

Date: April 4, 2016

To: Commission on Health and Safety and Workers' Compensation (CHSWC)

From: Diane Worley, Director of Policy Implementation, CA Applicants' Attorneys Association

RE: Benefits and Earnings Losses for Permanently Disabled Workers in California: Trends Through the Great Recession and Impacts of Recent Reforms, RAND, February 2016

The following comments regarding the RAND 2016 Wage Loss Report are submitted on behalf of the California Applicants' Attorneys Association ("CAAA").

The 2016 RAND Wage Loss Report confirms that permanent disability ratings assigned under the 2005 Permanent Disability Rating Schedule (enacted as the result of SB 899) continue to be inaccurate, inequitable and inadequate for many injured workers. This is based on RAND's own empirical data measuring the long term loss of earnings of injured workers. Findings include that permanently disabled workers experience large earnings losses, with earnings reduced by 28% on average in the second year following the injury. Also, although impairment ratings and benefits have increased over time, the fraction of earnings losses replaced by benefits declined between 2005 and 2012 due to increased earnings losses. Unfortunately, the amendments to the rating schedule adopted in SB 863 may not have improved the situation.

The 2016 RAND Wage Loss Report confirms that wage replacement rates have decreased over time. (See page 75, Figure 5.5) Further as shown in the RAND report wage replacement rates are lowest for low wage workers. Therefore, the findings in this report reveal there remain large groups of injured workers who are still grossly inadequately compensated.

The 2016 RAND Wage Loss report also focuses on the effects of the Great Recession of 2008-2009 on the economy and workers' wages. It is recognized that the gap between the earnings of injured workers and control workers increased rapidly after the onset of the recession, leading to a dramatic increase in average earnings losses for injured workers. But what the report does not recognize is that the American economy may be permanently changed as the result of the recession, and may never go back to where it was twenty years ago.

The Sharing Economy's Impact on Workers' Compensation was the focus of a presentation at the 32nd [WCRI](#) Annual Issues & Research Conference by Dr. Robert Hartwig, President of the Insurance Information Institute.

Dr. Hartwig's research focused on the "transformation of the American workforce," which finds more and more American workers flocking to companies such as Uber to bridge the gap between temporary and full time employment. Hartwig cited the meteoric rise of the smartphone and other mobile technologies that allow anyone to access services to discover a new source of income. Online corporations such as Uber and Airbnb are drastically changing the face of the economic workforce. Shared economy professions tend to reduce jobs to temporary "gigs" and to

attract low skill workers. “This is creating a trend toward growth of temporary workers in the United States,” Hartwig said.

It is true that workers who were injured during and after the Great Recession of 2008-2009 experienced substantially higher earnings losses than those injured before the great recession. However, while RAND believes this may have a temporary effect on wage replacement rates, changes in the composition of the injured worker population, particularly a shift toward workers with lower pre-injury earnings in temporary jobs, have not gone away. The empirical data supporting a dramatic increase in average earnings losses for injured workers since the recession is continuing. The 2016 RAND Wage Loss report further supports that injured workers never fully get back to where they were before their injury. They experience wage loss for the rest of their life.

The RAND report also acknowledges the Return to Work Fund benefit as a wage replacement benefit for the lowest wage workers with disproportionately high earnings losses. They include the payment of this benefit in their estimates of wage replacement for these workers. The Report states:

“The Return to Work Benefit has the largest impact on wage replacement rates for the lowest-wage workers. Since the other provisions of SB863 lead to larger benefit increases for middle-income and high-income workers, the Return to Work Benefit has an important role to play in preserving the progressivity of PPD benefits . We also found that the Return to Work Benefit serves a policy objective that is not advanced by the other SB863 reforms by making PPD benefit compensation more progressive. Even though it has a modest impact on overall wage replacement rates, the fact that the benefit was targeted to the lowest earning and most at-risk workers – those who do not return to work after an injury – led to an overall increase in the progressivity of benefits. However, more needs to be done to monitor the take-up and use of the benefits, and ensure that the Return to Work Benefit continues to support the most at-risk workers.”(Summary of Key Findings and Implications, page xii)

Unfortunately, most eligible injured workers have not been able to apply for the Return to Work Fund Benefit since the SB863 reforms.

