

## **ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES**

For past installments of the *George the Bartender* series, please visit our web site at <http://www.kttlaw.us/memos.html>

### **RE: GEORGE THE BARTENDER AND PAGE 427 OF THE AMA GUIDES OR A READING FROM THE HOLY BOOK OF IMPAIRMENT<sup>1</sup>**

#### **FROM THE LOBBY BAR AT THE HYATT:**

After a long, hard day denying benefits I was eager to get to the Lobby Bar to enjoy my cocktail of choice, a Beefeater's martini, straight up with two olives.

Okay, okay – being able to gaze at Kim, the Hyatt's breathtakingly beautiful cocktail waitress was also a motivating factor for my haste.

However, when I settled into my usual seat at the Lobby Bar I was greeted by the sight of Ron Summers, George the Bartender's worker's compensation attorney, and George's primary treating physician, Dr. Nickelsberg.

These two paragons of deceit were studying a diagram in a large green book I recognized as the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition), hereafter referred to as simply the "Guides."

The Guides have become the Bible of employers and insurance carriers because for the first time in the history of our workers' compensation system permanent disability is predicated on actual physical disability or impairment (what a concept!), which is then given a corresponding Whole Person Impairment (WPI) rating as adjusted by occupation, age and future earning capacity (FEC).

However, ever since the Board's *en banc* decisions in *Almaraz/Guzman I* and *II*, Ron and his cohort, Dr. Nickelsberg, have been plotting to increase the ratings by liberal and unsupported interpretations of the Guides.

Ron's bread and butter injury claim, as well as most applicant attorneys', is the low back injury. It has generated substantial permanent disability benefits and large attorney's fees under the prior permanent disability system which relied on work restrictions and subjective complaints.

The permanent impairment ratings as mandated by the Guides for the low back appear in Chapter 15 of the Guides entitled "The Spine."

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<sup>1</sup> For those new patrons to the lobby bar, George the Bartender's workers' compensation case involves an injury to his elbow, lateral epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

Of concern to Ron and Dr. Nickelsberg is the fact that the Guides mandate that the Diagnosis-Related Estimate method (DRE) is the preferred method for rating disabilities of the low back and the DRE ratings contain five categories. Under Category V the maximum rating for the low back is between 25%-28%.

Turning my attention back to the diagram that Ron and Dr. Nickelsberg were studying (with mischievous grins on their faces), I saw that this was the infamous diagram known as Figure 15-19, located on page 427 page of the Guides, which is a side view of the spinal column.<sup>2</sup>

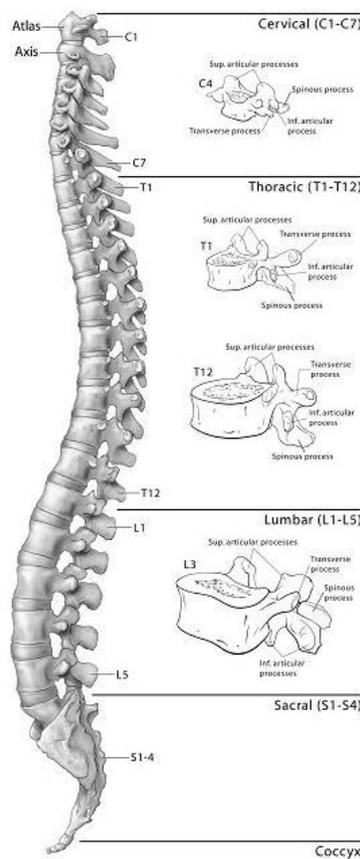


Figure 15-19 of the Guides notes that a *total impairment* of the lumbar spine, the second section from the bottom in the diagram above, equals 90%.

<sup>2</sup> The AMA vigorously enforces its copyright, so I'm using a similar diagram produced by the US Government National Institute of Health, therefore in the public domain.  
Source: [archive.nlm.nih.gov/pubs/long/jei2001/fig3.jpg](http://archive.nlm.nih.gov/pubs/long/jei2001/fig3.jpg) accessed 2-10-11

Wanting to learn what was behind these mischievous grins I decided to buy a round of drinks for the dynamic duo. After receiving their drinks and taking a few sips Ron told me gleefully that Dr. Nickelsberg had figured out a way to beat the DRE method.

Dr. Nickelsberg was prepared to issue a sedentary prophylactic work restriction for the applicant's low back equal to 70% permanent disability under the old permanent disability schedule and by simple mathematics 70% of 90% (total impairment of the low back) would equal 63%.

