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February 24, 2006

The Honorable Don Perata
Senate President pro Tempore
State Capitol
Sacramento, California 95814

The Honorable Fabian Nuñez
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Senate President pro Tempore Perata and Assembly Speaker Nuñez:

In response to your requests of June and July 2005, the Commission on Health and Safety and Workers' Compensation (CHSWC) has prepared a report entitled "Permanent Disability Rating Analysis".

This report was released for public comment on February 1, 2006. On February 9, 2006, CHSWC voted to adopt the report but to accept public comments for one additional week, after which the staff was to prepare an addendum including all comments received plus a digest and response to the comments.

As directed by the CHSWC members, we are hereby submitting the February 23, 2006 report and addendum.

Please let us know if you have questions or wish further information.

Sincerely,

Christine Baker
Executive Officer

Enclosure

cc: Commission on health and Safety and Workers' Compensation members
Victoria L. Bradshaw, Secretary, Labor and Workforce Development Agency (LDWA)
Rick Rice, Undersecretary, Labor and Workforce Development Agency (LDWA)
John Rea, Chief Deputy Director, Department of Industrial Relations

The California Commission on Health and Safety and Workers' Compensation

Permanent Disability Rating Schedule Analysis

Prepared at the Request of

Senate President pro Tem Don Perata
Assembly Speaker Fabian Nuñez

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February 23, 2006

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Introduction

Senate President pro Tem Don Perata and Assembly Speaker Fabian Nuñez requested information regarding a change in the California workers' compensation Schedule for Rating Permanent Disabilities effective January 1, 2005. They requested that the Commission on Health and Safety and Workers' Compensation (CHSWC) report to the Legislature on the impact of the change in the schedule as well as how the schedule could now be amended in compliance with Labor Code Section 4660(b)(2), which requires the use of findings from a specified RAND report and other available empirical studies of diminished future earning capacity.

Executive Summary

Thirty years after the 1972 National Commission on State Workers' Compensation Laws reported that permanent partial disability benefits are the most controversial and complex aspect of workers' compensation laws, issues of adequacy and equity of permanent partial disability benefits remain troublesome. California is in the midst of the biggest change ever attempted in its system for compensating permanent disabilities. Using data that did not exist when the latest reform was adopted, it is now possible to evaluate the effect of the changes and to fine-tune those changes to more accurately accomplish the state's public policy goals. This paper recommends a method to adjust disability ratings using empirical research to achieve greater equity, and this paper suggests that consideration be given to public policy issues of benefit adequacy and affordability.

Background

The California Constitution authorizes the Legislature to create a workers' compensation system that compensates employees for injury or disability sustained in the course of employment. Since at least 1917, compensation for permanent disability has been determined according to the percentage of permanent disability calculated according to a medical evaluation and a Schedule for Rating Permanent Disabilities. Both the schedule and its criteria for medical evaluation were unique to California. The schedule was refined from time to time and certain interpretations evolved, but the schedule was fundamentally unchanged until 2005. The benefits payable for a given percentage of permanent partial disability are calculated as a number of weeks at a weekly benefit amount. The number of weeks of indemnity payments depends on the percentage rating of the permanent disability. The weekly amount of the indemnity payments depends on the employee's earnings at the time of injury, subject to a minimum and a maximum. From time to time the Legislature has amended both the method of converting a percentage to a number of weeks and the minimum and maximum weekly amounts.

In an individual case, the worker's disability was evaluated by a doctor, a percentage disability rating was developed by using the rating schedule, and a the number of weeks of permanent partial disability benefits was calculated based on the percentage rating. The weekly benefit amount could depend on the worker's pre-injury wages, but most workers qualified for the

maximum weekly rates allowed for their date of injury ($200 per week for most injuries in 2004, for example).