Initially, there was no method to apply for the benefit until April 2015. Since then either due to lack of notice of eligibility for payments from the fund, failure of the claims administrator to provide the supplemental job displacement voucher which is needed to apply, or the complicated application process, very few injured workers have actually received money from the Return to Work Fund.

CAAA believes that the low number of applicants to the Return-to-Work Supplement program in 2015 (less than 4,000 when at least 24,000 were projected by the Rand study commissioned by CHSWC) is most likely due to this lack of notice of eligibility, as well as some difficulties in using the online application process. Therefore, CAAA petitioned for an extension for the deadline to apply for payments from the Return to Work Fund and a public hearing is expected

on this issue on April 15(as represented by Director Baker). CAAA believes it is the statutory responsibility of CHSWC to make sure injured workers get this money, especially in light of the findings of the 2016 RAND wage loss report.

In conclusion, CAAA acknowledges the PD benefit increase in SB 863 was substantial but it only brings benefits back to the inadequate levels before SB 899. Experience should tell us that the closer the schedule provides for accurate permanent disability ratings, the less friction there will be in the system. Yet we have been moving in the opposite direction for many years. The outcome of any evaluation of “Benefits and Earnings Losses for Permanently Disabled Workers in California” by RAND should be to achieve adequate wage replacement rates for all injured workers and to achieve rating accuracy through the use of reliable empirical data.

As noted above, what RAND has found is that ratings assigned under the 2005 rating schedule continue to be inaccurate and inequitable. RAND also found "that while SB863 did not worsen horizontal [rating] equity, it also didn't improve it." (page 110).

CAAA strongly urges the Commission to follow up with the empirical wage loss data developed by RAND and take a look at the fact that the current rating schedule has not been amended to be in conformance with RAND's findings.

From: Mark Gerlach
Sent: Monday, April 04, 2016 8:54 AM
To: DIR CHSWC
Subject: Comments on RAND Report, "Benefits and Earnings Losses for Permanently Disabled Workers in California"

Date: April 4, 2016

To: Commission on Health and Safety and Workers' Compensation (CHSWC)

From: Mark Gerlach

RE: Benefits and Earnings Losses for Permanently Disabled Workers in California: Trends Through the Great Recession and Impacts of Recent Reforms, RAND, February 2016

The following comments regarding the RAND 2016 Wage Loss Report represent my opinions as an individual and do not represent the position of any of the clients I have consulted with during my 40+ year career working in the California workers' compensation system.

The 2016 RAND Wage Loss Report presents a challenge to the Commission, and in fact to the entire California workers' compensation community. The findings of this Report are like the old Yogi Berra quip – "It's deja vu all over again." Simply put, what this Report found is that permanent disability ratings assigned under the 2005 Permanent Disability Rating Schedule were inaccurate and inequitable and that the amendments to the rating schedule adopted in SB 863 may make that situation even worse. The fact is that the 2003 RAND Interim Report found almost identical inaccuracy and inequity in ratings assigned under the "old" California Permanent Disability Rating Schedule.

What this means is that despite two major revisions of the permanent disability rating schedule over the past 12 years, California's employers and employees are back where they started, with a permanent disability rating schedule that assigns inaccurate ratings. The question is, what should be done about this problem?

To answer that question, it's helpful to take a look at the 2003 RAND Interim Report and the conditions which led the Commission to sponsor that study. The 2003 Interim Report was one of a series of groundbreaking studies conducted by RAND for the Commission. The purpose of those studies was to collect empirical data on the impact of a work injury on an individual's wages. There had been other attempts to measure the impact of work injuries, but the RAND studies were the first large scale studies to use what we now term "big data" to quantify the wage loss experienced by injured workers.