After adding a sleep disorder rating and psychiatric disability under the Global Assessment Functioning scale, Ron told me that his client would be eligible for a life pension, thereby becoming entitled to the gold mine of the Cost of Living Adjustment (COLA). Ron would therefore obtain an enhanced attorney fee.

Seeing that Ron was so elated at his scheme, I hated to rain on his parade. Okay, actually I enjoyed raining on his parade, almost as much as I enjoy the sight of Kim, the breathtakingly beautiful cocktail waitress.

I started by asking Ron whether or not he had ever considered what a total impairment of the lumbar spine would mean.

As Ron remained silent I decided I would enlighten him. A total loss of function of the lumbar spine would mean that one could not bend forward, backward or laterally. The resulting disability would be equivalent to that of a paraplegic.

I also reminded Ron that he was mixing apples with oranges, or I should say impairment with work restrictions, which was contrary to Senate Bill 899 and Labor Code §4660 as amended.

There sunny demeanor dissipating from my dose of reality, both Ron and Dr. Nickelsberg started arguing with me. With a smile on my face I referred them to the Board's recent panel decision in the case of *Lucas Wood v. U-Haul; Chartis Costa Mesa* (ADJ6606711), 2010 Cal. Wrk. Comp. P.D. LEXIS 535, filed on November 22, 2010.<sup>3</sup>

In *Wood* the Board overturned the finding of 53% permanent disability by the Workers' Compensation Judge (WCJ) based on the report of the applicant's primary treating physician, Dr. Charles Rudner.

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<sup>3</sup> Anyone requesting a copy of the *Wood* case should please do so by email.

In giving the applicant what he described as an *Almaraz/Guzman II* rating, Dr. Rudner stated in relevant part as follows:

“It is this examiner’s conclusion that the standard rating by the AMA Guides method, as described above, does not adequately assess this patient’s disability.”<sup>4</sup>

Dr. Rudner went on to conclude that the applicant “has lost 50% of his usefulness of his lumbar spine for performing work on the open labor market” and relied on page 427 of the Guides.

By doing the math, Dr. Rudner took 50% of the 90% total loss of function of the lumbar spine and arrived at a figure of 45%, which modified up to 53%.

In overturning the decision of the WCJ the Board concluded as follows:

Dr. Rudner's alternate rating does not constitute substantial evidence, as "ability to compete in the open labor market" is not relevant to the determination of impairment or disability under the 2005 Schedule for Rating Permanent Disabilities. Labor Code §4660(a) states that "[i]n determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, *consideration being given to an employees diminished future earning capacity.* (Emphasis added)

The Board went on to state, “. . . Dr. Rudner's alternate rating was based on an incorrect legal theory, since ability to compete in the open labor market is not relevant to cases decided under the 2005 Schedule.”

The Board then turned its attention to directly analyzing Figure 15-19 on page 427 of the Guides as follows:

In this case, Dr. Rudner does not utilize another chapter, table or method in the AMA Guides for determining permanent impairment. Rather, Dr. Rudner points to a figure which illustrates that total impairment of the lumbar spine constitutes 90% whole person impairment. The figure is used in the AMA Guides to illustrate how to convert a whole person impairment to a regional estimate of spine impairment. (AMA Guides, § 15.13, p. 427.) Dr. Rudner does not specify where the method that he utilized (multiplying his assessment of the percentage of regional impairment by the body part's maximum impairment) is outlined in the AMA Guides. We note that the highest diagnosis-related estimate for the lumbar spine (Category V) would yield a 25%-28% impairment of the whole person.

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<sup>4</sup> Dr. Rudner had previously placed the applicant into DRE III for his lumbar spine injury and had given him a whole person impairment of 12%.

Finally, in noting that employment is certainly relevant, the Board summarized as follows:

Finally, Dr. Rudner's analysis did not take into account the fact that applicant was subsequently able to secure full-time employment installing smoke alarms. As of the time of trial in this matter, applicant was working full-time installing fire alarms, which required him to repeatedly climb a ladder, carry 15 pounds of equipment, and bend and stoop.