2004 Reforms

The California permanent disability rating system came to be regarded as costly, inequitable, inconsistent, and prone to disputes. Workers who sustained similar earnings losses for different types of injuries received different compensation. Comparing shoulder and knee injuries, for example, the PD benefits replaced only about half as much of the average losses for shoulder injuries as for knee injuries. The same worker could receive widely different disability evaluations depending on who selected the evaluating physician. With the enactment of Senate Bill 899 in 2004, the Governor and the Legislature intended to enact a permanent disability rating system that would promote "consistency, uniformity, and objectivity."[1] Depending on how it is implemented, SB 899 could "lead to greater equity in benefits for injured workers and minimize unnecessary disputes between injured workers and their employers."[2] SB 899 made changes to:

- The goal of the rating schedule, giving consideration to diminished future earning capacity in place of consideration to diminished ability to compete in an open labor market (Section 4660(a)), as well as promoting consistency, uniformity and objectivity (Section 4660(d)),
- The criteria for medical evaluations, using the AMA *Guides to the Evaluation of Permanent Impairment*, fifth edition (AMA *Guides*) in place of the often subjective criteria traditionally used in California (Section 4660(b)(1)),
- The adjustment factors to be included in the Schedule for Rating Permanent Disabilities, specifying that diminished future earning capacity be a numeric formula based on average long-term loss of income according to empirical studies (Section 4660(b)(2)),
- The apportionment of disability between industrial injuries and other causes when a disability is caused by the combination of two or more injuries or diseases, such as a knee strain with pre-existing arthritis (Sections 4663 and 4664),
- The number of weeks of permanent disability benefits payable for each percentage point of permanent partial disability, reducing payments by up to 15 weeks on all awards of less than 70 percent permanent partial disability (Section 4658(d)(1)),
- The dollar amount of weekly permanent disability benefits depending on whether the employer offers to continue to employ the permanently disabled worker, if the employer has 50 or more employees (Section 4658(d)(2) and (d)(3)).

The schedule is just part of a complex system that determines the amount of individual PD awards as well as the system-wide cost of PD benefits. Other components include the number of weeks of benefits payable for a given rating, the weekly benefit amount, and the criteria for

[L] Labor Code Section 4660(d). See Attachment A for the full text of the section. All further statutory references are to the California Labor Code unless otherwise specified.
[2] Reville, et al., 2005, p. ix.

compensability of a disability. All of these were affected by SB 899, and the selection of goals for the rating schedule requires consideration of this context.

Impact of the 2005 Schedule for Rating Permanent Disabilities

The Legislature directly enacted many of the changes described above, but it delegated the task of revising the Schedule for Rating Permanent Disabilities to the Administrative Director (AD) of the Division of Workers' Compensation. The AD revised the schedule effective January 1, 2005. At that time, there was no satisfactory way to predict how the percentages of impairment evaluated under the AMA *Guides* would correspond to the reduction in injured workers' earning capacity. As requested by the Legislature, this paper examines the impact of the revised schedule and recommends a way to further revise the schedule in compliance with SB 899.

The first year of experience under the 2005 revision of the Schedule for Rating Permanent Disabilities demonstrates that the 2005 schedule reduces permanent disability benefits by more than 50% compared to the pre-2005 schedule, apart from the other changes made by SB 899. This reduction is observed by comparing the ratings in the population of cases rated under the 2005 schedule with the ratings for a similar population under the pre-2005 schedule. These cases provide a valid measure of the performance of the system, and because it is unlikely that the severity of injuries or the economic consequences to injured workers changed when the new schedule took effect, this reduction is due to the rating schedule itself. The dollar values of the awards are calculated by applying the 2005 laws to both the 2005 schedule ratings and the pre-2005 comparison ratings, so the 50% reduction is entirely due to the rating schedule.

Revision of the Schedule Using Empirical Data to Achieve Policy Goals

Without giving up any of the reforms enacted by the Legislature, it is possible to use the experience gained under the 2005 schedule to fine-tune the schedule. Revisions to the schedule can be adopted effective July 1, 2006, and updated periodically thereafter, based on analysis of actual ratings that have been produced under the schedule and the most recent research on the earnings losses resulting from industrial injuries.

The adoption of the AMA *Guides* is expected to improve equity among workers who sustain similar injuries so that they will consistently receive similar benefits regardless of who conducts the medical evaluation. This paper presents a method to further improve equity so that workers who sustain similar losses will consistently receive similar benefits regardless of which part of the body is injured. A uniform relationship between ratings and earnings loss regardless of type of injury is one aspect of equity recommended by the RAND report. (Reville, et al., 2005.)

