panel request from both parties on the same day that ask for different specialties, the Medical Unit will select the specialty of the treating doctor or, if both sides request something other than the PTP specialty, the Medical Unit will make the selection. Otherwise, the first one selects the specialty which, if different than the PTP specialty, must be accompanied by supporting documentation.
- The Medical Unit has self-imposed a 30 day time frame to issue a QME panel in represented cases, after which the parties may request an order from a judge. For unrepresented cases, panels are to issue within 5 working days.
- The Medical Unit will not issue a panel to resolve a contested claim if the 90 day period for denying liability has passed unless you present them with an order from a WCJ that the presumed compensability has been rebutted and that a QME panel should be issued.
- All parties must communicate to a QME, Agreed QME or AME simultaneously and in writing.
- A QME must schedule an appointment within 60 days of request or within 90 days of the initial request if parties decide that they will waive their right to a replacement QME.
- A QME, Agreed QME or AME is required to submit the evaluation report within 30 days after the appointment or request and obtain approval for an extension from the Medical Unit. Otherwise, either party may request a replacement QME.
- Supplemental reports must be submitted within 60 days of request, with a 30 day extension if the parties agree.

The new rules and forms can be found on the DWC Website: www.dir.ca.gov/dwc/forms.html or by calling 1-800-794-6900.

QUOTE OF THE QUARTER

"With the sunset of the vocational rehabilitation statutes, hundreds of DORs flooded the Los Angeles WCAB and caused the Electronic Adjudication Management System to experience a nervous breakdown."

Los Angeles Presiding Judge Jorja Frank at a public meeting on consolidation of VR Cases, 1/30/09

LEGISLATIVE NEWS

By Peggy Sugarman, Training Director

As the Legislature continues to struggle with California's massive budget deficit, there are two interesting bills that have been introduced in the Legislature for the 2010 session.

RETURN TO WORK: Once again, Senator Gil Cedillo has introduced a bill to deal with Supplemental Job Displacement Vouchers. This is the third attempt, the first of which was vetoed by Governor Schwarzenegger but softened by language that identified return-to-work as an important issue. As such, the Governor instructed the Administrative Director to convene a work-group to try to develop a consensus. Ms. Nevans did so and involved all interest groups to attempt a solution. Such a resolution was not completely successful but some progress was made that will be continued as the parties attempt to work through some of the sticking points.

As introduced, **SB 3** would provide for a supplemental job displacement voucher to workers injured on or after 1/1/10 in the amount of \$6,000 as opposed to the present tiered amount based on the percentage of Permanent Disability, absent a timely qualified offer of reemployment. The bill would change the timing of the offer from 60 days after the termination of TTD to 60 days from **receipt** of an admissible P & S report from the PTP, QME or AME, potentially solving that knotty problem of trying to offer reemployment where the termination of TTD may not coincide with the P & S date. The bill specifies that "all conditions" must be P & S in order to trigger the beginning of the 60 day time frame. Should the offer not be made within this time frame, a worker would be able to access the voucher at that time.

This bill would also expand the potential uses of the voucher money to include related expenses, such as licensing fees, tools and other necessary equipment.

CANCER PRESUMPTION: **AB 128 (Coto)** would amend Labor Code §3212.1 and extend the time in which the cancer presumption would apply to firefighters, police and other safety personnel. Currently, the presumption provides these members with three months per year of service after termination of service. This bill would extend that presumption to one year per year of service. This bill is referred to as the William Dallas Jones Act in remembrance of the long-time firefighter, labor union leader and former Director of the State Office of Emergency Services under both Governors Davis and Schwarzenegger. William Dallas Jones died of cancer in 2008.

GLSR&T IN THE COMMUNITY! *Did you know . . .*

QME TRAINING: Training Director **Peggy Sugarman** assisted the California Society of Industrial Medicine & Surgery in a training conference for QMEs. As part of the panel along side DWC Legal Counsel Suzanne Marria, Peggy delivered an overview of the new Court Administrator Regulations and the EAMS form filing requirements for QME physicians in Anaheim and Oakland in January, 2009.