By the look on the faces of Ron and Dr. Nickelsberg I knew that I was on a roll so I referred the dynamic duo to another recent decision by the Board *Robert Zimmerman v. Britt Lumber Company* [ADJ3218180 (EUR 0040749), ADJ4708435 (EUR 0040750)], 2010 Cal. Wrk. Comp. P.D. LEXIS 547, filed on November 19, 2010.<sup>5</sup>

In *Zimmerman* the Agreed Medical Examiner, Dr. Pang, “utilized the AMA Guides to rate permanent disability beyond the strict application, as permitted in *Almaraz/Guzman*.”<sup>6</sup>

In accepting the report of Dr. Pang at face value, the Workers’ Compensation Judge (WCJ) provided separate ratings for each of the applicant’s disabilities: a decreased range of motion and grip loss, and with regard to the left knee an impairment rating which combined gait impairment and a diagnosis-based estimate reevaluation.

In granting reconsideration and rescinding the decision of WCJ the Board initially observed as follows:

“As the AME’s use of inconsistent methodology has not been adequately justified, the record does not justify the WCJ’s permanent disability ratings under the AMA Guides.”

In rescinding the WCJ’s separate rating of each disability and Dr. Pang’s departure from the Guides the Board observed as follows:

In providing for a separate rating of applicant's loss of grip strength, the AME does not appear to recognize the directive that such combination of ratings for upper extremity disability should be used in "a rare case" where the physician believes the loss of strength "has not been considered adequately by other methods." A divergence from the usual rating method is permissible. However, in this case this divergence from the AMA Guides usual rating method requires more explanation to justify its use than that provided by the AME, as to why the other rating methods fail to adequately describe the extent of applicant's impairment.

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<sup>5</sup> Anyone requesting a copy of the *Zimmerman* case should please do so by email.

<sup>6</sup> It would appear that Agreed Medical Examiners on “the list” are required to have an *Almaraz/Guzman* caption, which is reason 434 not to use an AME.

By this time Ron and Dr. Nickelsberg had ordered another round of drinks and had very sour expressions on their faces. I told Ron that the most important part of the Board's decision in *Zimmerman* was the following statement:

“Such divergence from the requirements of the AMA Guides need greater justification than a reference to *Almaraz/Guzman*.”

At this point, Ron and Dr. Nickelsberg made an attempt at a rebuttal. They explained to me that although I had told them that lifting restrictions and/or work restrictions were not utilized by the Guides they pointed out to me that the hernia chapter based impairment on reduced lifting capacity.

Ron smirked and told me that Dr. Nickelsberg was prepared to use the lifting restrictions contained in the hernia section for other orthopedic injuries as *Almaraz/Guzman II* allowed him to go to all four corners of the Guides.

I had saved my best shot for last as I told Ron and Dr. Nickelsberg about the Board's decision in *Sarah Shipp v. Gottschalks* (ADJ1904323, ADJ3208896, ADJ649343), issued on November 1, 2010.<sup>7</sup>

In *Shipp* the Agreed Medical Examiner, Dr. Ovadia, based his Whole Person Impairment rating for the applicant's upper extremities by analogizing to the lifting restrictions and the requirements in the hernia section of the Guides.

In overturning the Workers' Compensation Judge and Dr. Ovadia's medical opinion, the Board stated in relevant part as follows:

In his deposition, Dr. Ovadia analogized applicant's bilateral shoulder impairment to hernia impairment based on her reduced lifting capacity, i.e., Dr. Ovadia believed that applicant is restricted from heavy lifting. This approach runs afoul of *Almaraz II*'s prohibition that a physician may not utilize any chapter, table, or method in the AMA Guides simply to achieve a desired result, e.g., a WPI that would result in a permanent disability rating *based directly or indirectly on any Schedule in effect prior to 2005*. In basing the shoulder component of applicant's WPI on the hernia analogy, Dr. Ovadia's approach resulted in a permanent disability rating based indirectly on the “old” (1997) PDRS, with its regimen of rating permanent disabilities based on lifting capacity and work restrictions. Therefore, Dr. Ovadia's hernia analogy is not substantial evidence under *Almaraz II*.

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<sup>7</sup> Anyone requesting a copy of the *Shipp* case should please do so by email.

With my last litany of Board decisions from November 2010 complete I could tell that Ron and Dr. Nickelsberg wanted nothing more to do with my sermon on worker's comp. Their "cups had runneth over" with not only the barrage of case law I had dumped on them but with drink as well. I asked Kim to have George call a cab for them. Under the old rating system their limousine driver would have taken them home in a presidential limousine.

