

CLIENT ALERT!

March 28, 2010

WCAB PANEL DECISION UPHOLDS THE USE OF SECTION 15.13 OF THE *GUIDES* [*Figure 15-19*] TO SUPPORT AN ALMARAZ/GUZMAN II DETERMINATION

(Using Apples to Make Banana Pie and then calling it Red Velvet Cake)

The WCAB has issued a Panel Decision in the case of **Laury v. SCIF** (ADJ3400378). While Panel Decisions are neither controlling nor citable as legal authority, they may carry some practical weight, as they are often widely circulated and they can therefore often reflect potential insights into the reasoning and thinking of at least the WCAB three member panels who decided the particular case. Therefore, we should likely expect this Panel Decision should get some wide attention within the compensation community.

Very simply, **Section 15.13**, found on page 427 of the *Guides*, featuring **Figure 15-19**, is nothing more than an illustration showing how a DRE or ROM based impairment assessment can be converted from whole person impairment to a regional spinal impairment. According to the *Guides*, this is the difference between “*the involved spine region rather than the whole person.*”ⁱ Therefore, this section represents nothing more than a conversion illustration *from the DRE and ROM* based whole person impairment (WPI) to regional spine impairment.

By illustration, a cervical impairment ratable under the DRE III at 15% WPI would be converted to 43% *spinal regional assessment impairment*. This is not a transposition of the WPI into a higher number, but represents **only** the proportion the cervical WPI has to the entire spinal region. In further illustration, if we take an injury to the lumbar spine, resulting in impairment based on the ROM method at 30% WPI, this would convert to 33% *spinal regional assessment impairment*.

Main Office

15760 Ventura Blvd.
Suite 1200
Encino, CA 91436
(818) 986-7561
Fax (818) 986-5147

Ventura Office

751 Daily Drive
Suite 325
Camarillo, CA 93010
(805) 987-7128
Fax (805) 987-7148

By simple logic, Section 15.13 should have nothing to do with **whole person impairment assessment**, except to show how it can be *converted* to regional spinal assessment impairment. *But there is no indication from this two paragraph section in the Guides that it was ever intended as an alternative method for determining impairment.* Nonetheless, we are seeing some physicians justifying an Almaraz/Guzman II determination, using Figure 15-19 as a license with which to assess a much greater level of whole person impairment. This practice is so convoluted and afar from the very principles upon which the *Guides* are based, that it is like using apples with which to make banana pie and then calling the final product red velvet cake. Therefore, by permitting the use of this irrelevant Section 15.13 to determine whole person impairment is tantamount to a wholesale rejection of the *Guides* and the principles upon which the *Guides* are based.ⁱⁱ

Unfortunately, this WCAB Panel upheld the AME's use of Figure 15-19 at Page 427, in order to support an Almaraz/Guzman II finding. In this case, the AME took Figure 15-19, which weighted lumbar impairment to the totality of spinal regional impairment at 90% and upon the AME declaring that, *"This man in my opinion has lost 60% of the use of his lumbar spine excluding the impact of his sexual function and sleep disorder. Therefore 60% of the lumbar spine function multiplied by .9 corresponds to a 54% WPI."*ⁱⁱⁱ Clearly, the 90% represented here, was intended to illustrate that a ROM based whole person impairment represented a proportional 90% of the *spinal regional impairment* and was not otherwise intended as a direct or alternative assessment of WPI.

We find this decision, and the facts upon which it is premised, to be troubling on a number of levels. For one thing, there is neither discussion nor analysis as to why the AME found Figure 15-19 to represent a more "accurate" assessment of impairment than the ROM determined whole person impairment. For another thing, while the WCAB did reflect that Figure 15-19 *"is within the four corners of the Guides,"* they provided little rationale for supporting the AME's use of this section and why it otherwise represented a more accurate level of impairment.^{iv} It appears the WCAB ignored the fact that Figure 15-19 was a conversion device and not an alternative method of impairment assessment. There is also no apparent reflection that the AME had determined this conversion formula reflected a more accurate picture or composition of the impairment assessment. The standard of "Accuracy" is now the essential foundation for justifying an Almaraz/Guzman II determination, under the En Banc decision in Almaraz/Guzman II. Also, it is clear that Figure 15-19 was meant to be nothing more than a *conversion tool, in order to demonstrate the proportionality of a whole person impairment expressed as regional spine impairment. This very conversion is based upon a whole person impairment, either by the DRE or ROM method converted to a regional impairment (within the spine—not whole person) and was not intended to provide a direct method for converting WPI to a higher level.*