The main focus of the RAND wage-loss studies was to look at the adequacy and equity of permanent disability ratings (and benefits) assigned under the "old" California Permanent Disability Rating Schedule. There had been continual criticism of that rating schedule for most of the history of the workers' compensation system, but – as several joint legislative study committees in the 1950s determined after extensive hearings– there was no evidence that any

other rating schedule was better. Consequently, the unique rating schedule survived all attempts at repeal.

By the early 1990s, increasing concerns by employer interests that the rating process was too subjective were an important issue when the Commission contracted with RAND to examine and evaluate the permanent disability rating process. The importance of the RAND study was that it provided concrete evidence that the California rating schedule produced inaccurate ratings. That finding provided the justification for finally replacing the "old" rating schedule in SB 899.

RAND even recommended a solution to the problem of inaccurate ratings – adoption of adjustment factors that would reorder ratings consistent with the empirical wage loss data. There can be no doubt that the Legislature intended that a new permanent disability rating schedule be adopted consistent with that RAND recommendation. Section 32 of SB 899 required that the permanent disability rating schedule be "based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies." [Labor Code §4660(b)(2)]

Unfortunately, reordering ratings to be consistent with the empirical wage loss data proved easier said than done. Although the empirical wage loss data developed by RAND could have been used to reorder ratings under the "old" California rating schedule, that data could not be used to develop adjustments to be applied to impairment ratings assigned under the *AMA Guides*, a completely different rating instrument. Consequently, when the new rating schedule was adopted in January 2005, even though it did include eight adjustment factors that were called "Future Earning Capacity" adjustments, in reality there was no empirical basis for those adjustment factors. Subsequently data was collected that could have been used to produce empirically based adjustments, but - despite a statutory mandate to revise the rating schedule at least once every five years - the originally adopted non-empirical adjustments were never revised. Ratings developed with those non-empirical adjustment factors could not, and did not, reorder the ratings to be consistent with the RAND wage loss data.

The 2016 RAND Report spells out the consequence of adopting that non-empirically based rating schedule. As noted above, what RAND found was that ratings assigned under the 2005 rating schedule were inaccurate and inequitable. RAND also found "that while SB863 did not worsen [rating] equity, it also didn't improve it." [page 110] The bottom line is that ratings under the 2005 schedule were inaccurate and inequitable, and ratings under the schedule adopted pursuant to amendments in SB 863 are also inaccurate and inequitable.

That brings us back to the question: what should be done? As noted, in its 2003 Interim Report RAND provided an answer – adopt empirically based adjustment factors that will reorder ratings consistent with the wage loss data. Some may object to that solution, claiming that we've "been there, done that." But that's simply not true. Empirically based adjustment factors were never adopted and have never been used in California. As RAND noted, "the FEC as implemented [in the 2005 rating schedule] was based on the old California PDRS and did little to address discrepancies in the relationship between earnings losses and disability ratings under the *AMA*

Guides." [page 107] Thus, in actuality there has never been an empirically-based rating schedule in California (or anywhere else, for that matter).

Conclusion

To summarize the bizarre "non-history" of the empirically-based rating schedule in California:

- based on the recommendation of RAND, the Legislature mandated that an empirically based rating schedule be adopted, but
- that mandate was never complied with, and as a result
- inaccurate and inequitable ratings were assigned under the 2005 PDRS, which led to
- disputes and litigation in an attempt to secure more accurate and equitable ratings, which caused
- employer discontent over that litigation, culminating in
- repeal of the never complied with mandate to adopt an empirically based rating schedule.

The challenge facing the Commission is whether it will continue its support for an empirically-based permanent disability rating schedule. I strongly urge the Commission to not simply accept this report and file it away, but to take a strong stand in support of amending the current rating schedule to reorder ratings in conformance with the empirical wage loss data developed by RAND. Although adoption of empirically based adjustments would not eliminate all disputes, it is as certain as night follows day that doing nothing to correct the documented problem with the current rating schedule can only result in increased turmoil in the permanent disability rating process.