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ALMARAZ/GUZMAN: REBUTTING THE AMA GUIDES

By Jerry Rempel, Esq., Chico Office

INSIDE THIS ISSUE

Almaraz/Guzman: Rebutting the AMA Guides 1
New Case Notes 2
Appellate Case of the Quarter – *XYZZX SJO2 v. Subsequent Injuries Benefit Trust Fund* 3
Legislative News 3
The Regulatory Corner – Updated Medical Treatment Guidelines Effective 7/18/09 4
GLSR&T In The Community! 4
The Things We Did Last Quarter 5
Announcements 6

You may have heard recent exclamations by applicant's attorneys that, "We're back in business!" The reason for this exuberance is that the WCAB recently released en banc decisions that will have a significant impact on the workers' compensation community and the practice of law in this area for the foreseeable future. These cases are *Almaraz/Guzman I and Almaraz/Guzman II*. In both of these consolidated decisions, the Board held that the 2005 PDRS is *prima facie* evidence of PD and by definition is, therefore, rebuttable.

The Board held that the WPI component obtained by using the AMA Guides can be rebutted. In the holding in *Almaraz/Guzman I* the Board stated that the doctor must show 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 and used the terms "permanent disability" and "impairment" interchangeably.

In *Almaraz/Guzman II*, the Board partially overruled its prior holding. No longer do they state that the doctor must show that the PD level under the AMA Guides would be "inequitable, disproportionate, and not a fair and accurate measure." Now, the Board directs the examining physician to address "impairment" only, allowing that the examining "***physician may use any chapter, table, or method in the Guides that most accurately reflects the injured employee's impairment***." This new standard in *Almaraz/Guzman II* is consistent with LC §4660(b)(1).

Also, consistent with §4660, the Board stated that the examining physician must stay within the four corners of the AMA Guides, which overruled their prior decision that allowed the doctor to rebut the Guides by use of other treatises. This has lead many in the community to state that *Almaraz/Guzman II* is a "win" for the defense. I couldn't disagree more.

First, the vast majority of "rebuttal reports" were not going outside the AMA Guides because there was no compelling reason for them to do so. If a doctor has the ability to use the AMA Guides in any way he/she deems necessary to achieve the desired level of impairment, then why would a doctor go anywhere else? For example, we have seen reports where the examining doctor provides impairment for RSD, causalgia, peripheral neuropathy, brain lesions (and the list goes on) when there are no such diagnoses.

It should be clearly understood that the AMA Guides is a consensus-based document, yet the Board's decision in *Almaraz/Guzman II* allows the Guides to be used in a manner inconsistent with the consensus upon which it is based. Further, the Board stated that the examining physician must not use the Guides in such a way as to simply achieve a desired result. Query: Why would a doctor use the Guides in a way that it was not intended, unless the doctor wanted to achieve a desired result?

Following *Almaraz/Guzman I*, the consensus was that a doctor would have to provide a "straight rating." It cannot be stressed enough that the Guides are *prima facie* evidence, and they are *presumed correct* until they are rebutted. As such, the doctor ***must***, under Labor Code §4660(b)(1), address the WPI using the AMA Guides as it was intended. Only then can the doctor attempt to rebut the straight rating.

The Board stated that the doctor can use other chapters of the Guides to rebut the straight rating, but they expressly precluded using pre-2005 criteria (i.e. work restrictions). However, in citing *Escobedo v. Marshalls*, they explained that the Guides are presumed to be accurate, and that the doctor has to explain ***how and why*** the Guides are inadequate in the particular case and ***how and why*** some other method is more appropriate. As such, the doctor's report must be substantial evidence. In so doing, the doctor must provide the requisite ***analysis*** and not just some boiler plate language in order to rebut the Guides.

(Continued on Page 2)

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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For example, a doctor may be able to use various parts of the Guide's Central and Peripheral Nervous System chapter by analogy, where the ADL's are so significantly affected as to warrant it. Such may be the case where the injured worker has no ratable impairment resulting from a carpal tunnel injury under the upper extremity chapter, but the doctor may use the criteria for upper extremities related to the central nervous system in section 13.6. Or, the doctor may state that a torn meniscus has affected the ADL's akin to a knee replacement and add in the station and gate disorders under section 13.5 to the WPI.

