

**Commission on Health and Safety and Workers' Compensation**

**MINUTES OF MEETING**

**August 9, 2007**

**Elihu M. Harris State Building  
Oakland, California**

In Attendance

Chair Kristen Schwenkmeyer

Commissioners Catherine Aguilar, Allen Davenport, Robert B. Steinberg, Darrel "Shorty"  
Thacker and Angie Wei

Executive Officer Christine Baker

Not in Attendance

Commissioner Sean McNally

**Minutes of Previous Meeting**

Chair Schwenkmeyer requested a vote on the Minutes of the previous meeting.

*CHSWC Vote*

Commissioner Wei moved to approve the Minutes of the April 27, 2007 meeting, and Commissioner Aguilar seconded. The motion passed unanimously.

**Report on the Division of Occupational Safety and Health**

**Len Welsh, Acting Chief, Division of Occupational Safety and Health**

Len Welsh stated that he understands there is interest in studying aspects of Cal/OSHA's regulatory effectiveness and that there is a draft CHSWC paper giving an overview of the Cal/OSHA program. Mr. Welsh stated that California is one of about half of the states in the country that has a State Plan, meaning that it is authorized by Federal OSHA to regulate occupational safety and health in the state. When Federal OSHA adopts a new occupational safety and health standard, California does not enforce the federal standard, but it does have to adopt and enforce an equivalent standard that is at least as effective in both areas as the federal standard within six months.

Mr. Welsh stated that the term "Cal/OSHA program" generally refers to the entire State Plan that California has to regulate occupational safety and health. It refers to a three-agency structure consisting of: the Cal/OSHA Appeals Board, where appeals of citations are heard; the Occupational Safety and Health Standards Board, which actually adopts the standards that Cal/OSHA enforces; and the Division of Occupational Safety and Health (DOSH), which is the formal title of the agency that he runs. DOSH is often referred to as just "Cal/OSHA," hence the distinction between the Cal/OSHA program and Cal/OSHA.

Mr. Welsh stated that Cal/OSHA has several public safety regulatory programs in addition to

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regulating occupational safety and health. These programs include: the Pressure Vessel Unit, which regulates any pressurized vessel that is larger than a certain size, which is a public safety and occupational safety and health function; an Elevator Unit that regulates elevators and issues permits, again, to protect non-occupational and occupational users; a Tramway Program for ski lift safety; and an Amusement Ride Program for portable and permanent amusement ride safety for patrons as well as for employees.

Mr. Welsh stated that the Appeals Board and the Standards Board are independent boards. Historically, this has had a significant impact. The agency is closer to stakeholders than Federal OSHA is, which may be partly because it is a smaller program compared to a national program. Over the past 30 years, a process has evolved through which almost every controversial issue is addressed through an advisory committee process of one type or another. Generally speaking, Cal/OSHA tries to bring all the stakeholders to the table, labor and management and members of the professional community who are interested, and try to achieve consensus on issues. When a controversial standard is adopted and a substantial part of the employer community does not like that standard, there is resistance in compliance with the standard, as well as a lot of litigation around trying to set the ground rules for compliance. When there is a standard with broad consensus, there is more buy-in, and both labor and management help broadcast Cal/OSHA's message to the regulated public.

Mr. Welsh stated that he wanted to draw attention to three issues that he believes are getting the most attention for those who are following Cal/OSHA developments. One is the High Hazard Program, which and its purpose was to target the industries with the highest number of hazards and the highest prevalence of hazards in the workplace and to focus the agency's attention on those workplaces. The program also tries to direct resources where they are most needed and to provide both an enforcement focus and a funding approach. The program targets employers who have experience modification ratios of 1.25 or higher, and those employers have to pay a special assessment. The assessments go towards the funding the High Hazard Program. The agency then targets those employers for attention, as well as other establishments that are randomly selected from industry segments for which statistics show there are higher hazard places of employment.

Mr. Welsh stated that the targeting process attempts to offer employers the opportunity to have a consultation with the Cal/OSHA Consultation Unit. That Unit conducts site visits by permission and agreement of the employer; the agreement essentially calls for the agency to come in and look for hazards, point them out to the employer, and obtain the employer's agreement to fix the hazards. If the employer fixes the hazards, then citations are not issued. The High Hazard Program also offers those employers who have been assessed penalties the opportunity for consultation. If they take the opportunity, they receive attention; if they do not accept the offer, they then get placed on a high priority list for inspection, and in most cases, they receive an enforcement inspection. Mr. Welsh stated that the targeting concept, in place since the early 1990s, has been successful overall.

Mr. Welsh stated that a more recent development at the agency is the Economic Employment Enforcement Coalition or Triple EC. It is the brainchild of Vickie Bradshaw, who runs the Labor and Workforce Development Agency of which Cal/OSHA and the Department of

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Industrial Relations (DIR) are a part. The Triple EC is a dual concept: first, an attempt to target the underground economy as a place where egregious violations are most likely to be found; and second, as part of that targeting process, to use the most holistic approach possible given the regulatory resources and data sources available. Historically, Mr. Welsh stated, Cal/OSHA might go into an establishment and find violations, even find a “bad actor,” that is, one subject to criminal charge, and would engage in the enforcement action; however, agencies that might also have an interest in that company would not necessarily be part of that enforcement effort. In fact, they might not even know anything about that enforcement effort. For example, the sister agency, the Division of Labor Standards Enforcement (DLSE) might be interested in labor law violations that the employer might be committing, or the Contractors State Licensing Board (CSLB) might be interested in the fact that a contractor is not licensed. He stated that the dual concept was to put together to group agencies, so that if one agency finds a violation, there is a high probability that other agencies are also going to find violations. The agencies would share information and engage in the enforcement effort as group and act as a team. The Employment Development Department (EDD) is also one of the partners, along with the DLSE, the Contract State Licensing Board, and Cal/OSHA.

Mr. Welsh stated that the Triple EC has been piloting this project for almost three years and that it is another version of the targeting approach, actually an offshoot of a “sweep enforcement” approach that Cal/OSHA has been involved in for over a decade, which is a targeting mechanism or means to find employers that Cal/OSHA is interested in. He stated that if they know where to find certain kinds of economic activity that they think will have a high incidence of underground economy participants, then they will try to approach those employers, unannounced, in a sweep fashion. For example, in agriculture, if Cal/OSHA knows that the harvest of grapes begins in mid-August and goes on through the end of October and it is known roughly where the crops are being harvested, Cal/OSHA can show up unannounced during the harvest and cover lots of different activities of several different employers in one inspection. Using this approach, there is higher likelihood of finding businesses in the underground economy.

Mr. Welsh stated that the Triple EC approach attempts to join the sweep concept to the concept of a more holistic agency approach to focus different regulatory agencies on those companies that most everyone agrees are not “good citizens.” Since the inception of the program, there has been a certain amount of pushback from the regulated public, not unjustified, which arises out of the sense that Cal/OSHA does not do as good a job as it should in finding the really “bad actors.” A lot of the time Cal/OSHA finds people with violations, but they are not necessarily bad corporate citizens. The program finds those violations because the employers are visible, but those employers do attempt to comply and send in reports on injuries, for example, as the law requires. Those employers become known and they get regulatory attention; however, the making of an example approach/penalty approach might not necessarily be appropriate in those situations versus situations in the underground economy situation where the truly bad actors are. Mr. Welsh stated that throughout the years, the program has been trying to improve the approaches to whom to deal with: the criminal approach to the true criminals; the “tough-love” approach to those in violation but who are not bad citizens overall; and the approach of rewarding the good actors who set an example for all of the regulated public to emulate.

Mr. Welsh stated that a regulatory issue for Cal/OSHA that has become very visible over the past

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three years is heat illness prevention for workers who work outdoors. This issue was dealt with through an advisory committee process for over 20 years without a lot of progress. In 2005, the Governor asked the Board to adopt an emergency standard, which was adopted the same month of the request. In the summer of 2006, a permanent standard was adopted. He stated that this was very timely as there were two heat waves in 2005 that were fairly unusual in California, as well as an exceptionally severe heat wave in 2006 which was one of the worst in California's history. A lot of fatalities resulted from those heat waves. An informational and enforcement program was begun in 2005 on heat illness prevention with the adoption of the emergency standard. At the request of stakeholders, Cal/OSHA conducted a study of what was found during inspections before the heat illness prevention standard. Inspectors were using the Injury and Illness Prevention Standard as a type of General Duty clause. Once the emergency standard was adopted, that became an additional tool until the final standard was adopted, and a study was conducted looking at the core issues of what causes workers to become seriously ill or to die when working in high heat.

