

Old Law, New Tricks

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Sturm v. Coronado Unified School District, Athens

2021 Cal. Wrk. Comp. P.D. LEXIS 4, 86 Cal. Comp. Cases 253

By Zane P. Uribarri, Esq.
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What “Violent Act” Allows Psyche Add-ons?

Facts:

- EE closed gate on finger
- index finger amputated
- add-on psyche impairment awarded



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LC 4660.1:

In order to receive an increased impairment rating for her psychiatric injury, applicant “bears the burden of proving [the] psychiatric injury was directly caused by events of employment, or, alternatively, if the psychiatric injury is a compensable consequence of the physical injury, applicant must show that the psychiatric injury resulted from either:

- 1) being a victim of a violent act or direct exposure to a significant violent act, or
- 2) a catastrophic injury.” (*Wilson v. State of CA Cal Fire* (2019) 84 CCC 393, 403 (en banc).)



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WCAB affirmed WCJ:

Force strong enough to crush finger necessitating
amp
=
strong physical force
=
violent act



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Takeaway:



1. Even if violent was in EE's control negligence or carelessness = AOE/COE
2. WCAB consistently loosening definition of "violent act" (esp if machines, and amp are involved)

Contrast Sosa v. Race Engineering
(ADJ 11024874, 3/4/22)

F: loading heavy ice, machine tilted, fell towards him causing him to move/injure hand to get out of the way

Held: not a "violent act"



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Rolda

Zane P. Uribarri, Esq.
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Good Faith Personnel Actions

Multilevel analysis:

1. psych injury involve ***actual events of employment?***
2. If yes, injury ***predominantly caused*** by work?
3. If yes, any/all “**actual events**” = “**personnel actions**”?
4. If yes, any/all “**personnel actions**” = “**lawful, nondiscrim & good faith**”?
5. If yes, were ***qualifying personnel actions*** a “**substantial cause**” of injury (at least 35 – 40%)?

Rolda v Pitney Bowes (2001) 66 CCC 241 *en banc*



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"ACTUAL EVENTS OF EMPLOYMENT"

LC 3208.3 requires causation from A.E.O.E.

- factual/legal issue for judge
- not a medical issue

Rolda v. Pitney Bowes, Inc. (2001)
66 CCC 241, 245 (appeals board *en banc*)

Objective? fewer fraudulent psych claims



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"ACTUAL EVENTS OF EMPLOYMENT"

Prong #1

1. is there an "event"?
 - injury from purely personal issue = not aoe/coe
 - job must play "active" role is causation; not mere stage

FACTS:

- EE victim of gossip about EE's extramarital affair
- gossip takes place at work

HOLDING: not aoe/coe

REASON: not part of ER-EE relationship
➤ work not "proximate cause"



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"ACTUAL EVENTS OF EMPLOYMENT"

Prong #1

1. is there an "event"?

FACTS: harassment by co-ee causes psych

HOLDING: aoe/coe

REASONING: work not mere "stage"

City of Santa Barbara v. WCAB (Sanchez) (2016) 81
CCC 357 (writ denied)



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Good Faith Personnel Action

Definition - Labor Code 3208.3(h)

"No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue."



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How Do We Know?

Three Step Test

- 1) Action must be a personnel action
 - Evaluations, Promotions, Terminations



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Three Step Test (cont)

- 2) Undertaken in good faith
 - Business Necessity, Followed it's own policies/procedures



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Three Step Test (cont)

- 3) Action is the Medical & Legal Cause of the injury
 - Other employer actions that also caused injury?
 - Show outside factors that caused injury



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Defense Has The Burden

- Preserve Evidence
- Establish Facts Before Memories Fade
- Collect Write-ups & Other Documents



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Rolda Holding:

- 1) whether the alleged psychiatric injury involves actual events of employment, a factual/legal determination;
- 2) if so, whether such actual events were the predominant cause of the psychiatric injury, a determination which requires medical evidence;
- 3) if so, whether any of the actual employment events were personnel actions that were lawful, nondiscriminatory and in good faith, a factual/legal determination; and
- 4) if so, whether the lawful, nondiscriminatory, good faith personnel actions were a "substantial cause" of the psychiatric injury, a determination which requires medical evidence.