The more vexing problem is adequacy. It has been stated that compensation benefits should, on average, replace two-thirds of the wages lost as a result of a compensable injury.[3] In practice,

[3] Reville et al. (2005) page 14, citing Hunt, H. Allan, ed., *Adequacy of Earnings Replacement in Workers' Compensation Programs: a Report of the Study Panel on Benefit Adequacy of the Workers' Compensation Steering*

states arrive at widely varying replacement rates depending on each state's solution to the tension between adequacy and affordability. When the 2005 schedule was adopted, its effects were not entirely foreseeable. The proposed method for revising the schedule will give policymakers the opportunity to choose the desired balance of adequacy and affordability for California. Policymakers can now make an informed choice of whether and how much replacement rates will be changed from the pre-2005 levels as a consequence of the schedule, apart from the other changes enacted in SB 899.

Terminology and Mechanics of Rating

Any discussion of revising the Schedule for Rating Permanent Disabilities requires some terminology and some understanding the mechanics of the schedule. See Attachment B for words that have special meaning in this discussion. The schedule prescribes the steps to calculate a permanent disability (PD) rating,[4] expressed as a percentage, based on a medical evaluation of impairment.[5] Pursuant to SB 899, the calculation begins with a whole person impairment (WPI) percentage established by a physician. As adopted by the AD, the 2005 schedule[6] assigns each type of injury (part of body) to one of eight future earning capacity (FEC) factors in the range of 1.100000 to 1.400000. The WPI is multiplied by the assigned FEC factor. The result is further adjusted upward or downward according to the worker's occupation and the worker's age at the time of injury. The result is the adjusted disability rating.

Apportionment may be applied to reduce the final rating if the disability is partly caused by a pre-existing injury or other cause in addition to the industrial injury. After SB 899, apportionment now appears to affect at least 11% of all permanent disability ratings. Apportionment is not directly controlled by the schedule and it is outside the scope of this paper. The ratings discussed in this paper are considered without apportionment.

Committee, National Academy of Social Insurance, Kalamazoo, Mich.: W.E. Upjohn Institute for Employment Research, 2004.

[4] Synonyms in common use include "final rating," "adjusted rating," "disability rating," "PD rating," or simply "rating." The disability rating is distinct from the impairment rating. See Attachment B.

[5] As used in this context, "impairment" is synonymous with "whole person impairment," ("WPI"). The WPI is expressed as a percentage, and it may also be called the "impairment rating." See Attachment B.

[6] For convenience, we refer to the schedule adopted January 1, 2005, as the 2005 schedule. By statute and a WCAB interpretation, it is also applicable to certain cases that arose prior to January 1, 2005, although that interpretation is not universally accepted. The 2005 schedule is available at http://www.dir.ca.gov/dwc/PDR.pdf. The schedule may be called the Permanent Disability Rating Schedule, or "PDRS."

CHSWC Findings and Recommendations

CHSWC finds:

1. At the time the 2005 schedule was adopted, adequate empirical studies did not exist to permit accurate calculation of the relationship between impairments evaluated according to the AMA *Guides* and diminished future earning capacity.

2. The 2005 schedule has reduced average permanent disability awards by more than 50%, independently of all the other reforms enacted by SB 899. (See Attachment E.)

3. Revisions of the schedule can be formulated immediately and revised periodically using a combination of:

    a. Analysis of the distribution of ratings obtained under the current schedule,

    b. Data and findings from the RAND interim report *Evaluation of California's Permanent Disability Rating Schedule* and additional empirical studies as described in Labor Code Section 4660, and

    c. A public policy decision on the overall goal of the permanent disability rating schedule.

4. The age adjustment in the existing schedule is not empirically valid, and it should be either replaced by an empirically supported adjustment or removed entirely.

In this paper, CHSWC recommends:

- Revision of the rating schedule to preserve the objectivity attained under SB 899 while improving the equity across different types of injuries and more nearly reaching the state's goal for balancing adequacy of benefits for injured workers and affordability of the program for employers.

- Revision of the schedule to be effective July 1, 2006.