Mr. Welsh stated that the heat illness standard is fairly simple and uses common sense: employers should have plenty of fresh water around; employees need to drink the water at a rate of four cups per hour during high heat, as most of the heat illnesses that result in a trip to the hospital are case of severe dehydration; and employees are required to have a break of at least five minutes when they feel that they need it to prevent getting sick from the heat. They can take several breaks during the day if they wish to for five minutes or more depending on the employer and be able to take that break in a shaded area completely out of the sun. Mr. Welsh stated that the problem is that employees feel a pressure not to take breaks, and there was controversy about whether the standard should have had a requirement for employers to allow employees to take breaks periodically. There is also a training requirement in the regulation. The study looked at the kinds of violations where the worker got sick from the heat, from mild heat cramps to death, and Cal/OSHA held an inspection. One notable finding from the study is that in 2006, there were substantially more cases of heat illness reported of than in 2005, but the number of deaths was a third lower than in 2005, and that this was a year in which the heat wave was more severe than 2005. In addition, non-occupational heat fatalities in 2006 were up to 200, whereas the figure was below 30 fatalities in 2005, although not all the data are available for 2005.

Mr. Welsh stated that the findings of the study may not be statistically significant, but they are suggestive and need to be studied further. The data appear to demonstrate that something significant was going on in terms of how effectively the entire heat illness prevention campaign was reaching its intended targets. Along with issuing the standard, Cal/OSHA used various ways to work with the media to get media spots and to do training sessions with the State Compensation Insurance Fund (SCIF) for employers and employees. A strong message was sent out including that the standard would be enforced through unpredictable sweeps, and that Cal/OSHA would be reaching industry associations and a lot of the labor unions. This set the stage for studies to conduct in the future about how Cal/OSHA most effectively goes about enforcement.

Mr. Welsh stated that there is a perception that enforcement is the primary tool that Cal/OSHA has. It certainly is a necessary tool; there is no doubt that the agency will never be effective if it does not have strong enforcement which has to be non-negotiable. However, the question is

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whether enforcement action is enough to stop non-compliance or whether there is a need to focus more on reaching the regulated public with information for employers about the requirements, as well as reaching employees about what they should be getting from their employers in terms of health and safety protection. He raised the question of whether they are taking advantage as much as should be done with stakeholder channels to get the message out, primarily, industry and labor organizations. It is important that these groups help Cal/OSHA identify employers that violate requirements. Cal/OSHA does hear from labor unions and from employers about employers who make it difficult for them to comply because they are undercutting the competition. As a result, Cal/OSHA is being seen more and more as an agency that can level the playing field and be a useful tool to industry by helping it follow an industry standard that is productive and the right thing to do.

*Questions from Commissioners*

Commissioner Wei asked whether Mr. Welsh could talk about Cal/OSHA's role in preventing workplace injuries and illnesses and workers and employers avoiding the workers' compensation system. She also asked about the efficacy of the General Duty Clause and the Injury and Illness Prevention Program (IIPP) in preventing injuries and illnesses. Mr. Welsh responded that the IIPP is different from the General Duty Clause. The General Duty Clause is about one sentence in the federal Occupational Safety and Health Act, which says that employers must protect employees from serious recognized hazards, but there is no specific standard for each hazard.

Mr. Welsh stated that California has the IIPP, established by statute around 1989. In contrast to the General Duty Clause, it lays out a procedural framework through which employers must address safety and health issues. It states that employers must have somebody in charge with the authority to correct hazards, and the employer has to have an effective system of communication to get real-time safety information to employees and hear back from them about safety issues on the job. The employer also has to have a system to conduct inspections and, periodically, to look for hazards in the workplace. In addition, there has to be a system for correcting hazards that are found and a system for investigating accidents and illness, and training. This program creates controversy and litigation, but it is a different approach than the General Duty Clause because it gives a lot more guidance to employers about how to create a structure which addresses safety and health hazards. Mr. Welsh stated that Cal/OSHA has used that regulation in the past to address tuberculosis, because there was no standard directly addressing protecting hospital and other allied health care workers against tuberculosis. In the 1990s, there were tuberculosis incidents in the state, and people were calling it an epidemic for a couple of years. Cal/OSHA effectively used Labor Code Section 3203 to enforce protections for tuberculosis. Mr. Welsh stated that this was easy to do, because tuberculosis is a recognized hazard; nobody wants to get it, and they are appropriately afraid of it. There were guidelines from the Centers for Disease Control and Prevention that laid out the procedures that hospitals and health care institutions should have to address tuberculosis protection, such as keeping patients in isolation rooms and restricting access by workers to those isolation rooms, and requiring the wearing of respirators and other precautions. This effort showed that Cal/OSHA had a well worked-out set of guidelines that everybody could use for protecting health care workers from tuberculosis.

Mr. Welsh stated that there was resistance to using Labor Code Section 3203 all during the

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1990s, for example, to protect workers from ergonomic hazards, but he stated that he believes that Cal/OSHA made in-roads in that controversy when it chose to take a strong stand by using Labor Code Section 3203 for tuberculosis. Cal/OSHA also used this ruling for heat illness prevention before other standards were adopted and continues to use it for indoor heat illness prevention. The standard is a “general duty clause plus.” He added that there is another tool called a Special Order. Many times Cal/OSHA can enter a place of employment where there is no specific standard to address a hazard and disagreement about the appropriate way to fix the hazard. Mr. Welsh stated that in a situation like this, it would be less appropriate to cite an employer with Labor Code Section 3203, the IIPP standard, and assess penalties than to issue a Special Order, which is penalty-free but is an instruction to the employer that they have to make certain changes, and it is tailored to that particular place of employment. Cal/OSHA often issues a Labor Code Section 3203 citation for something that was obviously done incorrectly and a Special Order to indicate that in addition to fixing the former, there are other changes that ought to be made. However, those citations are subject to appeal. When a Cal/OSHA citation or a Special Order gets appealed, the employer’s legal duty to abate the hazard is stayed until there is a final resolution through the appeal process.

Mr. Welsh stated that the Cal/OSHA regulatory paradigm does fit into a program that is based on injury and illness prevention and that seeks to reduce workers’ compensation claims. He stated that it is fundamental that health prevention should be used to reduce workers’ compensation claims. Workers’ compensation comes after an injury, while Cal/OSHA enforcement, training and information are all geared toward prevention. He also stated that there is a lot left to do to convince the insurance industry that loss control is a quantifiable tool that can be used to assess risk and thereby lower rates. All insurers have some sort of loss control worked into their programs, and advice and review of safety and health hazards at the workplace are included in loss control. Mr. Welsh stated that the product offered by insurance companies varies from carrier to carrier and that carriers do have problems figuring out how the impact of loss control can be quantified in the sense of underwriting and assessing rates. He stated that preventable loss control in the workers’ compensation insurance coverage is a current struggle.

Commissioner Wei asked if Mr. Welsh could discuss how many penalties are assessed and how much money is collected. She stated that the draft CHSWC report and the Triple EC may be a good targeting effort for enforcement, but that it looks like less than 10% of the penalties assessed are collected, and that this seems to be a pattern. Mr. Welsh responded that it has been a recurring theme throughout the history of the program. He stated that the penalties assessed and collected do not go to fund Cal/OSHA; they go directly into the General Fund, and the Cal/OSHA budget is not determined according to what is brought in by penalties, because it was decided long ago that there was too much of a risk that Cal/OSHA would be seen as a “bounty hunter.”

Commissioner Wei asked if Mr. Welsh agreed with that characterization. Mr. Welsh stated that he did agree with it. Certainly, if the agency were able to receive the money that it assesses, it might create an incentive to collect more. He stated that it could be at odds with the message that they are trying to give the regulated public. The penalty is assessed; actually Cal/OSHA uses the word “assess,” but the Appeals Board says “propose.” Appeals Board case law long ago defined the assessment of penalties as a “proposal.” Cal/OSHA applies the Director’s

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Regulations, which are formulas that specify how Cal/OSHA proposes a penalty. Cal/OSHA has to classify the violation in terms of classifications such as general serious, repeated, willful, willful-general, willful-serious, failure to abate, and regulatory. General and regulatory are the lowest in severity of the violations that are cited, and they receive the lowest penalties. Penalties can be adjusted up or down depending on how many employees were exposed, the overall assessment of the employer's health and safety program, and the size of the employer. Cal/OSHA classifies the violations and assesses penalties according to the formulas directed by the Director's regulations. An employer can appeal those penalties, which is what usually happens. In fact, employers have been appealing penalties at a higher rate for the past seven years than they have in the history of the program. The appeals process looks into the appropriateness of the penalty assessed by the Division. That is an opportunity for the penalty to be lowered substantially from the proposed level, and that typically happens. Mr. Welsh stated that controversy can arise around whether that process is functioning the way it should. He stated that there are certainly cases in which he believes it has been inappropriate for the Board to reduce penalties and cases when it has been entirely appropriate. He also stated that they do not believe that penalties are bound by the Director's regulations, and that the agency has statutory authority to lower a penalty in the interest of justice when it believes that that is appropriate after taking into account the entire set of circumstances for which there is a penalty violation.

Commissioner Davenport asked whether this happens 90% of the time. Mr. Welsh replied that it does not and that he was trying to describe the whole process of what happens between a proposal and what goes into the General Fund. One big factor is the appeals process, as a lot of reduction will occur in the appeals process. He stated that he would guess that about 66% of the dollars are reduced. He stated that they did a study in the 1990s. From the point where the penalty gets assessed, which is the Appeals Board pronouncement about what that penalty should be, there are also settlements which are reductions, and Cal/OSHA tries to get about 50 cents on the dollar, which is about what Federal OSHA gets; however, Cal/OSHA does not yet get that much, though that is improving.

