



California Association of  
Joint Powers Authorities



February 21, 2012

Lachlan Taylor  
Executive Director  
California Coalition on Health & Safety & Workers' Compensation  
1515 Clay Street, Suite 901  
Oakland, CA 94612

**RE: "Impact of the Adoption of AMA-Based Permanent Disability Rating Schedule in California"**

Dear Mr. Taylor:

The coalition of organizations listed below would like to thank the Commission on Health and Safety and Workers' Compensation (CHSWC) for providing an opportunity for stakeholders to provide public comment on the most recent report on permanent disability benefits following SB 899 (Poochigian, 2004) and the implementation of the 2005 Permanent Disability Rating Schedule (PDRS). It is very likely that this analysis of permanent disability ratings will serve as the basis for substantial public policy decisions in the near future, and the product can only benefit from a public comment period.

Our coalition represents a broad cross-section of employers from across California and the comments below contain the benefit of knowledge from a great many perspectives from every corner of California's public and private sector employer community.

Our coalition strongly believes that this report requires a great deal of context in order to be appropriately received by policymakers. Consider that, thanks to term limits, the vast majority of legislators who voted on reform proposals in 2002, 2003, and 2004 are no longer in the California State Legislature. Because of this fact, we believe that the commission should take caution to ensure that the findings contained in the draft report are effectively packaged for policymakers.

We have organized our comments into three separate sections:

1. Comments on Report Presentation by CHSWC

2. Specific comments on the substance and methodology of the
3. Comments on permanent disability as it relates to the report.

Should you have any question regarding these comments, please contact either Jason Schmelzer with the California Coalition on Workers' Compensation at 916-441-4111; or Jeremy Merz with the California Chamber of Commerce at 916-930-1227.

Signed,

California Coalition on Workers' Compensation  
California Chamber of Commerce  
California Self-Insurers Association  
National Federation of Independent Business  
California Association of Joint Powers  
Authorities  
California State Association of Counties  
California Grocers Association

California Independent Grocers Association  
Western Propane Gas Association  
Palm Desert Chamber of Commerce  
Greater Fresno Area Chamber of Commerce  
ALPHA Fund  
Acclamation Insurance Management Services  
Allied Managed Care Incorporated

## COMMENTS ON REPORT PRESENTATION BY CHSWC

CHSWC has developed into a strong and effective venue for delivering consensus on some important issues over the past several years, and the result has been positive for both workers and employers. In fact, in 2011 alone Governor Brown signed two pieces of legislation that were almost exclusively driven by CHSWC research – AB 335 (Solorio, 2011) on benefit notices, and AB 378 (Solorio) on compound drugs. CHSWC also had a hand in shaping several other bills as they worked through the legislative process. The commission's credibility among labor, management, and lawmakers has never been higher.

As such, we believe that CHSWC could strengthen the report by taking time to improve its presentation to stakeholders and policymakers.

### CHSWC Should Provide Additional Context

It is precisely because of the commission's credibility that we urge you not to release the report without additional context. In these comments we will provide specific examples about how and why we think the draft report could be strengthened and clarified. But, even if our recommendations are incorporated before the report is finalized, it would lack important context.

The result of releasing the report without additional context from the commission is that lawmakers could reasonably come away the impression that, because overall PD compensation was reduced by 58%, that all of those dollars should rightfully be restored. Frankly, any decision about increases in permanent disability compensation requires a great deal of additional information that is not included in this report. As such, we believe that the report would be much more useful as a tool for policymakers if CHSWC provided a secondary analysis that had the consensus support of the labor and management representatives of the commission.

Additionally, the report is replete with assumptions and caveats that take into question the degree of accuracy that policymakers should attribute to the findings. The simple truth is that the researcher had to make material assumptions when completing this research - we recommend that CHSWC provide an analysis of the limitations of the report as a tool for measuring permanent disability benefits.

By no means is this recommendation and indictment of the work done by Dr. Neuhauser. Rather, it is testament to the credibility of CHSWC among stakeholders and lawmakers. The probability that this report will play a major role in decisions about reforms to permanent disability benefits is high, and our coalition believes that, because of this, the commission should provide additional analysis and policy recommendations to help guide policymakers.

### CHSWC Should Provide Recommendations

Our coalition also believes that it would be useful for CHSWC to provide guidance to the legislature in the form of policy recommendations. CHSWC reports have, in the past, included specific recommendations for policymakers on issues related to workers' compensation. The commission has, in some cases, even provided draft legislation. The additional benefit of policy recommendations from CHSWC is the advanced vetting by labor and management that takes place during the commission voting process.

## COMMENTS SPECIFIC TO THE NEUHAUSER REPORT

The following comments are specific to the draft report entitled, "Impact of the Adoption of AMA-based Permanent Disability Rating Schedule in California", which is dated January 19, 2012 and was prepared by Frank Neuhauser, Executive Director of the UC Berkeley Center for the Study of Social Insurance.