Additionally, we may see arguments alleging loss in a certain percentage of the use of a particular body part, with a resulting WPI percentage assigned. Consider that an upper extremity has a maximum value of 60% WPI, a lower extremity has 40% and the spine is 0-100%. As such, if the injured worker has lost 50% of the use of the upper extremity, 50% of the use of the lower extremity, and 50% of the use of the spine, we could see 30%, 20% and 50% WPI assigned respectively.

I do not think that we have returned to the days of pure subjective complaints rendering substantial levels of disability. However, with the application of the *Ogilvie* decisions (rebutting the FEC component of the schedule), the applicant's attorneys may very well be back in business, and we will likely see a return of the 100% case. That said, defendants may in turn be able to use these cases to reduce exposure.

Since the clear legislative intent of the PDRS is to promote "uniformity, consistency and objectivity", and the doctor's report must be substantial evidence, the approach must be to closely scrutinize the doctor's opinion and to look for all of these elements:

1. A straight rating in the report.
2. A convincing explanation of ***how*** and ***why*** the alternative rating is more adequate.
3. Clear statements citing the objective medical evidence relied upon in reaching the alternate rating.

We are only able to touch on this subject in this article. However, if your organization is interested in a presentation regarding these very important issues, including the *Ogilvie* decision, please contact *jrempel@grancell-law.com* or *psugarman@grancell-law.com*.

NEW CASE NOTES

By Zane Uribarri, Inland Empire Office

Don't Bring Just A Bill to a Lien Fight. On July 29, 2009, the California Supreme Court denied review of the *Tapia* case which held that bills alone are insufficient to constitute evidence that the amount charged for medical services is reasonable. Lien claimant asserted that, under *Kunz,* the billing and lien claim information constituted prima facie evidence of a reasonable fee for services. Defendant did not present counter evidence regarding the value of the services provided by the lien claimant and simply argued that the fee claimed was unreasonable. The Court of Appeal held that the lien claimant has "the burden of proving the reasonableness of its charges." Even "absent rebuttal evidence from defendant, the amount billed would not have been accepted if it was unreasonable on its face." (*Tapia v. Skill Master Staffing* [2008] 73 CCC 1338).

Just Because It's Gone Does Not Mean Apportionment Is Not There. Applicant with a preexisting arthritic condition had total knee replacement surgery which the AME concluded was 50% due to the arthritis and 50% due to the industrial injury. The WCJ found no basis for apportionment as the arthritis had been eliminated. On appeal, the WCAB reversed and noted that "Apportionment of permanent disability shall be based on causation" pursuant to SB 899 and as discussed in *Brodie* and *Escobedo*. The WCAB found that the applicant's permanent disability was 50% as a result of his arthritis. The fact that the remaining work restrictions were due to his knee replacement did not change the fact that 50% of the cause for the knee replacement was the non-industrial arthritis. (*Williams v. WCAB*, 74 CCC 88).

(Continued on Page 3)

Judge Cannot Award Credit Where Credit Is Not Due. The Court of Appeal reversed a WCAB decision which limited the credit an employer may receive based on overpaid TTD benefits. The employer continued to provide TTD benefits to the applicant through March 2007 even though the treating physician said the applicant was TTD only through June 2006. The AME in February 2007 declared the applicant P&S as of August 2005. The employer sought credit for TTD overpayment back to August 2005. The Court of Appeal would not allow the credit since the AME report did not constitute a valid, supportable P&S date based on the medical evidence. I know that we will all look forward to the WCAB decision on remand. (*JC Penny v. WCAB,* opinion issued July 7, 2009, WCC 35402009 CA).

APPELLATE CASE OF THE QUARTER: COLA'S AND LIFE PENSION CASES
XYZZX SJO2 v. Subsequent Injuries Benefit Trust Fund

By David Chun, Esq. Managing Shareholder, Fresno/Bakersfield Office

Employers and insurance carriers are eagerly awaiting the 6th District Court of Appeal's decision in the above-titled case because the holding may substantially increase reserves and actual costs on 100% permanent total disability (PTD) and life pension (LP) cases. On July 1, 2009, the 6th DCA granted the Department of Industrial Relations' petition for writ of review of a WCAB panel decision finding in applicant's favor.