Mr. Welsh stated that it is a challenge to collect the penalty and that part of the problem is that the Appeals Board has a substantial backlog. Cases can wait as long as two and a half to three years before going to appeal. He stated that this is largely a result of the increased incidence of appeals coupled with the staffing of the Appeals Board which has not been adequate to meet the task. He stated that Candace Traeger, the Appeals Board Chair who has been there for about three years, has done a tremendous job with the staff available of getting the backlog down. She has come to the Cal/OSHA Advisory Committee meetings which are held every two months and are open to the public, and she has reported for the past two years on the steady reduction of the backlog. . Mr. Welsh stated that he thought the Board could still operate more efficiently, but that Chair Traeger has helped a lot to reduce the backlog and that will go a long way to collecting more money. He stated that after two to three years of sitting on appeal, the chances of prevailing on appeal begin to diminish because witnesses can not be found. He also stated that workers hesitate to be witnesses and say what happened at a workplace, which is necessary to do because hearsay evidence cannot be accepted. He stated that there are legal protections for workers if they are retaliated against for acting as a witness, but the effectiveness with which retaliatory actions are addressed can vary. He stated that he would think twice about being a

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witness if he were a worker with a family to support. He then stated that the length of time it takes to get to litigation can seriously prejudice the Division's case. Another key factor is the collection process, which the Department of Industrial Relations (DIR) has been looking into for the past two years. He stated that they are making ongoing changes to process, with someone from Cal/OSHA assigned to work with DIR accounting. He stated that improvements will be made, but there are several steps along the way that figure into the reduction of penalties.

Commissioner Davenport stated that Mr. Welsh is regarded as a standard bearer in California, but the Commission is about to hear a report that confirms his suspicion that insurance companies are in the business primarily of collecting money to cover their losses and make profits. He stated that Mr. Welsh pointed out that by the time they assess an appeal, it is three years late and worth about a one-third of its originally established value. He asked what incentives exist in the system for creating health and safety. Mr. Welsh responded that Cal/OSHA needs to take some of the blame as some of the reductions are appropriate because Cal/OSHA did not do their job well. He stated that there is Quality Control that goes throughout the DOSH enforcement process.

Commissioner Davenport stated that it seems to be of advantage to anyone who is trying to avoid their duty to delay and get their penalty reduced. Mr. Welsh replied that people like to think of the Cal/OSHA system as a criminal-type system, which it is not. There are aspects that are criminal and need to be treated on that basis; however, there is a large group of employers that will be fined for violations and Cal/OSHA will propose penalties, but will the issue is that Cal/OSHA had an interaction with those companies. He stated that in the end, the companies are far less concerned about the amount of penalty than they are about their reputation and having a business that is looked upon as competent. He stated that when a business has safety problems, it probably also has other problems. He stated that he did not believe that the issue for Cal/OSHA enforcement effectiveness begins and ends with the penalty amount. He stated that he thought that the threat of a penalty is important for somebody who is thinking about cutting corners, but the interaction with Cal/OSHA that they actually have may be far more important. This might be an area worth studying. He stated that if Cal/OSHA walks into a business, cites a lot of penalties, and those penalties prevail, that means is that there was a successful enforcement action, that the employer was fined and paid the penalties. However, Mr. Welsh stated, that does not necessarily mean that there was change at the workplace having to do with safety and health. It means the employer got punished. The purpose of punishment is to change behavior that will make the workplace better in terms of health and safety.

Commissioner Davenport asked Mr. Welsh to identify what can change behavior. Mr. Welsh stated that they struggle with that question and that he believes that having a relationship is what changes behavior. He defined that as the type of interaction Cal/OSHA has. Cal/OSHA goes to a workplace, assesses penalties if there are violations, and gives guidelines on how to fix the problem. They pay attention to the issues that exist in the company that caused the problem in the first place. It would also be helpful if they could return, perhaps even tell the employer that they are going to be followed for the next four years. In this type of system, Cal/OSHA would give the employer information about health and safety and perhaps become familiar with the work processes that produced the problem. They would come back in a year to see if there were positive changes and then come back three years later and see whether the employer was still

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focusing on health and safety practices. Mr. Welsh also stated that Cal/OSHA could be even more effective if it could identify sample industry segments to target, as they targeted agriculture. He stated that they would pick industry segments and develop a relationship with some of the people that would span four or five years. In Year 1 and Year 3, the sample would be those employers who did not have an interaction with Cal/OSHA in order to see if the campaign with the industry segment affected the level of compliance in the industry as a whole.

Commissioner Davenport asked if Cal/OSHA has the authority to do such a program, and Mr. Welsh responded that they did. Commissioner Davenport asked what percentage of their time and budget are dedicated to that, and Mr. Welsh stated that they are starting to put together an approach like that in the High Hazard Program. He stated that his idea is to start a pilot that would address a specific issue. For example, the heat illness study is a containable study, which regardless of its statistical significance, has a lot of important information in it. He stated that he wanted to pilot something as just described for the High Hazard program, where a regional manager and a district manager were just identified, and there is a structure now in place to do that. He stated that it will be a modest start, but it will provide useful information in the end indicating whether it is worth pursuing or what obstacles prevented it from achieving results.

Commissioner Wei stated that the data on health illness prevention in 2006 are impressive and that there seem to be more training, less deaths, and less severity in the injuries suffered by workers outdoors. She restated Mr. Welsh's description that the regulation was a logical, commonsense approach for the regulated public. She stated that it was still unclear to her why Cal/OSHA is not looking into indoor heat regulations, since the data suggest that there are cases of injury and illness due to indoor hot and humid temperatures. She then asked why the commonsense framework of regulatory action could not be applied to the hot and humid indoor workplaces to get the same results as have been achieved with outdoor workplaces. Mr. Welsh responded that when they looked at the indoor heat issue, they observed a problem that did not appear to be a workplace issue. He stated that Cal/OSHA's view is that outdoor employment is more an occupational issue, specifically when it refers to heat. Indoor issues seem to be more general in California. He stated that this does not mean that Cal/OSHA cannot regulate it but that the approach by Cal/OSHA is to get the word out to industry and labor organizations that Cal/OSHA will enforce and to provide advice about what exactly to do about heat. The enforcement tool is Labor Code Section 3203, which even the Chamber of Commerce has acknowledged as an appropriate enforcement tool for this issue. He stated that he believes that with this effective enforcement tool, Cal/OSHA will see results and improvement; a precedent is being established, and it is important to get the message across that Labor Code Section 3203 can be used in this way.

Commissioner Wei stated that this appears to be an enforcement approach versus a prevention approach. She stated that if training and education have identified what the signs and symptoms of heat illness are for outdoor employers after 20 years of regulatory discussion, the same could be said for indoor heat illness. There could be a prevention approach as opposed to an enforcement approach. She stated that commonsense training and education are not a punitive measure and that the Commission looks to Cal/OSHA as a resource to avoid injuries and illnesses. Enforcement focuses on the end of a process, and the focus should be on the early stages of the process. Mr. Welsh responded that he wanted to make clear that Cal/OSHA is

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enforcing protections for workers against indoor heat. Labor Code Section 3203 is the tool, and the challenge is to make sure that employers understand that Cal/OSHA is serious about enforcement of this law.

Christine Baker stated that the CHSWC background paper on DOSH, the invitation to Mr. Welsh, the Acting Chief of DOSH, and the invitation to RAND researcher Dr. John Mendeloff were all a result of an interest on behalf of Commissioner Sean McNally, who had an urgent matter come up and could not attend the Commission meeting, and he apologizes that he could not be present. She stated that the Commission believes that it is important to bring in some independent analysis on this subject and has asked Dr. John Mendeloff who has written articles and books on safety and health to speak on developing a research agenda for injury and illness prevention, which she believed should follow Mr. Welsh's presentation. The Commissioners agreed to hear Dr. Mendeloff's presentation next.

**Developing a Research Agenda for Injury and Illness Prevention**

**Dr. John Mendeloff, RAND, Center for Health and Safety in the Workplace**

Dr. John Mendeloff stated that he recently spent a lot of time working with safety and health and workers' compensation programs in Canada, British Columbia, Ontario and New Brunswick, to find out how they can use data to make programs there more effective. He stated that occupational health is about 30 years behind medicine in terms of evidence-based medicine, as there are not a lot of evidence-based safety and health programs. He stated that there are some major steps that California can take to lead the way to evidence-based programs, and he stated that the presentation would focus on the importance of developing an infrastructure that can support research and suggest some proposals that might be feasible to carry out, as well as provide some useful information.

Dr. Mendeloff stated that a research infrastructure is important in situations when it not clear what is happening. For example, when reported injury rates go down, does that mean that the risks going down or that other things are going on. He stated that it is often difficult to do good research when you do not know what your outcome indicators are telling you. Useful research requires an adequate "infrastructure" for research with measures of outcomes that are credible. Often, there is no way of linking injury data to management systems in place that can identify demographics on workers, such as whether they are married or have children, which can indicate whether those demographics affect how employees behave, or what kinds of incentives are there based on their particular workers' compensation and what kind of experience rating is there. Finally, there is the use of experimental design to evaluate interventions such as evidence-based occupational safety and health (OSH) prevention programs.