### Procedures and Methodology

The draft report is just the latest in a series of reports that have been prepared by Frank Neuhauser, and we recommend that the report include a specific description of any changes in methodology from previous reports. If alternative sources of data were used, different periods of data were chosen, new assumptions were made, or other changes in methodology were employed then those changes should be clearly understood by policymakers. Put simply, if the analysis in this most recent report is different than the analysis in past reports, that needs to be clearly communicated.

In addition to the simple identification of differences in methodology, CCWC recommends that the following information be provided:

1. The reasons behind the changes should be explained and justified. If changes were made to the data, assumptions, or methodology used to analyze the changes to permanent disability benefits, and this analysis is likely to play a major role in reform efforts, then the changes should be explained in the interest of full disclosure to stakeholders and policymakers.
2. The ultimate impact on the findings should be calculated where possible. Because this is the most recent in a series of reports, the potential impact on the findings that has resulted in changes to data, assumptions, and methodology should be disclosed to stakeholders and policymakers.

For Example, on page 1, lines 13-25, it is disclosed that the report uses the maximum weekly compensation rate in use as of 1/1/2011 to avoid bias due to changes in wages levels. This type of change, which may have a quantifiable impact on the results of the analysis, should be explained in more detail. And, if this was not done in previous versions of the report, that should be disclosed along with the potential impact of the change.

### Peer Review

There is no indication that the report went through any type of peer review process prior to release for comment. If there was a peer review process utilized, CCWC recommends that the comments received during the peer review process be made public.

### Impact of Almaraz/Guzman/Ogilvie Case Law

The draft report implies (page 1, line 20-21 and page 2, line 4) that the ultimate impact of the Almaraz/Guzman and Ogilvie case law, which undoubtedly drive ratings upward, is included in the analysis. Our coalition argues with any claim that the full impact of recent case law is captured by the results contained in the draft report. This is mostly because there is no reason to believe that the legal strategies employed by applicant attorneys as a result of those cases have been implemented fully. Moreover, no evidence is provided to support this claim and common sense indicates that the opposite is more likely to be true. If no evidence can be provided to support this conclusion, we recommend that it be removed from the report.

### “Zeros”

The estimate of the reduction in benefits associated with the “zeroes” makes up a substantial proportion of the overall decline in benefits. Unfortunately, the methods used to calculate the reduction in benefits associated with the “zeroes” appear suspect. The list of caveats in the report is nearly a page long, and the report leaves the impression that the analysis is more based in assumptions and guesswork than true data analysis. This is a major weakness in the report that needs to be remedied prior to release.

### 15% Bump Up/Down

The report does not estimate the impact of the 15% modification to permanent disability payment for accepting or refusing a valid offer of return-to-work. The draft report measures reductions in both PD ratings and overall compensation. Because the 15% bump up/down modifies total compensation after the rating and award, we recommend that the report include an estimate of the impact of the 15% bump up/down on overall compensation. CHSWC has provided an estimate of the impact of this reform in its annual report so it appears that the data is readily available for analysis. There has been a great deal of discussion about the bureaucratic hassle associated with this provision, and employers have frequently recommended that it be repealed.

## **COMMENTS ON PERMANENT DISABILITY AS IT RELATES TO THE REPORT**

Our first recommendation above – that CHSWC augment this report with additional analysis and recommendations – is based in the idea that this data, important as it may be, does not tell the entire story of permanent disability in the workers’ compensation system. The report provides only a comparison of PD ratings from two different periods in time and describes the difference in ratings and compensation between those two time periods.

In order to provide additional context, we offer additional observations below.

### Benefit Adequacy and Public Policy

The draft report is a useful tool that allows stakeholders and policymakers to measure and understand the causes of reductions in permanent disability benefits since the comprehensive reforms in 2004. However, it should be clearly stated by CHSWC that the report serves only as a comparison between two specific snapshots-in-time of the workers’ compensation system.

In order to draw conclusions about what should or should not happen as a matter of public policy requires a great deal more information than is provided in the current draft report. For example, this report answers no questions about benefit adequacy in California’s workers’ compensation system. Policymakers should not draw conclusions about the need for additional permanent disability benefits based only on the fact that overall ratings and compensation have declined since the implementation of the 2005 PDRS.

Understanding the decline in benefits is just the first step to understanding what policy decisions need to be made, and that fact should be clearly communicated by the commission in conjunction with the release of this report.

There is consensus around the idea that permanent disability benefits need to be augmented in some fashion, but this report should not be seen as evidence in support of a specific target for benefit augmentation.

### Apportionment and Fairness

The only discussion about apportionment contained in the report is the extent to which this reform lowered permanent disability ratings and compensation. While it may be valid to examine the impact of apportionment, CCWC believes that the commission should take the time to validate apportionment not just as a concept, but as applied by California law.