- A method to formulate new FEC factors for each type of injury based on average earnings losses and on observed impairment ratings, with the new FEC factors to be adopted in the revised schedule in place of the eight FEC factors in the 2005 schedule.

- A policy decision on the desired balance between adequacy of benefits and affordability of the program, with the resulting overall goal to be incorporated into the formulation of the new FEC factors (see pages 9-10).

- A separate method to determine the FEC factor for rating psychiatric disabilities (see page 17).

- A change to the age adjustments to conform to empirical evidence (see page 17).

- Amendment of the Labor Code to make the schedule conclusive evidence of the percent of PD with limited exceptions (see page 19).
- Adoption of a plan for continued monitoring of the impairment rating data which are used in the calculation of FEC factors.
- Revision of the FEC factors in the schedule every two years in response to any changes in the observed distribution of impairment ratings.
- Further study of earnings losses in relation to impairment ratings.
- Revision of the FEC factors when new studies establish updated or improved estimates of average earnings losses.

Next steps to be taken to carry out these recommendations are:

1. Determine the appropriate level of overall ratings as a matter of public policy.
2. Formulate the revised FEC factors using currently available data and incorporating the policy level decision from step 1.
3. Begin the process to revise the schedule, either administratively or legislatively, in time to become effective July 1, 2006.
4. Begin the legislative process to make the schedule conclusive evidence of the percentage of PD subject to specified exceptions.
5. Establish ongoing monitoring and analysis of the distribution of impairment ratings in cases rated by the Disability Evaluation Unit (DEU).
6. Conduct a study of earnings losses correlated with impairment ratings.
7. Revise the schedule biennially with the latest available information on average impairment ratings and corresponding average percentages of earnings losses.

Costs and Interplay of Disability Ratings, Weeks of Benefits, Weekly Benefit Amounts, and Compensability

SB 899 affected all of the components that determine both the amount of PD compensation payable in a particular case as well as the system-wide cost of the PD benefit. The schedule is just one of those components. The amount of compensation payable for an individual permanent disability is determined by the PD rating, the number of weeks of benefits payable for that rating, and the weekly benefit amount. The system-wide cost of PD compensation is determined by all of these elements combined with the policies that determine compensability.

- Compensability of PD (but not compensability of the underlying injury for purposes of medical treatment or temporary disability) was restricted by the adoption of the AMA *Guides.* Subjective disabilities and work restrictions that were compensable as permanent disabilities under the former schedule will often receive zero impairment ratings under the AMA *Guides.* For example, the *Guides* give no impairment rating for back pain without objective evidence of impairment or for a chronically dislocating shoulder without a measurable loss in range of motion. The system-wide cost reductions from the "zeros" have been estimated from 7% to 30% of all benefit dollars.

- Apportionment of permanent disability is another aspect of compensability, as apportionment determines what part of the disability is compensable when there are multiple contributing causes. In one of the first cases applying the new law, a 53% knee disability was apportioned one-half to preexisting degenerative arthritis and one-half to an injury when the employee fell at work. The reduction in system-wide PD benefits due to the revised law of apportionment was initially estimated at 3%, but early research is placing the reduction at 5% or greater.

- Weekly benefits amounts are two-thirds of an employee's average weekly wage up to a maximum amount. The maximum rate was raised to $270 per week for injuries after January 1, 2005, as a result of Assembly Bill (AB) 749 passed in 2002. SB 899 introduced a differential of plus or minus 15% in the weekly amount for most employees, depending on whether the employer makes a qualifying offer of return to work. (Employers of fewer than 50 employees are excluded.) This return-to-work (RTW) incentive is projected to reduce costs by 3% (WCIRB estimate) because a majority of injured workers already return to the at-injury employer and SB 899 gives both parties added incentive to return the employee to the workplace.

- The number of weeks of benefits payable for a given rating was reduced for most awards by SB 899. Fewer weeks of benefits are payable for each percentage point below 15 and more weeks are payable for each point over 70. Every PD award includes some number of percentage points below 15, while few PD awards reach 70%. The net effect of the changes in weeks, analyzed apart from any of the other changes made by SB 899, was a reduction of approximately 8% to 10% of system-wide PD costs.