The WCAB panel decision holds that cost-of-living adjustments (COLA) for LP and PTD cases become effective the first January immediately following the date of injury, not a later date as interpreted by most defense attorneys. The panel's rationale is that the Legislature intended to protect an injured worker's LP and PTD benefits from inflation in cases where there is substantial time that passes between adjudication of entitlement to such benefits and the time when said benefits are actually paid. According to the panel, evidence that its holding is correct is in the statute itself.

The defendant in XYZZX, and most defense attorneys, argue that COLA adjustments become effective the first January after payments are due, which could be many years after the date of injury. Some cases have adopted a compromise approach of having COLA adjustments become effective the first January after an injury becomes permanent and stationary. There could be a substantial cost differential depending on which way COLA is calculated.

The dispute essentially is based on differing interpretations of Labor Code Section 4659(c), which states:

> For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the "state average weekly wage" as compared to the prior year.

The defendant in XYZZX asserts that the WCAB panel misinterpreted 4659(c) and the Legislature's intent. Note that 4659(c) does not specify when COLA increases are to become effective, but it does indicate that an employee who becomes "entitled" to LP or PTD benefits shall have "that payment" increased annually. The 6th DCA will have to interpret if "that payment" means those that are actually due and owing or those that will become due and owing sometime in the future. The DCA will also have to interpret if "entitled" contemplates a date when an applicant is supposed to start receiving LP or PTD benefits or contemplates going back to the date of injury (i.e. becoming "entitled" to such benefits at the time of injury although the determination for such entitlement comes later through medical reports, trial etc.).

LEGISLATIVE NEWS

By Peggy Sugarman, Training Director

While most of the proposed workers' compensation legislation either failed to meet legislative deadlines or were held up in Appropriations – that committee where bills that are likely to have a fiscal impact on the state are heard after the policy committees – one bipartisan bill did reach the governor's desk and seems is likely to be signed.

Commonly referred to as the "Dollar Tree" bill (AB 1093, Yamada), this bill will ensure the compensability of a workplace homicide where the murderer is motivated by his or her beliefs regarding the race sex, race, color, religion, ancestry, national origin, marital status, or sexual orientation of the victim.

Bills that failed to survive include the extension of the blood-borne pathogens and neck/back injury presumptions for hospital workers, a requirement that UR physicians be licensed to practice in California, elimination of apportionment based on age, gender or other risk factors, and the expansion of the firefighter cancer presumption.

THE REGULATORY CORNER: Med Treatment Guidelines – 7/18/09

By Peggy Sugarman, GLSR&T Training Director

Since 2003, when ACOEM was the statutorily imposed medical treatment guideline pending adoption of the Administrative Director's Medical Treatment Utilization Schedule (MTUS), claims administrators have had a guidepost by which the efficacy of medical treatment recommendations could be evaluated. The ACOEM acronym is still largely synonymous with the established treatment guidelines as opposed to the more appropriate reference to the "MTUS". Effective 7/18/09, the new regulations incorporate specific *additional* guidelines for medical treatment on or after the effective date.

The dominance of ACOEM has now been lessened by the adoption of postsurgical and physical medicine portions of the Work Loss Data Institute's ODG/Treatment guidelines to address the treatment of chronic pain and the use of physical medicine in postsurgical cases. Amendments to the ODG/Treatment guidelines were made based on the consensus work of the Medical Evidence Evaluation Committee appointed by the Administrative Director and were subjected to a rigorous rulemaking process.

While the Appendices of these regulations are daunting in length, the text of the regulations from CCR §9792.20 *et seq.* is concise and formulaic. ACOEM Chapters 1, 2, 3, and 5 that address their general approach to the treatment of occupational injuries in terms of assessment, disability prevention and disability management were adopted without change or amendment. [*Note the absence of ACOEM's Chapter 4 on "Work Relatedness" in the adopted regulations*.]