*Infrastructure Issue #1: Do the Measures We Use Really Capture What We Want to Measure?  
Are they Valid?*

Dr. Mendeloff described some data examples, for example, the Lost Workday Injury Rates (which are now called the DART rate) shown below.

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|                   | <u>1996</u> | <u>2004</u> | <u>% Change</u> |
|-------------------|-------------|-------------|-----------------|
| US Private Sector | 3.4         | 2.5         | -26%            |
| CA Private Sector | 3.4         | 2.9         | -15%            |
| CA State Gov't    | 3.6         | 3.9         | + 8%            |
| CA Local Gov't    | 4.5         | 4.7         | + 4%            |

He stated that private sector rates went down but public sector rates went up, and he posed the question of whether these data mean that the risks went down in the private sector or whether other things are going on. Several questions also arise including: are public sector worksites really more risky? is there less reporting, due to use of reported injury rates used for targeting? are employers now trying to suppress the claims so that they will not be targeted, knowing that rates are being used for targeting? is there less reporting due to fewer opportunities to pursue weak claims due to workers' compensation changes? is there less reporting due to more aggressive return-to-work programs? and is there less reporting due to employee fear of retaliation? These have all been suggested as factors that are influencing the reported rates. Clearly, it is important to know the real facts in order to make progress in understanding what effectively reduces risk to workers. Reported rates are not necessarily going to help reduce risk to workers unless there is a better way to understand what is really going on.

*Infrastructure Issue #2: Enriching the Data in Order to Learn*

Dr. Mendeloff stated that by adding variables or linking data sets, some important questions could be explored including:

- Do certain management systems prevent injuries?
- Do demographic factors (inexperience, marital status) explain much of the variation in injury rates?
- Does the use of new or different technologies explain variation in injury rates?
- Does a new regulation have an impact?

He stated that it is critical to find ways of identifying which actions are being done in which industries, and that workers' compensation data need to be enriched or linked in order to study the important questions.

*Infrastructure Issue #3: Using Strong Research Designs*

Dr. Mendeloff stated that too often someone comes in and says, "we would like you to evaluate this program we've been running." In these situations, there is usually no control group, no consistent data collection, no baseline measures, and no variations in program intensity. He stated that he believes that Mr. Welsh and DOSH are trying new approaches to learn what comes from results, both good and bad. He stated that often that is very hard to do because there are political risks and because once people have fought to get a program, they are less enthusiastic to learn if it really works. He stated that new interventions should be designed to be evaluated, and experimental design should be used when possible. He also stated that cooperation between the government and the private sector is essential for evaluation, particularly when there are public datasets as in studying highway safety where everything is out in the open in public datasets. Work goes on in private firms, and unless there is a way to get private firms to work more closely with researchers and agencies to understand new technologies and management systems,

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knowledge can not be developed in a systematic way. Instead, there will be the type of magazine articles about “how I reduced my firm’s injury rate by 87%,” which may be purely anecdotal. Dr. Mendeloff stated that efforts need to be organized in a more systematic way to be able to learn in a way which is credible.

*Having a Good Infrastructure is Crucial*

Dr. Mendeloff said that it is important to imagine how difficult the effort to assess health care institutions and interventions is without good measures of outcomes, methods to control for case-mix, and the use of experimental methods for clinical trials. California has a good opportunity, much better than the federal government has, to lead the way in research by creating the infrastructure that will both allow new insights about what works in California, as well as enrich the broader field of occupational safety and health prevention.

*Topics for Research*

Dr. Mendeloff stated that there are an infinite number of topics for research and that useful research requires posing answerable questions where the answers will lead to better decisions. He then stated that if you can not say how decisions would change as a result of what the findings are, then there may be no value of the research for decision-makers. He stated that these are tough criteria, even for applied research, but that research sometimes has to proceed in stages laying the groundwork for being able to answer questions in the future.

Dr. Mendeloff next stated that there are several key questions that can be research topics, such as: how can DOSH foster greater prevention? what research could help to answer this question? how can California reduce risks to workers in the underground economy; and what research could help to answer this question?

*Possible Research Question 1: How much of an impact does the citation of different standards have on reducing injuries?*

Dr. Mendeloff stated that this replicates an earlier study with U.S. data, where they matched establishment data from the Bureau of Labor Statistics (BLS) survey data with enforcement data. Findings could be used to focus more on those hazards that seem to have the greatest impact on preventing injuries, both in enforcement and consultation situations. He stated that they studied the effects of citing particular standards on different injury event types, such as days-away-from-work injuries in the manufacturing sector during the period 1992 to 1998 in Federal OSHA States. He stated that in a limited study, personal protective equipment citations for violations were found to result in reductions of injuries of 5 to 15% over a wide group of injuries. He stated that personal protective equipment affects a lot of injuries and that in this case, citations for violations such as machine guarding did not lead to as big a decrease in injuries. He stated that the results suggested that personal protective equipment perhaps deserves more attention in injury prevention. He stated that this study could be replicated for California to see if it is also true here.

*Possible Research Questions 2: What factors explain why some establishments have more injuries and losses than others?*

Dr. Mendeloff stated that they are in a period where partnerships and alliances are popular, but it seems that it should be quid pro quo to ask that an industry group conduct a study of its membership and ask key questions. Information could be learned about what successful

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companies are doing that the less successful ones are not doing, an industry with high average rates but considerable variation could be identified. In addition, carrying out a study of the reasons for variations in the industry would identify features associated with better and worse performance, and results could be made public. He stated that this study could be a model of what industry associations could be asked to carry out among their members.

*Possible Research Question 3: What have been the effects of the injury and illness prevention standard adopted in California?*

Dr. Mendeloff stated that there are differences in workplaces where the injury and illness prevention standard has been adopted. He stated that they could learn what kinds of injuries have been prevented. He stated this is also an important issue nationally, as federal OSHA was considering such a standard but did not adopt it, but that other states want to know what such a standard would accomplish. He stated that perhaps he should go back to infrastructure and address how they conduct these studies. He stated that the need is to create a database in California that identifies the injury rates for each individual establishment. That database could be created without a great deal of trouble or cost by taking the data from the Workers' Compensation Information System (WCIS) using First Reports of Injury (FROIs), and hopefully other measures, and combining it with data on employment from the Employment Development Department (EDD) as has been done in other states; this would create a system that allows identification of establishments in each industry that are doing better. He stated that they could also use the experience modification factors, although they change slowly over time being based on three years of data. He stated that without that kind of database, the kind of studies discussed here cannot be carried out. For example, a database of what the effects are of inspections and citing various standards on preventing certain kinds of injuries has to exist if there is to be progress in these areas. He stated that the Commission needs to make that an important priority.

*Possible Research Question 4: What more should be done to facilitate the identification of emerging hazards?*

Dr. Mendeloff asked whether California was confident with the current state – whether it is able to prevent the next asbestos crisis. He stated that they could carry out a study of several recently identified hazards (e.g., popcorn flavorings, beryllium at lower levels) to identify the factors associated with earlier or later recognition of hazards and what does that imply about the level of surveillance systems or kinds of reporting, and the adequacy of what is currently in place. The study could also consider the possible trade-off between early recognition and an increase in the number of falsely identified hazards.

*Possible Research Question #5: What can be used other than injury rates to measure safety performance?*

Dr. Mendeloff stated that this is a more long-term question. Because injury rates are a “lagging” measure of performance and subject to random fluctuations, firms, insurers, and regulators have been exploring how to develop “leading” indicators of safety performance that can predict future performance and serve as another tool for assessing the impact of interventions. He stated that one effort getting a lot of attention recently is the “safety climate” survey that is administered to employees to obtain their view of the firm’s commitment to safety and the management systems in place to enhance safety. He stated that there is evidence that these survey methods are good at assessing the safety performance of companies and predicting the injury rates. He stated that

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California could join these efforts by requesting or requiring selected groups (e.g., workplaces in the Voluntary Prevention Program (VPP) or those targeted for high experience modifications (Ex-Mods)) to administer these surveys to assess whether there is improvement in safety performance.

*Conclusion*

Dr. Mendeloff concluded that a lot of information that is not known should be known, and that working on infrastructure issues is critical to obtaining credible data that can be used guidance to implement effective injury and illness prevention. He stated that there is an important need to start remedying the old gap in evidence-based occupational safety and health prevention.

