

California Orthopedic Association Annual Meeting  
April 22, 2012

Pertinent Case Law/American Medical Association Provisions  
Presenters: Mark Edelstein, Esq., Carl Jacobs, Esq.

1. *Escobedo v. Marshalls* - this case sets forth the principles for "substantial medical evidence" as to apportionment per LC 4663 (apportionment of causation of injury). *Escobedo* discusses the five following components of an opinion that comports with substantial medical evidence:
  - i. Reasonable medical probability
  - ii. Not speculative
  - iii. Based on pertinent facts
  - iv. Based on adequate examination and history
  - v. Reasoning in support of conclusion

The fifth criterion is the most important and is also the criterion that is most often overlooked. Per the *Escobedo* court, reasoning in support of the conclusion must state the "how and why" of the conclusion. Specifically, the court stated as follows:

- "For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability."
- "And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability."

2. *Benson v. Kaiser Permanente* - this case requires a physician to address apportionment of residual disability of injury between more than one date of industrial injury, if the physician can do so without speculation. The *Benson* decision, however, does not mandate apportionment of disability between dates of injury if it would be speculative to do so. Where apportionment would be speculative, the physician may state that he/she cannot apportion and that as such, the residual disability is "inextricably intertwined" between the various dates of injury. Notably, the *Benson* opinion provides examples of instances in which residual disability cannot be parceled out as follows:

- "...any effort to medically separate the causative effects of each discrete injury may be frustrated by the fact that "[t]he second injury may prevent the first from healing properly, converting that which would have been a temporary disability into a permanent disability" or "the first injury may render the injured part of the body unusually weak or sensitive and thus contribute to the damage caused by the second." Under such circumstances, an allocation of the causation of the combined disability between the multiple injuries may be "impossible or inequitable" or may be "no more than speculation and guesswork."
3. *Almaraz/Guzman* - this line of cases (with the seminal case most often referred to as "*Guzman 3*"), the court has articulated, albeit without much concrete directive as to how LC 4660 (2005 PDRS), can be rebutted. In essence, the *Guzman 3* cases stands for the principle that in "complex or extraordinary cases," where the physician feels that the strict AMA impairment does not accurately reflect the injured worker's impairment, he/she may exercise clinical judgment to evaluate the impairment most accurately by way of alternate methodology within the four corners of the Guides (note that *Guzman 3* is essentially derived from Chapter 1.5 of the AMA Guides, 5th Ed.).

However, *Guzman 3* does not allow a physician to conduct an arbitrary "fishing expedition" throughout the *Guides* for a desired impairment. Rather, in order to be substantial medical evidence as to rebuttal of LC 4660, the physician must set forth the "how and why" as to deviation from the standard AMA rating. The *Guzman 3* decision provides the best example as to the accuracy/substantial medical evidence standard as follows:

- "If *Guzman's* carpal tunnel syndrome, for example, is adequately addressed by the pertinent sections of Chapter 16, an impairment rating that deviates from those provisions will properly be rejected by the WCJ." In fact, the WCJ in the *Guzman* case found that Dr. Feinberg's departure from the strict application of the AMA Guides based on ADL losses for each upper extremity, a method that was not sanctioned by the AMA Guides, did not constitute substantial medical evidence. In essence, Dr. Feinberg attempted to compute WPI directly from ADL loss. The WCJ in rejecting this "deviation" from the Guides stated "in particular Dr. Feinberg provides no data or clinical observations in support of his opinion; his opinion seems to be, rather, that the Guides generally underrate this impairment...but without a significant amount of objective data I am unwilling to accept his opinion, standing alone, against that of the Legislature."