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**"Alert: Bradford & Barthel to Counter WCAB Undermining of AMAs/PDRS"**

Bradford & Barthel, LLP is the lead defense firm in what is likely the most important case of the decade: Almaraz/Guzman!

**THE BAD NEWS!**

This past Tuesday, 2/3/09, the WCAB attacked—and arguably destroyed—one of the most significant aspects of SB 899.

As you will recall, SB 899 did away with PD awards based on subjective complaints and work restrictions, both of which were often manipulated and misused to justify PD awards far in excess of anything rationally related to an applicant's true condition. Replacing this confusing and too easily abused methodology was—per Labor §4660—the “*AMA Guides to the Evaluation of Permanent Impairment*, (5<sup>th</sup>).” By applying the *AMA Guides*, California was at last able to both control PD (awards, on average, decreased in the neighborhood of 50%) and—finally—ensure that PD assessments follow a protocol that provides the required “consistency, uniformity, and objectivity.” [See LC §4660(d)]

This system has worked well since January 1, 2005.

This system is now under attack by the WCAB Commissioners!

In the consolidated cases of Almaraz v. SCIF et al. and Guzman v. Milpitas Unified School District, the WCAB--by a vote of 7 to 0--held that:

- 1) the *AMA Guides*, when used to assess impairment, is rebuttable;
- 2) the *AMA Guides* is rebutted by showing that an impairment rating based on the *AMA Guides* results in a PD permanent disability award that is “inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability”; and
- 3) when a rating based on the *AMA Guides* has been rebutted, the WCAB may make an impairment determination that considers medical opinions that are “not based or are only partially based on the *AMA Guides*.”

In short, the method upon which all of us have relied since SB 899 to (a) determine reserves, and (b) assess the PD value of a case, is—as of the issuance of Almaraz/Guzman—fully susceptible to attack.

Almaraz/Guzman is as significant—or probably *more* significant—for what it is does *not* tell us:

- (1) Who is to determine whether a PD award based on the AMA *Guides* is “inequitable, disproportionate, and not a fair and accurate measure of the employee’s permanent disability”? The WCJ? Physician? VR expert?
- (2) By what yardstick are we to measure whether an AMA *Guides*-based PD award is equitable, proportionate and fair?
- (3) How much can we expect PD awards to increase as a result of the judicial activism found in Almaraz/Guzman?
- (4) How dramatically can we expect litigation costs to sky-rocket via various methods CAAA will now utilize to attack AMA *Guides*-based PD assessments (e.g., supplemental physician reports and depositions, VR expert reports and depositions, etc)?
- (5) How do we now settle cases given that the yardstick by which we measure PD is now in flux?
- (6) How do WCJs assess whether settlements are adequate given the lack of guidance Almaraz/Guzman provides in terms of assessing PD adequacy?

How important is this case?

In a Workcompcentral article that issued on 2/5/09 (“AMA Rebuttal Decision Raises New Questions”), a defense attorney based in San Jose, said, "My personal opinion is that it is the single, most important, significant SB 899 case since SB 899 was adopted in the middle of 2004...The board saying that the whole person impairment (WPI) is alone subject to rebuttal, is a development of enormous significance."

### **THE GOOD NEWS!**

B&B’s own John “Jack” Costello was the defense attorney in Guzman v. Milpitas Unified School District!

Mr. Costello was *completely* successful in his defense of this matter at the SJO Board!

Mr. Costello’s successes included the following:

- a. The DEU, via cross-examination, wholly agreed with Mr. Costello’s interpretation of applicable statutory requirements;
- b. The WCJ issued a defense Finding & Award that, like the DEU, completely agreed with Mr. Costello’s arguments;
- c. When Applicant’s Counsel filed his Petition for Reconsideration, the WCJ drafted a Report & Recommendation that continued to support Mr. Costello’s arguments.

More good news!

Bradford & Barthel, LLP's "Reconsideration and Writ Department" has taken the lead to overturn Almaraz/Guzman.

The fight is led by Mr. Louis Larres, the Managing Attorney of B&B's Fresno office, who is working in conjunction with Donald Barthel, Christopher Stettler, Gregory Fletcher, Kent Ball, Amir Adil and J. Stephen Donovan.

Given Bradford & Barthel's industry-leading focus on the AMA *Guides* [recall that (a) over the last several years, Don Barthel has instructed workers compensation professionals throughout the U.S. on proper application of the AMA *Guides*; (b) in 2005 Bradford & Barthel established the "Rating & File Consultation Department" to assist clients in assessing whether an AMA-based physician's report is accurate; and (c) Don Barthel has worked as a Reviewer of the AMA *Guides* (6<sup>th</sup>) and is the only non-physician Board Member of the American Board of Independent Medical Examiners (ABIME)], we believe B&B is *perfectly situated* to take this matter to the Court of Appeals.

If you have any questions and/or suggestions regarding the defense of this matter, please contact Don Barthel [(916) 996-1263; ext.1125; [dbarthel@bradfordbarthel.com](mailto:dbarthel@bradfordbarthel.com)] or Louis Larres at [(559) 259-4366; ext.1409; [llarres@bradfordbarthel.com](mailto:llarres@bradfordbarthel.com)].