*Questions from Commissioners*

Commissioner Davenport restated the conclusion that they do not know everything that they should know about preventing illnesses and injuries in the workplace, and Dr. Mendeloff confirmed that statement. He asked why this is so, especially since California is spending money on educational health and safety programs. He asked whether the conclusion is that California does not know what it is doing or that California is not doing enough. Dr. Mendeloff responded that a critical conclusion is that very often the effects of health and safety efforts are not known. A very good research design is needed when effects are being reviewed to allow to control of a lot of other factors and to isolate the impact of a program. For example, if DOSH were interested in a new intervention, it might decide that it would try it out in six or seven offices, chosen randomly, but not in the others. That would be a more credible way to learn whether these interventions really work than just saying that the intervention will be rolled out everywhere when there is no comparison group to see the results where the intervention was not used. He stated that it is the same issue with drugs until the FDA started requiring randomized clinical trials on American drugs before 1962, they were in the same shape that occupational safety and health is now. Some things were known, but they were operating in the dark much more frequently. He stated that it is difficult to try out an intervention, such as an ergonomic intervention in just one company, as one wants to try it out in several places, maybe with a different way in some and not others. He stated that in the safety and health arena, the cooperation of private firms is required, and that makes it more difficult to do. There are a number of reasons why it has not been done. He stated that the agencies themselves are sometimes defensive and afraid that they will not look good. Therefore, instead of trying to see it as an opportunity to learn what works better and how to become more effective, in many places, including federal OSHA, the agency says that it is an enforcement agency and does not do research and that this response is stated as if it frees the agency from the obligation of trying to figure out how to be more effective.

Commissioner Davenport stated that he regretted that Commissioner McNally was not present because this was a topic that he had raised, but he stated that he hoped the Commission would move in this direction. He stated that he was concerned that they would come back with the same results: that if people paid more attention to what they were doing, there would be fewer injuries in the workplace, and that there is a standardized list of actions one could take to make the workplace safer. He stated that he did not think they needed that kind of research but that he was interested in finding out what the government could do to encourage health and safety in the workplace and what is being done that is successful and what is not successful.

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Chairperson Schwenkmeyer asked the Commissioners if it made sense to propose establishing an advisory group to look at this topic and come up with questions about the research that should be done before moving forward with any expenditure. Commissioner Davenport stated that he does want to pursue this matter. He stated that the Commission spends 90% of its time on workers' compensation, and that they ought to spend more time on health and safety.

Executive Officer Christine Baker stated that they could propose that before the next CHSWC meeting, a group of stakeholders, such as employers, labor, and different groups interested in this issue including Cal/OSHA, could be brought together to vet some of these research questions, prioritize them, and make recommendations for further work in this area. Chair Schwenkmeyer said that that sounded like a good idea. Commissioner Steinberg asked if there was an existing RAND proposal about this, and Ms. Baker responded that there was no RAND proposal.

*CHSWC Vote*

Commissioner Davenport moved to create an advisory group to report to the Commission on ideas on how to proceed with the investigation of the effectiveness of safety and health programs, and Commissioner Aguilar seconded it. The motion passed unanimously.

**Update on Permanent Disability Studies**

**PD-Related Research: Wage Loss Estimates**

**Bill Kahley, Research Director, Division of Workers' Compensation**

Christine Baker stated that on behalf of Carrie Nevans, Acting Administrative Director of the Division of Workers' Compensation (DWC), Research Manager Bill Kahley would report on the status of permanent disability studies.

*Overview of Studies*

Mr. Kahley stated that he would provide an update of the analyses of permanent disability studies that the DWC is engaged in and where the DWC is headed with its research. Mr. Kahley stated that the DWC is engaged in a number of studies: a return-to-work study of currently disabled workers in the state of California; and a study of wage loss associated with permanent disability; and a study comparing permanent disability ratings between the 1997 and 2005 permanent disability schedules. Mr. Kahley stated that there are several steps in the wage-loss study: Step 1 analyzes three-year wage loss for workers injured October 1, 2000 (March 2007 report); Step 2 combines return-to-work rates and indemnity payments to determine uncompensated wage loss under the 1997 schedule (May 2007 report); and Step 3 compares ratings in the 2005 schedule (May 2007 report). In addition, routine quarterly updates will be done on the return-to-work rates and wage loss analysis.

Mr. Kahley stated that the methodology for the return-to-work study is to match DWC's Disability Evaluation Unit (DEU) data to DWC's WCIS data. That data is linked to data on reported wages in the EDD base wage file to indicate whether or not someone is working in a given quarter. The preliminary result of the analysis is that the overall return-to-work rate at 12 months increased for workers injured between 2003 and 2005 by about five percentage points

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(65% to 70%). These return-to-work rates varied significantly by part of the body, and the rates rose with age up to age 60.

Mr. Kahley stated that the DWC retrospective wage loss study released in March 2007 looked at three-year wage loss for workers injured from October 1, 2000, to June 30, 2003. This study followed RAND's methodology of 2004-2005. RAND used uninjured co-workers with similar earnings as a control group to indicate what earnings of the injured worker would have been if there had been no injury. When the injured worker returns to work, there is wage growth but this does not compensate for the period of wage loss; wages never return to the level of uninjured workers with similar earnings pre-injury.

Mr. Kahley stated that the results of the DWC study of March 2007 based on data from 2000 to 2003 are similar to the results of the RAND study of 1991 to 1996. When looking at the wage loss by part of body, wage loss of workers with upper extremity injuries increased, while workers with spine injuries decreased, and there were mixed results for injuries to the lower extremities and other body parts. Mr. Kahley stated that in Step 2 of the Wage Loss Study, three-year uncompensated wage loss and total wage loss for workers injured in 2002 using a methodology referred to as propensity scoring analysis. This study, "Uncompensated Wage Loss for Injured Workers with Permanent Disabilities," was released in May 2007. The assumptions at this stage were to compare injured with uninjured workers who had similar wages and probability of injury at any employer based on available data for industry, employer size, and tenure, wages, and gender. Ratings from litigated and non-litigated cases were used. The study looked for proportional wage loss for injured workers who become permanently disabled. This took into account additional support from temporary disability and permanent disability payments. Average total wage loss is \$37,700, but part of that is offset by compensation of \$19,800 from temporary disability and permanent disability payments.

Mr. Kahley stated that Step 3 analyzes the differences between the 1997 and 2005 rating schedules. He stated that Frank Neuhauser of UC Berkeley has extensively and thoroughly analyzed the ratings data. He also stated that several factors have changed since the new rating schedule was instituted; there has been a lot of reform to the system. Two significant reforms have affected the return-to-work rates. The reforms have decreased the negative impact on the permanently disabled worker, though more research could be helpful by indicating what is going on in this area so that injured workers can be compensated more fairly. Data from third and fourth quarters of 2006 and even first-quarter data from 2007 will be available soon. Information from EDD's State Disability Insurance (SDI) database will be available. Mr. Kahley stated that updating the study with different new information about injured workers will be a continuing area for research.

*Questions from Commissioners*

Commissioner Davenport asked if the studies were being done to figure out how much wage loss for permanently disabled workers are behind in order to create another permanent disability rating schedule. Mr. Kahley replied that the research is being done to draw as complete a picture of what the wage loss is for permanently disabled workers and to determine if wage loss is equitable across different parts of the body. Commissioner Davenport stated that several of the charts look the same and asked if there is any expectation that some categories of permanently disabled workers are financially better off than other permanently disabled workers. Mr. Kahley

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replied that the reason to continue to study this area is to be as objective as possible by using empirical data when extracting information from the available data. Commissioner Davenport stated that he thinks that the data are likely to be consistent over time. Mr. Kahley replied that if you are trying to estimate the impact of wage loss on permanently disabled workers under the new rating schedule, you need three years of data even beyond the effective date of the new rating schedule, perhaps five years, to look at the actual injured workers' experience under the new rating schedule. Mr. Kahley stated that this type of research will have ongoing value. Commissioner Davenport stated that while the studies are being carried out, injured workers are not receiving benefits as expected. Mr. Kahley replied that he agreed, but that was not the question he was responding to.

Commissioner Wei asked if the return-to-work rates are up driven primarily by workers returning to the same employer and if the EDD data can indicate if the injured worker is going back to the same employer. Mr. Kahley replied that the data does tell that. Commissioner Wei pointed out that one of the slides indicated that it might be counting an injured worker as having returned to work as long as there are earnings. Mr. Kahley replied that they are looking at return-to-work rates for both the at-injury employer or not and in a variety of contexts; he stated that the findings at this point are that on average, it looks like the return-to-work rate has gone up by about percentage five points. Commissioner Wei asked if the data can indicate if the injured worker who has returned to work and is earning wages at the actual rate that wages should be, i.e., earning a comparable wage, rather than just earnings at any rate. She asked if the figure of 70% means that the injured worker has returned to the at-injury employer. Mr. Kahley responded that he would be happy to respond to any questions in writing. Ms. Baker stated that there is an answer to that question and it could be discussed at a later point in the meeting. Commissioner Wei stated if the five (this needs to be checked) percentage-point increase in simulated earnings is in the aggregate return to work, rather than the individual worker's return-to-work rate. Mr. Kahley stated that this figure is based on an average. Commissioner Wei then asked if one could assume that earnings plus temporary disability benefits represents an average temporary disability rate or whether it is based on the actual individual worker's earnings. Mr. Kahley stated that it is an average of individual permanently disabled workers' earnings. The unit of observation is the individual; but the figure is summarized and expressed in terms of averages. Mr. Kahley stated that he would be happy to answer any questions posed in writing.

Commissioner Steinberg commented that Mr. Kahley was in front of the Commission about a year ago. At that time, the Commission was receiving early reports and findings on the impact of SB 899 on permanent disability based on analysis from Frank Neuhauser. These reports and findings suggested that there was a reduction on average of 50% to 60% of permanent disability benefits for those injured workers who were evaluated under the new rating scheduled using the American Medical Association (AMA) Guides.