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How Determines If The Defense Applies?

- Judge - Actual Events of Employment were Personnel Actions
- Judge - Personnel Actions Lawful and In Good Faith
- Doctor - Medical Evidence of Causation AND if the Personnel Action Was A Substantial Cause

San Francisco Unified School Dist. v. Workers' Comp. Appeals Bd. (2010) 190 Cal. App. 4th 1



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Judge vs Doctor Role:

The foregoing analysis requires the evaluating physicians to take a history of all events alleged to have contributed to the psychiatric injury, to render an opinion as to causation in terms of first whether the employment events were a predominant, or greater than fifty percent, cause of the injury. Then, where it has been claimed, as here, that the applicant's injury is the result of a lawful, nondiscriminatory, good faith personnel action, the evaluating physicians must also offer their opinion as to the percentage of causation for any such alleged or apparent actions.



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Kite



By Zane Uribarri, Esq.
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"Go fly a kite"

AKA Fighting the "Kite" decision



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Kite v. Athens Administrators

F:

- bilateral hip replacements
- hip = 20% WPI
- doctor: iw has no “good” hip to compensate other hip

MAGIC WORDS: “synergistic effect”—instead of using CVC, “more accurate” to *add*



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WCJ:

“It appears logical that a person who is able to compensate through the opposite member for an injury to one limb is to some extent less disabled or impaired than someone who cannot so compensate.”

- Guides are *rebuttable*
- DCA denied writ



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And then came...

Sweetman v. Bank of America
(2014 Cal. Wrk. Comp. PD LEXIS 510)

F:

- QME added back, left wrist, and sleep
- CVC = “unfair”



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H:

- back, left wrist injuries from slip & fall did not overlap = add
- sleep arose from back pain = complete overlap = addition prohibited

Practice Pointer

- "compensable consequence", by definition = overlaps



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Lotspike v. J. Jill

(2013 Cal. Wrk. Comp. PD LEXIS 564)

F:

- AME provided Kite analysis
- AME failed to explain *why* addition was "appropriate"

H: Kite analysis not substantial evidence



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Borela v. State of CA and SCIF (2014 Cal. Wrk. Comp. PD LEXIS 217)

F: WJC allowed addition

WCAB H: nope

R:

- WCJ didn't articulate reason for not combining (e.g. following PDRS) other than to assert that use of the CVC was "not mandatory".
- not "substantial evidence"



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Diaz v. State of California and SCIF (2015 Cal. Wrk. Comp. PD LEXIS 683)

H:

- AME's failure to *rule out* the addition meant Kite = "not inappropriate"

I: Is this a "legal" or "medical dispute"

H: (2-1) = *legal*



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PROBLEM:

conflicts with prior decisions that required Kite medical opinion be based on "substantial medical evidence"

if AME deferred the issue, how could it be "substantial medical evidence" on the issue



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New trend: holding doc's feet to the fire

Leo v. Greenspan Adjusters International
(2016 Cal. Wrk. Comp. PD LEXIS 431)

F:

- QME added neck & lumbar

R: "separate areas of the spine"

H (WCAB) addition denied

R:

- QME had not explained "how" was "more accurate"



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Trend continues

Johnson v. Wayman Ranches and SCIF
(2016 Cal. Wrk. Comp. PD LEXIS 235)

H:

- rejected QME's finding of no overlap/use of adding
- b/c QME stated it had "become his policy" never to use CVC



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Wong v. National Union Fire Ins and AIG
(2016 Cal. Wrk. Comp. PD LEXIS 604)

H: rejected addition

R:

“The great weight of case authority holds the Board should rate by combining the separate disability using the CVC unless there is substantial medical evidence that says the disabilities should be added.”



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What does the DCA say?

Department of Corrections and Rehabilitation vs WCAB (Fitzpatrick)

H: "substantial medical evidence" means "substantial medical evidence

PDRS "shall" be prima facie evidence of % of PD each injury covered by the schedule

R: to hold otherwise...