My how the times have changed, but this is not entirely true thanks to a little irony of our present litigation system. Prior to SB 899 the cost driver in the worker's compensation system on the issue of permanent disability was referred to as the problem of "Dueling Docs." Though passage of SB 899 went a long way towards eliminating this cost driver, what the California State Legislature couldn't anticipate was the emergence of a new devil: "Dueling Ratings."

### **"IT IS WHAT IT IS" OR "WHO CARES?"**

Why do we waste our time deposing doctors?

Likewise, why do we show up at noticed depositions of doctors?

Who cares about a doctor's opinion as to a whole person impairment rating, as the opinion must be supported by the Guides itself?

In one case in which the Board overturned a doctor's so-called *Amaraz/Guzman II* decision the defense attorney did nothing to attack the doctor's opinion. He didn't depose the doctor nor did he write the doctor a letter.

In reversing the Judge who relied on the doctor the Board pointed out that the defendant did not have the burden of proof in demonstrating that the doctor's opinion must constitute substantial evidence. This burden rests with the applicant.

In other words: "It is what it is."

The Court of Appeal in *Milpitas Unified School District v. Workers' Compensation Appeals Board* (H034853), 187 Cal. App. 4th 808; 115 Cal. Rptr. 3d 112; 2010 Cal. App. LEXIS 1454, certainly didn't care.<sup>8</sup>

The Court sent a message to the entire industry that the *Almaraz/Guzman II* principle applies *only* in serious and rare cases or cases involving a complicated or new medical condition. (emphasis added)

The staple of our industry is a low back strain, which is as about as rare as smog in downtown Los Angeles in the middle of summer.

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<sup>8</sup> Anyone requesting a copy of the *Milpitas* case should please do so by email.

In indicating that the *Almaraz/Guzman II* rationale does not apply to run of the mill low back cases the court further explained:

...the Legislature recognized that not every injury can be accurately described by the classifications designated for the particular body part involved. Had the Legislature wished to require every complex situation to be forced into present measurement criteria, it would have used different terminology to compel strict adherence to those criteria for every condition.

Therefore, the Court is telling us that the principles as set forth in *Almaraz/Guzman II* are reserved for those unlikely, rare, serious and complicated injuries. So much for the above theory as it would appear that a majority of applicant attorneys are applying *Almaraz/Guzman II* in almost every case that comes before the Board.

In *Guzman* the Court addressed this issue as follows:

... we have no reason to question the implicit assumption that while directing those features to the Schedule itself, the Legislature sought consistency, uniformity, and objectivity in the overall process of determining disability across individuals.

The Court went on to note:

The Guides itself recognize that it cannot anticipate and describe every impairment that may be experienced by injured employees. The authors repeatedly caution that notwithstanding its “framework for evaluating new and complex conditions” the “range, evolution and discovery of new medical conditions” preclude ratings for every possible impairment.

### **DISCLAIMER:**

The characters at the Lobby Bar, aside from Kim, George and I are imaginary, as well as the story line, but the continuing assault on the Guides is most certainly not.

Although the Board gave the industry guidance in *Almaraz/Guzman II*, the attacks on the Guides are incessant.

In all of the Board’s panel decisions cited above the Board has consistently shot down creative lawyering on the part of the applicant’s bar in interpreting the Guides and the Board’s reasoning is consistent, articulate, well-reasoned and well-researched

Yes, the Board has adopted the *Almaraz/Guzman II* argument in a few serious case such as cases involving multiple failed back surgeries and undeniably 100% situations.

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In *Almaraz/Guzman II* and the Court of Appeal decision in *Guzman*, it was clear that straying from a specific chapter of the Guides is the exception and not the rule.

Remember, the panel decisions by the Board referred to above can be received as evidence or brought to the attention of a Workers' Compensation Judge or the Board pursuant to Labor Code §5703(d).<sup>9</sup> It's a vital tool to have at your disposal, especially when facing down the likes of Ron and Dr. Nickelsberg.

Make mine a double, George.

-Joe Truce

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<sup>9</sup> Although not referred to in this George episode, the Board also issued a decision dealing with the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) entitled *Gustavo Melesio v. Hambro Forest Products, Inc.* (ADJ6882436) on November 17, 2010. In this case the Board once again held the line on *Almaraz/Guzman II* of return to Workers' Compensation Judge by finding that impairment ratings were expressed in the alternative and the most accurate impairment should be selected as opposed to combining the rating. Anyone requesting a copy of this case case should please do so by email.