Thus, it appears that there are substantial savings (or benefit reductions) due to zeros, apportionment, return-to-work incentives, and the schedule of weeks of benefits, all of which are

distinct from the rating schedule. Ongoing study of the performance of the schedule indicates that the 2005 revision of the schedule reduced overall benefits by approximately 51% in addition to all of the reductions described above. Each of these reductions was estimated for the effect of the individual change. The combined effect is not simply additive or even cumulative because the interactions are complex. For example, a 40% reduction in the average rating could produce a 50% reduction in the average award, depending on how the awards are distributed in severity. While public policy and the "bottom line" for stakeholders must consider all these components and their interactions, this paper is concerned only with revisions to the schedule.

Recommended Method for Developing Revisions to the Rating Schedule

The schedule prescribes the steps to calculate a PD rating. In the schedule adopted January 1, 2005, the calculation begins with a whole person impairment (WPI) percentage established by a physician in accordance with the AMA *Guides*. The 2005 schedule assigns each type of injury (part of body) to one of eight future earning capacity (FEC) factors in the range from 1.100000 to 1.400000. The WPI is multiplied by the assigned FEC factor. The result is further adjusted upward or downward according to tables in the schedule based on the employee's occupation and age at the time of injury.[7] The result is the final disability rating. CHSWC recommends a method to formulate different FEC factors for a revised schedule while retaining the basic structure of the 2005 schedule. The age adjustment will be discussed separately.

CHSWC recommends that the FEC factors used in the schedule should be formulated by dividing the average proportional earnings loss by the average WPI for each type of injury, with further modifications as discussed in this paper. The most current information on average proportional earnings loss is shown in the RAND reports cited in the Bibliography.[8] The most current information on average WPI is obtained from the ongoing analysis of DEU ratings.[9] CHSWC recommends that the formulation of the FEC factors be regularly updated with continuing empirical research. This paper will explain the data that would be used in the formulation and describe an exception for psychiatric disability rating.[10] The new set of factors would be substituted in place of the eight FEC factors that are in the 2005 schedule. Instead of assigning each of the 22 types of injury to one of eight FEC factors as in the 2005 schedule, it will be possible to separately formulate FEC factors for each of the common types of injury (accounting for over 90% of all injuries). The purpose of the recommended method is to achieve a consistent ratio between ratings and proportional earnings losses so that workers with similar earnings losses will receive similar ratings regardless of the type of injury.

One more step is required to implement a public policy decision. The first step of the calculation recommended above (average proportional earnings loss divided by average WPI) would lead to

[7] The pre-2005 California schedule used a "standard rating" percentage corresponding to the disability described by a physician according to a rating system that included objective and subjective factors and work preclusions. The standard rating was then adjusted upward or downward according to tables in the schedule based on the employee's occupation and age at the time of injury.
[8] See excerpt showing proportional earnings losses, Attachment D.
[9] Attachment E.
[10] Psychiatric injuries are discussed separately. Unless otherwise indicated, references in this paper to "each" or "all" types of injuries exclude psychiatric injuries.

average percentage ratings of PD that are equal to the average percentages of proportional earnings loss. Such a 1 to 1 ratio between ratings and proportional earnings losses may or may not reflect the intended public policy, as discussed in the following section. The new FEC factor for each type of injury should include a modification to achieve the overall public policy choice, so the calculation becomes:

$$\frac{\text{(average proportional earnings loss for type of injury) * (overall public policy modification)}}{\text{(average WPI for type of injury)}}$$

Policy Goals Remain Controversial

Some of the public policy goals of SB 899 are undisputed, while some remain controversial. The Legislature directed the AD to revise the schedule, saying that the new schedule "shall promote consistency, uniformity, and objectivity." Other significant changes include:

- Adoption of AMA *Guides* in place of the unique-to-California system of standard disabilities previously in effect.
- Consideration for the injured employee's diminished future earning capacity, in place of consideration for the employee's diminished ability to compete in an open labor market.
- Definition of diminished future earning capacity to mean a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees, based on specified research.

By adopting the AMA *Guides* as the starting point for a rating calculation, the Legislature substantially limited ratings for subjective disabilities that often have no ratable impairment under AMA criteria. Regardless of what adjustment factors are applied by the schedule, the zeros will remain zeros. The only cases that remain ratable are cases with impairments recognized under the AMA criteria.