"would return us to the ad hoc decision making that prevailed prior to 2004 with regard to permanent disability findings, which is exactly what the legislature sought to avoid in enacting the amendments. It would allow an administrative law judge to make a subjective determination that may lead to inconsistent and non-uniform permanent disability ratings with respect to the most expensive claims under our workers' compensation framework..."



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Fitzgerald thus takes a swipe at recent decisions holding:

PDRS = merely a "guide" rather than a mandate

- USE *Fitzgerald* to insist WCAB require "substantial medical evidence" supporting nonscheduled ratings
- USE *Fitzgerald* to object to a WCJ who argues there is no overlap in the absence of any medical reports addressing such
- USE *Fitzgerald* to remind WCJ a Kite analysis explanation of

why
addition
=
more *accurate rating*
(not merely more generous)

"magic words" (synergistic effect)

NOT =
"magic words"



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Guzman: “The Battle Continues”



By Donald Barthel
Bradford & Barthel, LLP

Guzman Facts

Bilateral UE (CTS)

AME says:

AMA *Guides* give 3% WPI per UE

BUT WAIT... “You are aware...there is often a discrepancy between the disability and the impairment....Based on her ADL...losses, each [UE] would have a 15% WPI...this is not a method that is sanctioned by the *AMA Guides*.”



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Scores a “Split Decision”



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HOLDING 1:

PDRS ratings are “rebuttable”

NO



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HOLDING 2:

Burden of challenging PDRS rating:

AA: for higher ratings

DEF: for lower ratings

NO



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HOLDING 3:

Want to challenge a PDRS rating?
How might you do it?

“[C]hallenge one of the component elements of that rating, such as the...whole person impairment (WPI) under the *AMA Guides*...”

NO



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HOLDING 4:

Challenging a PDRS rating?

Sorry, CAAA! Your *stuck* with the *AMA Guides*!



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HOLDING 4:

“it is not permissible to go outside
the four corners of the *AMA Guides*”

BIG  **!!!!**



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HOLDING 4:

Challenging a PDRS rating?

“a physician may utilize any chapter,
table, or method in the *AMA Guides*
that most accurately reflects the
injured employee’s impairment”

BIG 



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HOLDING 5:

Reject “inequitable, disproportionate, and not...fair” standard?



“Reason:” “...a 'fairness' standard is not a true standard at all” (AGII, p. 29, footnote 38)



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What *does* the 6th DCA say?

8/19/10

Milpitas Unified v WCAB; Guzman

Holding: “We...affirm the [AG II] decision



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Does this apply to all PD cases?

HECK NO!



New magic words:

“complex or extraordinary cases”

“To accommodate...*complex or extraordinary cases*, the *Guides* calls for the physician’s exercise of clinical judgment to assess the impairment most accurately.” (p. 25, italics added)



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New magic words:

“complex or extraordinary cases”

“To accommodate...*complex or extraordinary cases*, [the *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*” (p. 16, italics added)

NO! I did **NOT** repeat myself

The DCA did!



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Back strain?

Herniated disc?

Carpal Tunnel?

Hernia?

“Complex or extraordinary”



GIVE ME A BREAK!



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Danger, Danger Dr. PTP/QME/AME

“Chapter Shop” At Your Own Peril!



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Chapter Shop At Your Own Peril!

“Given the comprehensiveness and precision attendant in the chapters pertaining to each system, ***in most cases a WCJ will credit ratings based strictly on the chapter devoted to the body part, region, or system affected.***” (p. 20, emphasis added)



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Chapter Shop At Your Own Peril!

“If the physician expresses the opinion that the chapter applicable to a particular kind of injury does not describe the employee’s injury...”

I HATE THE DRE METHOD

“...but all other chapters address completely different biological systems or body parts, ***it would likely be difficult to demonstrate that that alternative chapter supplies substantial, relevant evidence of an alternative WPI rating.***” (pp. 23-24, emphasis added)



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Guides say each chapter...

“address[es] completely different biological systems...body parts”

You want proof?



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Chapter Shop At Your Own Peril!