Commissioner Steinberg stated that he recalled that at that time, the Commission was very concerned about getting additional data to see if the original future earning capacity (FEC) modification was something that should be corrected in light of the early findings. Commissioner Steinberg commented that Mr. Kahley had indicated and was quite optimistic about getting the data analysis to the Commission by the end of last year. However, it seems that from the current presentation, in order for the Commission to have a fair analysis of the permanent disability FEC formula, we have to wait for findings of the results analyzing those who were injured from 2005

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and on. Mr. Steinberg asked Mr. Kahley if this was correct. Mr. Kahley responded that the actual wage loss would not be known for permanently disabled workers rated under the 2005 rating schedule until three years of time had gone by because the future wages for permanently disabled workers can not be projected. However, that is separate from the issue of whether the FEC adjustment factors are appropriate or could be appropriately modified in some way. He stated that the Administrative Director is addressing this issue and is moving forward as quickly as possible to consider changes to the Permanent Disability Rating Schedule (PDRS), where she has authority to make changes, based on best available data. Commissioner Steinberg stated that Mr. Kahley seems to be saying that some change to the FEC factors appears to be appropriate, and Mr. Kahley responded that he thought that they should be based on the analysis already conducted.

**Public Comment**

Linda Atcherley, president of the California Applicants' Attorneys Association, stated that she attended Mr. Kahley's presentations and has studied the data presented. She stated that her understanding is that in order to do the data mining, the DWC is looking at each individual worker, based on the DEU database, comparing the EDD earnings data with the WCIS data. The DWC aggregated all the injured workers and determined an average. The DWC then decided to adjust the actual earnings by including temporary disability payments on an average basis and then offset that figure with the permanent disability payments on an average basis. That is how the difference between the counterfactual worker, who has not been injured and has been working continuously, differs from the actual injured worker. The key thing is that the wage loss continues and never meets the actual earnings of the counterfactual worker who has never been injured. The RAND study showed that this difference continues even up to ten years. This is why the Administrative Director has said that Future Earnings Capacity (FEC) adjustments would be needed. They have studied this for 18 months. The 2005 schedule actually applies to injuries before 1/1/2005, so they actually have 42 months of data.

Mr. Kahley again stated that he would be happy to answer any specific questions sent to the Commission and forwarded to the DWC.

**Update on Permanent Disability**

**Judge Lach Taylor, CHSWC**

**Frank Neuhauser, Project Director, Survey Research Center, UC Berkeley**

Frank Neuhauser stated that he would provide an update of the permanent disability study with another six months of data. He stated that the results have not changed. Over 60,000 ratings under the 2005 schedule in the DEU data were considered; one half of them were Summary ratings and one-half were Consults. The average rating under the new rating schedule is down 41 to 42% compared to what it was under the 1997 permanent disability schedule. The consequence is that permanent disability compensation is down about 51 to 53%. These numbers have not changed substantially in about a year and a half, and there would be no expectation that they would change in the future. Mr. Neuhauser stated that the same could be said for apportionment, which is a little more surprising. Apportionment is not clear in the DEU ratings

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for Consults which are expected to more often involve apportionment because they are more complex cases and the more typically higher-rated claims, but there is no way to observe apportionment in those claims. About 10% of Summary-rated cases are apportioned to non-industrial causes or prior injury and that apportionment is about 40% of the 10% of the cases. Overall, this reduces permanent disability ratings by about 4% and the permanent disability award by 5.8%. The combination of the two reductions is about a 58% to 60% reduction in permanent disability awards. The data have not been broken down by individual impairment which would be the basis for future economic capacity (FEC) factors. This analysis will go to the DEU and the DWC.

*Questions from Commissioners*

Chair Schwenkmeyer asked if the study of the data will continue, and Mr. Neuhauser replied that it would, as this is a way of preparing data for the DEU and the DWC to use for their wage-loss studies and for work on FEC adjustments. He stated that there is enough data on spine and knee impairments to be sure of the average rating under the new schedule. For some of the less common impairments, such as hip, heart, lung, and hearing loss, there is not enough data on average ratings to determine what the average rating under the new schedule is. It should soon be possible to determine ratings for 17 of the 20 impairments that RAND has identified. He stated that the DWC is working on a system to extract data without assistance.

Commissioner Aguilar asked if it is evident that injured workers are receiving less under the new schedule but that it is too soon to determine that before three years of data are available. Mr. Neuhauser stated that that was true. He stated that the introduction of the new schedule would not change wage loss for injured workers, but it might change wage loss for those workers who get ratings. Commissioner Aguilar asked if with an aging workforce there would be a higher rate of apportionment. Mr. Neuhauser replied that it is surprising that that change is not being seen in the data, at least for the Summary-rated claims. It would require going to the attorneys on both sides of the Consults to see what is happening on the litigated claims. The data show that older workers are apportioned more often and to a higher degree than younger workers, so it will be an issue as the workforce continues to age. Mr. Neuhauser stated that this should be an area for study by the Commission, especially because California is the only state that has apportionment and analysis would show whether this was a good or bad idea.

Christine Baker stated that last year, CHSWC estimated that SB 899 and the 2005 rating schedule had reduced system-wide permanent disability benefits by more than 50%. There was some skepticism at the time, but now these estimates are generally accepted as accurate. If anything, permanent disability benefits may be even lower than estimated. The debate continues, however, whether the permanent disability system will be revised in some way, and if so, how.

Ms. Baker stated that the Commission received a request from the Legislature to evaluate the impacts of a variety of potential revisions to permanent disability rating and compensation. Staff has analyzed the components of permanent disability compensation, and Mr. Neuhauser has estimated the financial impacts using a benefit simulation model. Drafting of a reply to the request is in process. The components looked at are:

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- The FEC Factors used in the rating schedule to get from an AMA impairment evaluation to a disability rating.
- The number of weeks of permanent disability benefits payable for a given percentage rating.
- The amount of the weekly PD payment.
- The 15% bump up/bump down of weekly PD amount, depending on whether the employer offers a return to work.
- The Supplemental Job Displacement Benefit.

Ms. Baker stated that the reply will include a modeling of the impact of a range of alternatives for each of the three major components. Some of the alternatives by themselves would reduce costs. Most of the alternatives and the combinations of alternatives would increase permanent disability by varying degrees. The information should assist policymakers in evaluating the impacts of the changes that may be proposed and to select features that will be acceptable to both labor and employers. At the next meeting or if a special meeting is called, a draft should be ready for review and for public comment.

**Briefing on the Apportionment Issues after the Supreme Court Ruling**  
**Larry Swezey, Consultant**

Mr. Swezey stated that about 40 years ago, the Legislature instituted a progressive schedule for permanent disability compensation. In April 2004, Senate Bill (SB) 899 put in place several formulas (A, B, and C, and modified C) that would give a little higher compensation to the injured employee than the compensation formula in place before the bill. Recently, with the *Brody* case, which was the lead case to come before the Supreme Court, the Court ruled that SB 899 did not indicate any intent by the Legislature to change what the Court had decided in the *Fuentes* case. Mr. Swezey stated that apportionment awards are calculated by subtracting a percentage of non-industrial disability from the percentage of combined disability, and then the remainder is the percentage of compensable disability upon which benefits are awarded.

*Questions from Commissioners*

Commissioner Steinberg stated that the Court found that the Legislature intended to abolish the whole system of apportionment. Mr. Swezey replied that the Court stated that neither Labor Code Sections 4363 and 4364 combines an employer's liability to the percentage of disability caused by the industrial injury. Neither of the provisions indicates that the Legislature intended to change what the Court had decided.

**Update on Medical Study: Pay-for-Performance in California's Workers' Compensation Medical Treatment System: An Assessment of Options, Challenges, and Potential Benefits**  
**Barbara Wynn, RAND**

Barbara Wynn stated that she would share the major findings from the work the Commission asked RAND to do concerning the potential for using pay-for-performance incentives in the

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worker's compensation medical care program. She stated that she wanted to acknowledge the contributions of the co-author on the paper, Melony Sorbero, whose prior work in this area was extremely valuable. Ms. Wynn stated that the study drew on the literature and interviews for an earlier RAND study, a roundtable discussion among workers' compensation stakeholders, and interviews with stakeholders performed as part of the study evaluating the impact of the reform provisions.

Ms. Wynn stated that she would start with an overview of pay-for-performance and share some specific examples of current programs. There are some important lessons learned from pay-for-performance programs in group health that should be considered when designing a program for workers' compensation. She stated that she would also discuss why the California workers' compensation system might consider using a pay-for-performance program in paying for physician services, what the major considerations are when designing a pay-for-performance program, three potential models, and a summary of overall findings and recommendations for next steps.