By requiring consideration of diminished future earning capacity, as defined by statute, the Legislature supported a consistent ratio between ratings and diminished future earning capacity across different types of injury. In the PD study by RAND, the ratios of ratings compared to proportional earnings losses were shown to be inconsistent across different types of injuries. The Legislature specifically referred to that study in SB 899. The proportional earnings loss findings in the RAND study are the diminished future earning capacity numbers required by SB 899.

The more controversial goal is whether the consistent ratio should be a ratio that maintains, increases, or decreases the average rating for cases that remain ratable. For example, the RAND study found that the average ratio of ratings over proportional earnings losses was 1.09 under the pre-2005 schedule. To maintain the same average rating for cases that remain ratable while re-ordering the ratings to obtain a uniform ratio for all types of injuries, the calculation of the new FEC factors would require an additional multiplier of 1.09. To maintain the same average rating as the 2005 schedule while re-ordering the ratings to obtain a uniform ratio for all types of

injuries, the additional multiplier would be approximately 0.55. (More exact modeling of the weighted distributions may refine that estimate.) While any multiplier could be inserted into the calculation, some of the choices that may be considered are:

- A ratio of 1 (i.e., 1 to 1) would mean that the average percentage disability rating is equal to the average percentage of earnings loss.
- A ratio of 1.09 between average percentage disability rating and the average percentage earnings loss would produce average ratings equal to the average pre-reform ratings for the cases that are still ratable under the more stringent AMA criteria.
- A ratio of 0.55 between average percentage disability rating and the average percentage earnings loss would maintain approximately the same average rating as the 2005 schedule currently in effect.
- Some other ratio may achieve some other balance among benefit adequacy, affordability, and secondary consequences.

CHSWC recommends that the public policy be discussed and decided. The broader issues include adequacy of benefits for injured workers and affordability of the program for employers. The most generally recognized standard of adequacy is that benefits should replace two-thirds of average earnings losses. (Reville et al., 2005, page 14.) Studies have shown that California did not meet this target on the average and over the long term due to poor return-to-work rates, but California sometimes exceeded the target for workers who returned to their former employers following their injuries. Under SB 899, benefits will be more accurately targeted to the workers who need them because of the plus-or-minus 15 percent change in weekly benefit payments based on an offer of return to work for employees of larger employers. It appears that California would not meet the two-thirds standard on average even without the 50% reduction caused by the 2005 schedule. Accordingly, an argument may be made for maintaining the overall average level of ratings that existed under the pre-2005 schedule while redistributing the ratings to achieve greater equity, consistency, and objectivity. On the other hand, cost savings were a clear motivation for SB 899, and the goals for adequacy cannot be adopted without weighing the cost of the program to employers. Because comparison with other states is one potential factor in that policy decision, CHSWC has conducted a survey of the compensation payable in nine other states for two hypothetical cases.[11] Only limited inferences can be drawn from such a limited survey, but the results suggest that the 2005 schedule places California significantly below the majority of states surveyed with respect to compensation payable for the "typical" back injury example and slightly higher for the "severe" example. Once legislative intent, cost, replacement rates, comparison to other states, and other factors have been considered and a public policy choice is made, that choice can be implemented in the schedule, at least in part, by formulating FEC factors that produce the desired ratio between disability ratings and diminished future earning capacity. CHSWC recommends that an overall ratio be chosen that will reflect a policy decision and that the FEC factors for each type of injury be formulated to include that overall ratio as described above.[12]

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[11] Attachment G.

[12] Illustrations of FEC factors formulated pursuant to the CHSWC recommendation, including the effect of three options for the overall public policy choice, are shown in Attachment H.

When to Revise the Permanent Disability Rating Schedule

CHSWC maintains that there is adequate data to begin revising the schedule immediately. It may be argued that waiting for more data would allow the calculations to become more accurate. CHSWC maintains that an immediate revision of the schedule will enable California to more nearly meet its policy goals and will not preclude further revisions as more accurate calculations become possible with additional data.