- a. each chapter does “address **completely different** biological systems or body parts”
- b. whenever a doctor “chapter shops”, s/he *attempts* to apply a chapter that “address[es a] **completely different** biological system or body parts”
- c. *attempt* will “likely be difficult”
- d. *attempt* will not likely “suppl[y] substantial... evidence”
- e. *attempt* will not likely “suppl[y]...relevant evidence”



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"any chapter, table or method"?



NO!

"any applicable portion of the...Guides"

applicable: adj. relevant or appropriate



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"[I]f a particular impairment is not addressed by the...Guides, [doctors] 'should use clinical judgment, comparing measurable impairment resulting from the unlisted objective medical condition to measurable impairment resulting from similar objective medical conditions with similar impairment of function in performing activities of daily living." (p. 17, quoting PDRS, pp. 1-4)



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What do Chapters 1 & 2 really say?

Just ask the 6th DCA...

"The Guides itself recognizes that it cannot anticipate and describe every impairment that may be experienced by injured employees. To accommodate those **complex or extraordinary** cases, it 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*."
(p. 25, in "Conclusion")



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The 6th DCA "gets it"!

"[4660 does] not prohibit incorporation of the portions outside the descriptions, measurements, and percentages in ***a complex case not addressed by the chapter*** devoted to the affected body part or system." (p. 20)

“not addressed”



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What about the doctor shenanigans we've seen?

"The [defense] invokes the scenario of a spine injury accompanied by difficulty lifting and sleep disturbance, which the physician evaluates by using chapter 6.6 on hernias or chapter 13.3c on sleep disorders or both, thus arriving at a radically different impairment value than that prescribed in chapter 15 on the spine." (p. 18)

We didn't need to use our imaginations!



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What's the DCA's opinion of such examples of...

"Doctors Gone Wild"



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DCA's opinion re "Docs Gone Wild"

"abuse[]" (p. 18)

"physician...fishing expedition through the *Guides*"
(p. 19)



"not substantial evidence" (p. 19)



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DCA's opinion re "Docs Gone Wild" (con't)

"medical opinion that **departs unreasonably** from a strict application of the *Guides*" (p. 19)

"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**" (p. 23, emphasis added)



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DCA's opinion re "Docs Gone Wild" (con't)

"Any WCJ would err by allowing the scheduled rating to be based on an **obviously inapplicable** section of the *Guides*." (p. 23)



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What's the WCJ to do?



"necessarily reject"
doc's shenanigans!

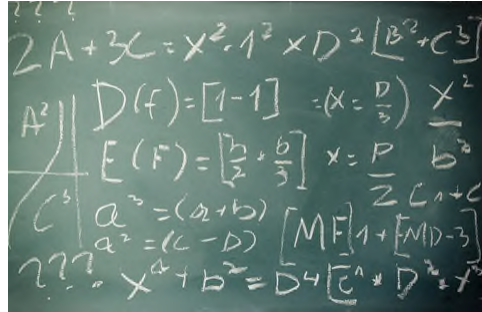


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What were your *least favorite* words
in 5th Grade math?

“Show your work”



Same rules apply to doctors (now!)



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“In order to support the case for rebuttal, the physician must...explain **why** the departure from the impairment percentages is necessary and **how** he or she arrived at a different rating.”

Explain why the departure is necessary
Explain how arrived at different rating



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Explanation must include...

- physician's skill
- physician's knowledge
- physician's experience
- "other considerations unique to the injury"
- "free to acknowledge...reliance on **standard texts** or **recent research data** as a basis for...medical conclusions" (p. 24)



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“Without a **complete presentation** of the supporting evidence on which the physician has based his or her clinical judgment, the [WCJ] 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.” (p. 24)



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Explanation must include...

“Skill, knowledge, and experience”



“Can we stip to doctor’s credentials?”

HECK NO!



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Is your PTP/QME...

- *Really* an “expert” on *Guides*?
- *Really* giving “expert opinion testimony” re *Guides*?

Only one way to find out!