*Overview*

Ms. Wynn stated that the goal of a medical treatment system is value-based care. The efficient delivery of high-quality care improves the health and functional status of injured workers and enables rapid and sustained return to work. One way to promote this is to align financial incentives for physicians with the provision of value-based care. The key mechanism of a pay-for-performance system is to reward health care providers on a set of specified measures related to quality, efficiency, compliance with administrative processes, adoption of information technology adoption, and patient satisfaction. Ms. Wynn stated that there can also be other non-financial ways to promote value-based care that frequently are part of a pay-for-performance program. These include reduced administration burden, such as exemption from the utilization review process, and public reporting, which puts peer pressure and public market on physicians to improve and can be available to guide consumer choice. She stated that unless properly done, public reporting can also lead to unintended consequences where physicians might avoid treating more complex patients if there is not appropriate risk adjustment. She stated that performance measures can also be used to select narrow high-performing networks. In group health, this has been mostly based on an efficiency measure up to now, but some quality measurements are being taken into consideration.

Ms. Wynn stated that it is useful to think of pay-for-performance programs as having four stages: (1) the planning and design stage, which specifies the key components of the program; (2) the implementation stage, which leads to data collection and performance measurement; (3) the assessment of performance, which then leads to the payment of rewards; and (4) program evaluation, which ideally occurs throughout implementation and the findings of which may lead to refinements in the program design. She stated that in reality, there has been little formal evaluation of pay-for-performance programs, so that it is not known for sure how well they actually work and which design elements are likely to be most successful and produce the desired results.

Ms. Wynn stated that CHSWC asked RAND to examine the major considerations that would be involved in developing a pay-for-performance program. Generally, a program's goals and objectives will determine what is measured and what the reward structure looks like. However,

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other constraints, such as data availability and the availability of sound evidence-based measures, will also affect program design. She stated that she would discuss a few examples of pay-for-performance programs that have elements that might be relevant for California workers' compensation.

*Existing Pay-for-Performance Programs*

Ms. Wynn stated that a nationally prominent pay-for-performance program is in California. It is sponsored by the Integrated Healthcare Association. It involves 7 health plans, over 225 physician groups, and 35,000 physicians. This program measures performance in three areas: clinical measures; patient satisfaction; and investment in information technology. It includes a standard set of core measures and pooled data to measure performance. Pooling data overcomes the obstacle of each plan having an insufficient number of observations to obtain reliable measures. This is an important concern for the workers' compensation system where there are multiple payers and a number of physicians who treat only a few injured workers each year. She stated that another important feature is use of a core set of measures to measure performance with the flexibility given each plan to add additional measures and determine how it will reward high-performing physicians. There is also public reporting of physician group scores, not individual group scores, which can be informative for patients in selecting their physician and can help plans in putting together the network. The early results from this program are promising and show improvements in quality scores. It was recently announced that the program would begin to measure efficiency for episodes of care and on a population basis.

Ms. Wynn stated that Washington State, which is one of the few single-payer states, has the only pay-for-performance program for workers' compensation that could be evaluated. This program is the Occupational Health Services (OHS) Project. This is a community-based delivery system in two sites. The goals are to enhance timeliness of treatment, encourage return to work, and promote "best practices." The targeted conditions are low-back sprain, carpal tunnel syndrome, and fractures, the three most frequent conditions within the California system. The initial focus was on measures common across all three conditions, such as: timeliness of submitting the Report of Accident; the prevalence of two-way communication with the employer about return to work; activity prescription at each evaluation; and a regular assessment of impediments to returning to work. Condition-specific quality indicators are still under development. The reward structure covers pay for previously unreimbursed services such as telephoning the employer and higher fees for certain services. The results of this program are promising. There have been improvements across all three conditions: timeliness of accident reports; activity prescription occurring; and significant reduction in disability days and therefore in total cost. The work-related outcomes were better for those physicians who showed higher adherence to the measures and for physicians with a higher workers' compensation case load.

Ms. Wynn stated that an example of a type of program that California workers' compensation might want to leverage off of is a program just starting for physicians treating low-back pain. The National Committee for Quality Assurance (NCQA) recently established a recognition program for any physician specialty treating low back pain, the Back Pain Recognition Program. The program includes 16 measures for quality of care, such as or overuse (appropriate imaging for acute back pain) or under-use (advice against bed rest). Physicians self-report measures to NCQA and this process can be seen on a website; those meeting performance criteria for the measures receive recognition. The Bridges to Excellence (BTE) Program is a coalition program

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of very large employers. They have established the Spine Care Link Pay-for-performance Program which pays more to physicians who are NCQA-accredited. Physicians will receive higher payments and they will be listed on the physician-rating website so consumers will know that those physician's efforts have been recognized by the NCQA.

Ms. Wynn stated that there are number of reasons to consider pay-for-performance in the California workers' compensation system. She stated that very little is known about the quality of care provided to injured workers. Workers' compensation reforms have emphasized evidence-based treatment, but the recent UCLA access survey found that only 10 percent of physicians thought that quality has improved, and 30 percent of physicians in internal medicine and family practice thought it actually has declined. She stated that the current payment system does not reward quality or efficiency. The Official Medical Fee Schedule (OMFS) does not reward disability management, prevention activities, or care coordination. Currently, payment levels are based on outdated fee schedules rather than actual cost of providing the services, which creates perverse incentives. In fact, fee-for-service encourages unnecessary services.

Ms. Wynn stated that this is a critical time for establishing pay-for-performance. Employers forming medical networks do not have the information needed to select high-quality providers, and physicians have a high administrative burden and are using this as a reason for not treating worker's compensation patients. A proactive system based on report cards may be less costly than an administrative system based on utilization review (UR).

Ms. Wynn stated that a tremendous amount of effort is needed to implement a pay-for-performance system. She stated that there are a number of potential roadblocks including: the complexity of the current system due to implementation of recent legislative provisions; the level of distrust among parties in the system; the lack of a consistent, ongoing monitoring and evaluation; the multiple payers which means data pooling may be necessary for reliable measurement and even then, there may be a problem because physicians may treat only a few injured workers each year; and physicians in occupational medicine have little exposure to non-occupational health-quality initiatives.

Ms. Wynn stated that some lessons were learned from another RAND study which interviewed pay-for-performance sponsors. The lessons learned included that it is important to: engage providers from the beginning of program development; strive for transparency in how performance is assessed, critical for getting trust and buy-in; pilot test measures; be open to stakeholder suggestions and willing to change; recognize that changes will be needed over time, as pay-for-performance can not create a perfect system but has to be part of a multi-pronged strategy to improve health care.

Ms. Wynn stated that there can be multiple goals in a pay-for-performance system including: improve the quality of care through clinical outcomes, processes of care, and care coordination; improve the efficiency of care including providing the least costly care alternatives and reducing administrative burden; increase patient satisfaction; and improve work-related outcomes, specifically days lost from work and return to work.

Ms. Wynn stated that there are two approaches to consider for a pay-for-performance program: either rewarding truly excellent physicians; or engaging all physicians and encouraging quality improvement. If only the top physicians are rewarded, the other physicians may not be motivated to work for improvement. It is possible to create a multi-faceted approach where all physicians

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are rewarded for improvement and top performers are rewarded. The choice will determine how the financial rewards are structured.

*Mandatory and Voluntary Program Models*

Ms. Wynn also stated that another key decision is whether a pay-for-performance program should be mandatory or voluntary. A mandatory program requires regulatory action and therefore means that: all payers and self-insured employers would be required to participate; physician participants, performance measures, and performance targets would be uniformly defined; and the reward structure could be either determined uniformly or left to each payer. One of the main advantages of a mandatory program is that it could facilitate pooled data and public reporting. In contrast, Ms. Wynn stated, a voluntary program could be undertaken by payers individually or collectively and would not require government involvement; it would likely result in more experimentation; and it would be a little more nimble in responding to issues that arose in the implementation. An individual payer voluntary program, which could be implemented by an individual payer at any time, could cause multiple reporting requirements for physicians and therefore increase administrative burden and weaken incentives. A collective action would facilitate pooling of data and uniform measures.

Ms. Wynn stated that the potential measures for a pay-for-performance program include: clinical process and outcome measures, such as the number of surgeries or repeat surgeries; efficiency measures on the total cost of the claim; patient experience, both patient satisfaction measures and time between referral and an appointment; administrative measures, such as timely filing of reports and compliance with medical treatment guidelines; work-related outcomes of care; and structural measures. Key issues related to measures include: what kind of conditions should be the initial focus; whether the level of focus should be the individual physician, the medical group, or the network; and whether the care should be attributed to the primary treating physician, the physician who provides treatment, or all the physicians who provide care.

Ms. Wynn stated that there are several decisions that need to be made about a reward structure, including: the form of financial reward, whether a modified fee schedule payment, which is the easiest form, or a bonus payment at the end of the year; the criteria for receiving a reward, whether a fee-for-service basis, an absolute threshold, or a relative threshold; and the financing mechanism, whether insurance premiums, a bonus pool created through withholds, or a shared cost-savings formula. She stated that a shared savings formula would be much too difficult to generate in the workers' compensation system as cases extend over time. She also stated that financing a mandatory program may require changes in the Official Medical Fee Schedule (OMFS). OMFS modifications required to reward physicians include performing specific services that do not have explicit maximum allowable fees and rewarding top performers through higher or bonus payments. She also stated that there are several options for financing through the OMFS, including: savings from improved performance; lower payments to poor performers; and fee schedule adjustments to pay less for specific services.