The ACOEM Chapters dealing with the treatment of specific body parts were adopted in general from the familiar 2nd edition with the exception of the Elbow Chapter which was replaced in the regulations by ACOEM's revised 2007 Elbow guideline. The treatment and practice guidelines in each of these sections may be superseded by other guidelines where:

- Acupuncture is appropriate and is being considered, in which case the acupuncture guidelines in CCR §9792.24.1 apply;
- Surgery has been performed, in which case the postsurgical treatment guidelines in CCR §9792.24.3 apply; and/or
- Recovery has not taken place with respect to pain by the "anticipated time of healing", in which case the chronic pain guidelines apply.

Because treatment decisions can only be questioned through the UR process, you may hesitate to take precious time to examine all 127 pages of the adopted Chronic Pain Guidelines. However, I highly recommend going through the first nine pages as an overview of this complex issue. After that, you can peruse at your leisure the various treatments and medications that are discussed, including some of the most costly and/or controversial treatments that have been commonplace in the workers' compensation system. Laid out in alphabetical order, you can see what they say about such treatments as the use of the drug *Actiq (Fentanyl lollipops)*, implantable drug delivery systems, the appropriateness of functional MRIs, epidural steroid injections, and the use of interdisciplinary pain/rehabilitation programs that emphasize functional restoration. For example, did you know that . . .

- *Fentanyl* is ***eighty times*** more potent than morphine?
- Exercise is generally recommended at the start of any treatment or rehabilitation program?
- There is "considerable evidence" for the efficacy of mind-body therapies such as yoga for motivated patients?

You can find the regulations on the DWC Website at: http://www.dir.ca.gov/dwc/dwcRulemaking.html

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

GLSR&T is now a certified provider of continuing education with the Department of Insurance. Our first program under this certification will be provided by **Medy Beauchane, Esq**. of the **Chico** office at the Big I Day seminar for property and casualty brokers in Sacramento on October 13, 2009. The course is titled: ***Cal/OSHA Enforcement and Appeals: What are your Rights?***

Our lead article in our last issue of the GLSR&T Quarterly caught the attention of Robin Kobayashi, the site coordinator for the LexisNexis Workers' Compensation Law Center. ***"Apportionment Under §4664: Are the 'Conclusive Presumptions' Really Conclusive?"*** by **Stewart Reubens** was published to their site on 6/19/09. Stewart is the Managing Shareholder of the Greater San Francisco office. To view it and other articles on California Workers' Compensation, go to: http://law.lexisnexis.com/practiceareas/Workers-Compensation-Law-Blog/Workers-Compensation/Apportionment-Under-Calif-Labor-Code-Sec-4664-Are-the-Conclusive-Presumptions-Really-Conclusive.

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Kimberly Dyess' engaging style continues to keep her busy on the speaker circuit. Her latest speech ***Recent Work Comp Updates and Case Law*** was given to the Association of Insurance Professionals on August 11, 2009 in San Diego. Kim is the Branch Managing Attorney for GLSR&T in San Diego.

GLSR&T's Training Director **Peggy Sugarman** is the Association of Workers' Compensation Professionals' Educational Program Chair for the upcoming Annual Fall Conference in Sacramento on October 19, 2009. The theme of the program ***"It's Not Just About Workers' Compensation Anymore"*** will tackle the complexities in today's world of workers' compensation by featuring a diverse panel of experts discussing Return to Work/FEHA and ADA that includes Mark Webb from Employer's Direct. The keynote speaker is Michael Nolan of the renowned California Workers' Compensation Institute. You will also hear an update on the DWC from Chief Counsel and Acting Administrative Director Destie Overpeck, learn about the latest medical issues from Peter Yip, M.D. of Kaiser's Occupational Health Program and have fun as GLSR&T's **Ted Richards** and **Stewart Reubens** go to great lengths to keep you laughing while the give the case law update. Mark your calendars for October 19, 2009 and go to www.awcp.org for more information!

The Things We Did Last Quarter . . .

A management employee, trained in proper work-injury reporting, filed a claim for injuries to her spine and psyche that were suspicious at the outset. The fact that she had been involuntarily terminated for falsifying her time card and waited until after her termination to report the injury led **Julie Feng** of **Los Angeles** to successfully employ the §3600(a)(10) post-termination defense. Armed with substantial medical evidence that failed to support industrial causation, Julie was able to show that the applicant was unhappy with the severance decision and succeeded in getting a **TAKE NOTHING**. The Court's decision resulted in savings for substantial PD, spinal surgery and future medical care. **Estimated Savings: $100,000+.**

GLSR&T Celebrates 30 Years of Service to the Workers' Compensation Community!