AWCP CONFERENCE ON APRIL 7, 2009: THE Association of

Workers' Compensation Professionals held a conference sponsored in part by GLSR&T in Walnut Creek. The program featured WCAB Commissioners **Al Moresi** and **Ronnie Caplane**, and **Acting DWC AD and Chief Counsel Destie Overpeck**. A review of the new QME regulations was provided by DWC Medical Unit Manager **Suzanne Honor-Vangarov** followed by a lively panel discussion moderated by GLSR&T's Training Director, Peggy Sugarman. Past President of CAAA **Sue Borg** and GLSR&T's **Kathleen Roberts** of the San Jose office discussed strategies with the audience on how to live with the new regulations. An entertaining case law update was provided by **Ted Richards** and **Stewart Reubens** of GLSR&T's Sacramento and Novato offices.

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IN THE NEXT ISSUE

**APPORTIONMENT UNDER §4664:
ARE THE "CONCLUSIVE PRESUMPTIONS"
REALLY CONCLUSIVE?**

ANNOUNCEMENTS

Tony Fink is pleased to announce the hiring of **Amy Vanderwood** for his **Los Angeles** team. Ms. Vanderwood began her legal career as a Judicial Clerk in Superior Court for Kitsap County in Washington and brings experience in California WC defense and civil litigation. Amy graduated *Magna Cum Laude* from Southwestern University School of Law in Los Angeles in 2001.

Kimberly Dyess welcomes **Charles Hoffman** to the **San Diego** office. Charles returns to GLSR&T after three years representing clients in the civil litigation arena. Formerly a GLSR&T attorney in the Riverside office, Charles also brings civil litigation experience. He has studied in London, Paris and Florence and obtained an Intellectual Property Specialization Certification *with distinction*.

Next is a warm welcome to **Michelle Shabo**, who also joins **Kimberly Dyess** in **San Diego**. Michelle worked as a law clerk in the Ventura County District Attorney's office and served as a research assistant at the Nova Southeastern University, Shepard Broad Law Center in Florida before beginning her career in the area of criminal law. She received honors for her work as Articles Editor and Senior Staff Member of the Nova Law Review.

David Chun welcomes **Nicholas Webber** to the **Fresno** team. Nicholas has represented employers in labor and employment law, was a staff attorney for the SEIU Union Local 1000 and has worked as a law clerk for the Santa Clara District Attorney's office in San Jose, CA. He spent the summer of 1999 Washington, D.C. where he interned at the White House and subsequently spent the summer of 2001 in Thailand researching various legal issues.

Stewart Reubens welcomes two new attorneys to the **Novato** team. **Ryan Sapp** comes to GLSR&T with over four years of WC experience as a both a defense attorney and law clerk, prior to which he was a research assistant for one of his law professors at the University of San Francisco School of Law. He received a CALI award in Antitrust and is a lifetime member of Phi Theta Kappa Honors. Ryan also served in the US Air Force Reserves for seven years.

Also joining **Stewart's** team in **Novato** is **Marco Acosta**, who comes with over 10 years of experience in the California WC system as a rehabilitation counselor. His legal experience also includes administrative law, family law, criminal defense and general civil litigation. Marco also manages the intellectual property rights for the literary works of Oscar Zeta Acosta, whose writings in the field of Chicano literature are often required readings in university classes.

Joanne Thomas is pleased to welcome **Kimberly Mall** who joins the **Riverside** team. Kimberly brings two years of WC legal experience prior to joining GLSR&T. She also completed her MBA at St. Mary's College prior to entering law school at the University of La Verne College of Law in Ontario. She received a CALI award in Legal Writing and Analysis in 2003.

Aaron Hemmings welcomes **Anthony Cho** to the **Ventura** office. His legal background includes family law, estate planning and probate, immigration and civil law. Anthony received his *Juris Doctor* from Ventura College of Law where he also completed a Certificate of Concentration in Business Law. He is conversant in the Korean language.

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