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TEST

1. PTP/QME *really* an “expert”?

Challenge claimed
“expertise”



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TEST

2. PTP/QME *really* “expert opinion deposition testimony”?

“[T]he qualifications of each...expert must...be determined on a case by case basis.” (Costa II, 11/13/07)



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Dear PTP/AME/PQME/APQME,
When assessing impairment (WPI), it is essential that:

1. you first provide a WPI impairment percentage via a traditional application of the AMA Guides (5th) **as written**, so as to permit the parties, DEU and WCJ to determine the “scheduled permanent disability” (Almaraz II, p. 35, 47, 49). A “scheduled permanent disability” rating is required prior to any application of Almaraz/Guzman II that you may deem appropriate.



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2. if you should determine that a modified impairment assessment pursuant to Almaraz/Guzman II is appropriate, please be certain to:
 - a. limit your analysis to the “four corners of the AMA Guides”;
 - b. please explain as to whether you believe that this is a “**complex**” or “**extraordinary case**[]”, and, if so, the reasons for your conclusion (see Guzman, 8/9/10, p. 16, 25)
 - c. “describe and explain the reason for [any] modification [of a traditional AMA Guides rating] in writing” (Almaraz/Guzman II, p. 23, citing with approval the AMA Guides), and
 - d. describe and detail why you believe a modified application of the AMA Guides “most accurately reflects the injured employee’s impairment.” (Almaraz/Guzman



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2. *if you should determine that a modified impairment assessment pursuant to Almaraz/Guzman II is appropriate, please be certain to:*
- e. advise as to whether the chapter(s), table(s), and method(s) you apply is/are the traditional chapter/table/method per the Guides (example: Chapter 15 for spine injuries, Chapter 16 for upper extremity injuries, etc.). If utilizing a nontraditional section, please advise as to whether and why you believe the section you utilize addresses “completely different biological systems or body parts” than is involved in the alleged industrial injury (see Guzman,*



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3. *Credentials: If you should provide an Almaraz/Guzman II analysis that deviates from a strict/traditional application of the Guides as written, please attach a copy of your most recent curriculum vitae and detail the following information upon which you have relied, including:*
- your skill, knowledge and experience in such matters;*
 - “considerations unique to [this] injury” (Guzman, p. 24);*
 - “reliance on “standard texts or recent research data” upon which you have based your “medical conclusions” (Guzman, p. 24);*
 - any additional “extrinsic resources” upon which you have relied (Guzman, p. 24);*
 - the number of Guides-based analyses you have performed since Almaraz/Guzman II (9/3/09);*
 - the number of analyses since Almaraz/Guzman II wherein you have rejected the traditional application of the Guides as written;*
 - a list of all formal training you have received relating to the application of the AMA Guides (5th)*



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WCAB's "Ordinary Progression of a Challenge"

- STEP 1: PTP/PQME/APQME/AME "offer[s] an opinion regarding...WPI under the AMA Guides..."
- STEP 2: Employee or Defendant "challenge[s] that opinion" by:
- a. "deposing the physician", or
 - b. "supplemental report", or
 - c. "medical reports or medical-legal opinion of another physician--if permissible under the Labor Code"



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WCAB's "Ordinary Progression of a Challenge"

What time do you start the challenge?

"...the prudent practitioner should exercise reasonable diligence to obtain rebuttal evidence *before* the initial MSC relating to [PD]..."



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PRACTICE POINTER

Don't get caught with your...

Do not get caught at MSC w/out your rebuttal!

Notice AME/PQME/AME depo
Before
P&S/MMI Exam!

Why?



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Did the doctor get it right...?

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Lorenz v. Stowasser Pontiac, et al (2010 Cal. Wrk. Comp. P.D. LEXIS 137)

EE argues for *Almaraz/Guzman*-based PD
AME stated: "I was asked to give my opinion in this case, based upon estimated percentages between 0% and 100%. It would be my opinion that applicant's [spinal] loss of function is 50%."

ISSUE: substantial evidence?

HOLDING:



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ISSUE: substantial evidence

HOLDING: nope!

REASONING:

"conclusory"

AME did not revise his WPI assessment

AME did not say how such a loss of spinal function
wld yield a different/higher WPI



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