Ms. Wynn stated that a voluntary program would not require changes in the OMFS. Payers and providers may contract for different amounts than levels allowed by the OMFS. Several options are available for finance mechanisms, such as savings generated by improved performance or

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negotiated fee schedule reductions. Additional savings from the program would be passed on to employers through lower fees.

*Pay-for-Performance Data Models*

Ms. Wynn stated that two main data systems could be used to support the infrastructure for a pay-for-performance program in workers' compensation. One data system is the database maintained by the California Worker' Compensation Institute (CWCI). CWCI is a private, non-profit organization of insurers and self-insured employers. Members voluntarily submit data to CWCI for research, and access to the data is restricted. The second system would build on Workers' Compensation Information System (WCIS) which is maintained by the DWC. There has been a recent requirement for reporting medical data; at this time, the consistency and quality of the data are unknown and still have to be evaluated. Ms. Wynn stated that the recommendation is to build on an existing data structure but that evaluation could be through a third-party independent system, as this would create more trust in the system.

Ms. Wynn stated that there are several potential pay-for-performance data models: (1) a mandatory program that would pay fee-for-service rewards; (2) a mandatory program rewarding overall performance; and (3) a collective voluntary program with payer-determined rewards. All models assume that the pay-for-performance program would be cost-effective but a pilot test the model would be needed to confirm cost-effectiveness. An individual payer voluntary model is not being discussed because it can be implemented without workers' compensation policy changes, though that may be the most feasible model for the short-term.

Ms. Wynn stated that the mandatory program model would modify the OMFS to include explicit fees for disability prevention and management activities, such as separate payment for permanent and stationary reports filed by the primary treating physician, and rewards for all physicians for engaging in desired activity. This system would be the easiest to implement, as it does not change the data structure, and the measures do not require risk-adjustment or rate calculations. Therefore, this model could be implemented in the short-term.

Ms. Wynn stated that the mandatory program rewarding overall performance requires pooling of data to identify "gold star" physicians; it could be broadly applicable or could target specific conditions or specialties, and initial measures should not require risk-adjustment. This model also requires the infrastructure to collect and pool the data. An alternative to this would be to tie into an existing program such as the NCAQ spinal recognition program. The reward could be either a two-tier fee schedule or payers supplementing with additional payments. Depending on the policies, this model could be implemented in the short-term to intermediate-term, and it could lay the groundwork for more sophisticated programs in the longer-term.

Ms. Wynn stated that the third model would be a collective voluntary program with payer-determined rewards modeled after the Integrated Healthcare Association (IHA) initiative. This requires data pooling and common evaluation for a core set of measures. Potential conditions could be low-back pain and carpal tunnel syndrome. This model requires physician/payer agreement on reporting requirements and financial reward. This is a longer-term model that requires more infrastructure and the most collaboration among stakeholders. It is unlikely to be feasible in the near-term on other than on a pilot basis.

*Key Elements for a "Win-Win" Program*

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Ms. Wynn stated that from the interviews conducted, the key elements that might lead to a “win-win” pay-for-performance program include: (1) establish safeguards and processes that build trust among stakeholders; (2) choose performance measures that will generate overall savings through improved quality and better work-related outcomes; (3) use pilot test to determine realistic goals, measures, and reporting burden; (4) create financial incentives that provide bonuses for good performers without reducing payments below current levels for poor performers; and (5) build on existing data infrastructure and reporting systems.

Ms. Wynn stated that progress is being made in the areas which would support improving value-based medical care including that: the WCIS is being established and could eventually lead to an ongoing monitoring system; RAND is doing more work on developing quality indicators for carpal tunnel syndrome; the NCQA has established quality indicators for low-back pain; the DWC recently released additional medical treatment guidelines for acupuncture and should be providing guidelines for chronic pain; and finally, the DWC has started work on a new OMFS.

*Recommended Next Steps*

Ms. Wynn stated that there are several recommended next steps including: convene a workgroup with representatives of stakeholder groups to gauge level of interest in pay-for-performance and to flesh out “straw man” models for further discussion and to identify “idea champions” to promote the concept; assure that WCIS is structured to support ongoing monitoring and performance measurement at the physician level; and consider how pay-for-performance incentives might be incorporated into the new physician fee schedule.

**CHSWC Fraud Studies:**

**Misrepresentation and Under-Classification of Workers’ Compensation Premiums  
Split Class Code Abuse in Workers’ Compensation**

**Frank Neuhauser, Project Director, Survey Research Center, UC Berkeley  
Colleen Donovan, Ph.D. student, UC Berkeley**

Mr. Neuhauser stated that he would update the Commission since his previous report on the fraud study on premium fraud by employers and review some of the major results. The study took place between 1996 and 2002, a period during which pure premium amounts increased substantially, and more than doubled. Two types of cheating were looked at: The first one is under-reporting of payroll, the second one, which is harder to track, is where employers report workers to be in a less risky job, e.g., roofers might be reported as a clerical professional. There is a substantial savings to misreporting the payroll.

Commissioner Davenport asked if it is possible to determine if employers are lying more about workers’ compensation than, for example, unemployment. Mr. Neuhauser replied that it is possible. One of the recommendations of the study is that insurers should have access to what employers report to the EDD. He also stated that unemployment is not a function of the type of job a worker and an employer reports only total payroll to EDD. He stated that unemployment is much less costly than workers’ compensation. Commissioner Davenport mentioned that employers see the government as intervening in unemployment. Mr. Neuhauser stated that the government has access to a whole set of records, including tax records, which can be used to

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determine incorrect reporting.

Mr. Neuhauser stated that the estimates of the potential size and percentage of unreported payroll in the workers' compensation system also includes the grey economy and self-reported employment status (i.e., independent contractors) by workers. An employer does not have to pay workers' compensation for an independent contractor. In California, the definition for an independent contractor is strictly written. One of the abuses by employers is to report employees as independent contractors when they are not. It is not clear how employees understand the difference behind independent contractor status. It is clear that under-reported payroll ranges from 6% to 23%. He also stated that payroll under-reporting changes by premium rate classes. For higher premium rate classes, reporting declines dramatically. Fraudulent under-reporting is high for high-rate classes.

**Executive Officer Report**

**Christine Baker, CHSWC Executive Officer**

Ms. Baker stated that last week, the Commission held a very successful conference on carve-outs. Over 200 participants including employers, unions, insurers and other interested parties came together to discuss three areas: how to decide if a carve-out is right for you; where to start in negotiating and creating a carve-out; and problem-solving in existing carve-outs. A summary document will be prepared on the issues raised for that meeting.

Ms. Baker stated that Commission staff has also been working on a request from Senate President Pro Tem Don Perata and Assembly Speaker Fabian Núñez to analyze the effects of several alternatives to the PD schedule. This project is underway. In addition, analysis of the data that is the basis for our annual report is ongoing. Commission staff also provides technical assistance to the Legislature and the Governor's office as requested. These topics range from existing legislative proposals and their cost benefits to new proposals that might be considered. In addition, Commission staff is working with the Department of Insurance on a project regarding fraud. Ms. Baker stated that she is serving as chair of the Workers' Compensation Fraud Focus group for Insurance Commissioner Poizner's office. This project works well given all the projects the Commission is working on that address fraud. She stated that Commission CHSWC has also been partnering with the Fraud Assessment Commission to address a major study on medical provider fraud and that project is underway.

Ms. Baker stated that several reports discussed at this meeting are subject to CHSWC approval for release for distribution and feedback: the Briefing on the Apportionment Issues after the Supreme Court Ruling; the study on Pay-for-Performance in California's Workers' Compensation Medical Treatment System: An Assessment of Options, Challenges, and Potential Benefits; and the fraud studies, Misrepresentation and Under-Classification of Workers' Compensation Premiums and Split Class Code Abuse in Workers' Compensation.

Ms. Baker stated that a background draft report on occupational safety which is being updated as data from the Division of Occupational Health and Safety are made available will be presented for approval at the next meeting.

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*CHSWC Vote*

Commissioner Davenport moved to approve the release of the draft updates on permanent disability and apportionment and the draft reports on the fraud studies for distribution and feedback, as well as to approve the release of the draft final report on pay-for-performance. Commissioner Aguilar seconded. The motion passed unanimously.

*Comments from Commissioners*

Chair Schwenkmeyer stated that she attended the carve-out conference and thought that it was excellent. The conference was heavily attended, with excellent speakers and lots of participation. She stated that CHSWC staff is to be commended for the conference. Commissioner Aguilar stated that she also attended and agreed that it was very successful.

**Adjournment**

*CHSWC Vote*

Commissioner Steinberg moved to adjourn the meeting, and Commissioner Aguilar seconded. The motion passed unanimously

The meeting was adjourned at 12:30 p.m. The next CHSWC meeting is scheduled for Thursday, October 4th, in Oakland.

**Approved:**

|                             |      |
|-----------------------------|------|
| Kristen Schwenkmeyer, Chair | Date |
|-----------------------------|------|

**Respectfully submitted:**

|                                    |      |
|------------------------------------|------|
| Christine Baker, Executive Officer | Date |
|------------------------------------|------|