Founded on July 13, 1979 by Norin T. Grancell, Esq., the Law Offices of Grancell, Lebovitz, Stander, Reubens and Thomas has maintained a thriving practice serving employers and insurers in legal defense arising out of workers' compensation cases, including subrogation, Longshore & Harbor Workers' defense, maritime and other matters relating to it.

We deeply appreciate our partnership with you. Thank you for your patronage as we look forward to the next 30 years!

Norin T. Grancell, Founding Shareholder

Jennifer Oldham of the **Fresno/Bakersfield** office faced three lien claimants for liens filed by a surgery center and two physicians. In this case, a well-known AME had determined that some limited spinal injections would be reasonable as part of applicant's future medical care but ultimately found that the treatment was no longer supported by the evidence. Defendants dutifully paid for the number of treatments recommended by the AME and appropriately denied the rest. In addition to providing more than the recommended number of injections, lien claimants continued to attempt to circumvent the legal process at trial, including failing to support fees higher than the OMFS allows per the *Kuntz* decision. Ms. Oldham's defense resulted in a **Take Nothing Further** for our client. **Estimated Savings: Up to $54,982.**

Daniel Hawkes of **the GLSR&T San Diego** office showed a recalcitrant dentist that the WC laws do have teeth. While defendants had stipulated to future medical care for the body part "teeth", it wasn't clear that the applicant's "dry mouth" was related to the industrial injury. The dentist's refusal to provide additional information as required by the UR physician resulted in a substantial delay in the provision of the treatment. Undaunted by the threats of penalties and interest, Mr. Hawkes convinced the trial judge that the delays were perfectly reasonable, resulting in the WCJ's opinion which we quote: ". . *the preponderance of the evidence establishes that any delays in treatment were due to the failure of the doctors in this matter to properly request the consultations and treatment in writing as required Title 8 of the CA Code of regulations sections 9792.6 and 9785."*
Savings: $9,000 in AA fees plus potential penalties of $11,250.

ANNOUNCEMENTS

Please join **Joanne Thomas** and all of the GLSR&T Shareholders in congratulating **Kimberly Dyess,** Branch Manager of our **San Diego Office,** on her appointment by the California State Bar's Board of Governors to the Workers Compensation Law Advisory Commission. Her appointment is effective 9/13/09 – 2012. Kim is an active participant in the workers' compensation community as a presenter and to such organizations as RIMS, AIP and AWCP. Kim also participates frequently in many charity events. Way to go, Kim!

Managing Shareholder Ted Richards welcomes **Hetal Naik** to his legal team in Sacramento. Hetal graduated from San Francisco State University with a Bachelor's degree in Political Science and completed her Juris Doctorate from the University of Northern California, Lorenzo Patino School of Law in 2006. While she is new to the world of workers' compensation, Hetal comes to GLSR&T with experience as a legislative assistant tracking legislation and summarizing regulations for the Randstad/Hispanic Association of Colleges and Universities and has worked as a paralegal.

Managing Shareholder Tim Kinsey announces the addition of **Scott Ashby** to his legal team in the **Orange County** office. Scott attended California State University at Long Beach where he received a Bachelor's Degree with a dual major in Creative Writing and Film & Electronic Arts. He went on to receive his Juris Doctorate from Chapman University School of Law with emphases in Environmental, Land Use, and Real Estate Law. While an undergraduate, Scott was a staff writer for the *Long Beach Union. He* continued to use his writing skills in law school where he was a staff writer for the *Chapman Courier.* Scott was also a member of the Entertainment and Sports Law Society, and brings work experience as a legal research assistant.

Managing Shareholder Stewart Reubens is proud to announce that Katie Siemont has returned to the **Greater San Francisco** office after her maternity leave. Katie and her husband are proud parents of twin baby girls, born in December, 2008. Both parents and babies are doing well!

Managing Shareholder Tony Fink welcomes **Laura Speakman** back to work in the greater **Los Angeles** office as of September 1, 2009.

IN THE NEXT ISSUE

THE PROPER METHOD FOR ACCESSING SENSITIVE WCAB RECORDS

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