The simple fact is that apportionment is a statutory provision that protects employers from paying benefits for permanent disability that is the result of some factor *other than the workplace injury*. Unfortunately, prior to SB 899 (Poochigian, 2004) apportionment was regularly disallowed by the administrative law judges at the Workers' Compensation Appeals Board.

The fact is that apportionment should have been, but was hardly ever allowed under during the time that the 1997 Permanent Disability Rating Schedule (PDRS) was in use. The result was that employers were forced to pay for inappropriately inflated permanent disability awards. The apportionment reforms of 2004 had the effect of making apportionment laws stronger, and did result in a reduction in permanent disability benefits. However, the 6.2% of compensation eliminated by apportionment reforms never should have been paid to injured workers in the first place because it was compensation for disability that resulted from some factor other than the industrial injury.

### Injured Workers Un-ratable Under the 2005 PDRS

Page six of the draft report contains an estimation of the so-called "zeroes". In opening this section of the report it is stated that, "Most observers have understood that the *AMA Guides* also were more restrictive than the 1997 California PDRS in the range of cases that are assigned any degree of permanent disability. That is, some portion of cases that would have been assigned a permanent disability (PD) rating under the 1997 PDRS would not rate any PD under the *AMA Guides*-based schedule." While this coalition does not disagree with this statement, we think it deserves additional context that is not provided in the report.

There is a reason that some injured workers receive a PD rating higher than 0% under the 1997 PDRS, but do not receive a PD rating higher than 0% under the 2005 PDRS – these people have absolutely no objective measure of impairment according to the American Medical Association Guides to the Evaluation of Permanent Disability (5<sup>th</sup> Edition). In other words, there is no objective medical basis for a permanent disability benefit.

It is important to understand how permanent disability was established prior to the 2005 reforms that introduced the *AMA Guides* – 5<sup>th</sup> Edition. Prior to the implementation of the 2005 PDRS permanent disability levels could be established by one of three methods, but the injured worker was always entitled to the highest rating produced from any of the three methods:

1. Objective Measurements – This is where there would be some objective and measurable physical manifestation of impairment, such as grip loss, a reduction in range of motion, demonstrable hearing loss, or some other objective criteria. Objective measurements were then translated into disability ratings.

2. Subjective Complaints – This is where permanent disability was awarded based on a subjective description of pain. Specific verbiage translated into specific percentages of permanent disability. For example, a doctor may say that an injured worker had “intermittent moderate” pain. This was not verifiable objectively and was based purely on an interview with the injured worker.
3. Prophylactic Work Restrictions – This is where a physician would place a specific limitation on the workplace activities of an injured worker. For example, the physician could require limitations to the amount of lifting, standing, sitting, or some other function. Again, specific language translated into specific permanent disability ratings. There was no requirement that the work restrictions be based on any objective demonstration of ability to perform specific tasks.

It should be understood that the system of establishing permanent disability ratings under the 1997 PDRS was broken. Ratings under the 1997 PDRS were almost entirely based on unverifiable and subjective factors instead of objective findings supported by evidence-based medicine. The results were unpredictable, inconsistent, and tended to favor the small number of people that opted for litigation and gamesmanship at the expense of typical injured workers.

CHSWC’s characterization of California’s subjective, pre-reform system was, “costly, inequitable, inconsistent and prone to disputes.” California’s rate of PD claims per 100,000 workers was three times the national average – 1,221 in CA compared to a national average of 434. The application of an objective standard for determining impairment was obviously going to have the effect of reducing California’s highest-in-the-nation frequency of PD claims, and rightly so.

#### Years Selected for Comparison

While the draft report demonstrates a clear reduction in benefits since the implementation of the 2004 reforms and the 2005 PDRS, this coalition strongly believes that it would be a mistake to attempt to draw conclusions about current benefit adequacy based on a comparison with ratings during two of the most problematic years under the 1997 PDRS. In other words, the draft report is best used as a tool to understand where PD ratings were and are, but not to understand where they should be.

#### Impact of Almaraz/Guzman and Ogilvie

The draft report provides only a cursory analysis on the impact of the Almaraz/Guzman and Ogilvie (AGO) decisions on PD ratings. Indeed, this single sentence analysis assumes that by evaluating claims from 1/1/2010 to 6/10/2011, the effects of this case law were incorporated into the final analysis. The California Court of Appeal decided AGO half way through the time period evaluated in the draft report. The practical effects of a court decision often take years – not months - to internalize.

Conventional wisdom amongst all stakeholders recognizes that the amount of PD paid to injured workers will increase as a result of the AGO decision. This decision swings the PD ratings system away from the objective based system and back towards the old system by allowing for gamesmanship and inconsistent ratings amongst injured workers. However, the draft report fails to capture this significant increase in PD ratings or acknowledge the likelihood that PD ratings are on a significant upward trend at the very moment this draft report was published as a result of AGO. A much deeper analysis of the present effects of AGO is necessary to give stakeholders and lawmakers a more accurate snapshot of the PD ratings.