This Panel decision seemingly misconstrues the meaning of Section 15.13 by permitting the AME to ignore the conversion from DRE or ROM based WPI to regional spine impairment, but rather going directly to a new WPI assessment, based upon the use of an element of the conversion number. This number is abstracted from a single sentence under Figure 15-19: “*The whole spine divided into regions indicating the maximum whole person impairment represented by a total impairment of one region of the spine. Lumbar 90%, thoracic 40%, cervical 80%.*”^v In other words, instead of a simple mathematical conversion from DRE or ROM based WPI to regional spine impairment, this decision permits the physician to simply use the conversion as a direct transformation of a DRE or ROM based WPI to a regional WPI, and then substituting WPI for regional impairment. The illustration presented by the *Guides* at Page 427 demonstrates that a neck injury resulting in a 20% DRE based WPI would convert to a 57% *regional spinal impairment of the cervical spine*,^{vi} not a 57% WPI. This is the use of apples to make banana pie and then calling it red velvet cake.

In its decision, the WCAB has upheld the AME, who concluded the applicant had lost 60% use of his lumbar spine and then applying that number against the 90% proportion the ROM based lumbar WPI is to the spinal region, to calculate a new WPI of 54%. The flaws here include:

- 1) Section 15.13 is nothing but an illustration showing spinal WPI, *based upon the DRE or ROM method*, as a relative percentage of the entire spinal region; it starts with the premise that the conversion involves a DRE or ROM based rating. So, the physician would use the weights here in order to convert WPI to a percentage of the spinal region. *But the converted number is not a WPI number, but a regional impairment number! To permit the regional impairment assessment to reflect a new WPI is to ignore the intended purpose of Figure 15-19.*
- 2) The use of .90 as a multiplier, described as “*the maximal WPI due to the lumbar spine is 90%*” also seems to misconstrue the plain meaning of section.^{vii} *The .90 is not the WPI but rather merely the “percentage” of lumbar WPI expressed as a percentage of the spinal region impairment.*
- 3) This Panel seems to have ignored the current standard of proof required to factually sustain an Almaraz/Guzman II finding; i.e. more accurately reflective of the actual impairment. This is ironic, since the conversion formula found on Page 427 appears to have been both misconstrued as well as misapplied, so how can a trier-of-fact correctly determine that the impairment assessment made by this AME is now “more accurate?” Here, the Panel seemingly permitted an A/G II finding without holding to the requisite foundation of “**accuracy**” as the basis. Instead, they seemingly permit the now supplanted standard of “proportionality.”

On a going forward basis, we should probably anticipate that some applicant attorneys and treating physicians will regard this Panel Decision as a sanction permitting the use of Section 15.13 as a new or alternative impairment generating device. We believe that using Section 15.13 as an impairment creating tool represents an improper and unsupportable use of the *Guides* and should be opposed.

You should be ready to defend against any physician who attempts to establish higher levels of impairment, using this section.

°Copyright 2011 Landegger, Baron, Lavenant & Ingber

ⁱ American Medical Association Guides to the Evaluation of Permanent Impairment Pp. 427

ⁱⁱ “Impairment percentages estimate the extent of the impairment on whole person functioning and account for basic activities of daily living, not including work.” Guides at Pp 13.

ⁱⁱⁱ See decision at page 4, lines 14-16)

^{iv} See decision at page 8, line 16

^v Ibid

^{vi} Ibid

^{vii} See decision at Page 4, lines 14/15