If a revision is adopted by the AD under the existing authority of Labor Code Section 4660, it will apply to injuries occurring on and after the effective date of the revision.[13] The usual rule, retained in Section 4660(d), is that revisions are applicable to injuries occurring on and after the date the revisions are adopted. The schedule adopted January 1, 2005, is applicable to many injuries that occurred prior to the adoption date, but that is due to a one-time legislative exception provided by SB 899. (This interpretation is still unsettled. One trial judge recently held that the 2005 schedule does not apply to any injuries occurring prior to 2005.) CHSWC recommends that the revised schedule be applicable to injuries occurring on and after the effective date of the revision without another legislative exception to the usual rule. The reasons for this choice are efficient administration of claims, prevention of tactical maneuvering to manipulate individual ratings, and predictability of costs for purposes of insurance ratemaking.

CHSWC recommends that the revision be published by March 2006 and become effective July 1, 2006, so that the changes can be taken into account in the insurance rate-making process for the premium rate changes that become effective July 1, 2006.

Adequacy of Rating Data

An adequate set of data is available to begin the process so a revision of the schedule can become effective July 1, 2006. For these purposes, an adequate set of data is a set of (1) summary ratings of single-impairment cases, (2) with average whole-person impairment (WPI) ratings for each type of injury, (3) in which the standard error is less than one half a percentage point for the types of injury that encompass at least 90% of all injuries. Each of these criteria will be explained.

1. Summary ratings are the most consistent measure of system behavior.

Summary ratings are used for two reasons. First, proportional earnings loss data are available only for workers who received summary ratings**.** There are no data available on the percentage of proportional earnings loss for workers who received consultative ratings. Future research may include represented cases, but applicable data on those cases has not been collected yet.[14]

[13] See subdivision (d) of Labor Code Section 4660, in Attachment A.
[14] The DEU issues summary ratings on the reports of treating physicians and the reports of QMEs selected from randomly assigned panels when the employee is not represented by an attorney. The DEU issues consultative ratings when an employee is represented by an attorney. (8 Cal. Code of Regs. 10160, 10166.) Berkowitz and

Second, the cross-section of cases that appear in summary ratings is expected to be substantially the same under the new schedule as it was under the pre-2005 schedule. These cases, unlike consultative ratings, are less subject to the influence of any changing litigation strategies because attorneys are not involved.[15] Summaries are issued in unrepresented cases whenever an employee obtains a panel qualified medical evaluator (QME) report or a treating physician's report on PD, so there is little opportunity for anyone to selectively keep these cases from the DEU. Therefore, the flow of summary ratings through the DEU is likely to continue as cases reach maximum medical improvement, generally unaffected by legal strategies. It is still possible that the selection is influenced by the strategies of some sophisticated workers and some physicians, but the likelihood and opportunities for maneuvering are far more limited in cases receiving summary ratings. The sample of cases obtaining summary ratings under the 2005 schedule is expected to be comparable to the sample of cases that received summary ratings in the PD study by RAND.

Consultative ratings slightly outnumber summary ratings. In the first 3407 ratings, 47% were summaries and 53% were consults. Consult-rated cases tend to be rated higher than summary-rated cases, with average ratings of 17.62% and 11.28%, respectively, but the percentage reduction in observed ratings under the 2005 schedule compared to the pre-2005 schedule is very similar at 40% reduction for both types, give or take a tenth of a percent. Although the analysis is limited to summary ratings for the purpose of calculating new FEC factors, both groups appear to be similarly affected by changes in the rating schedule.

Single-impairment cases are those where the impairment is confined to one part of the body. The effect of separate impairments cannot readily be identified in multiple-impairment cases. RAND observed that about 85% of summary ratings were single-disability ratings. (Reville, et al., 2005, page 45.) For this purpose, the terms "single impairment" and "single disability" are equivalent. The RAND findings of proportional earnings loss were based on single-disability cases, so it is appropriate to use the same type of cases for the WPI figures that will be used to formulate new FEC factors using those earnings loss findings.

2. Adjustment factor will be calculated for each type of injury.

In the 2005 schedule, there are 22 types of injury, each assigned to one of eight adjustment factors in the range from 1.100000 to 1.400000. Three regions of the spine (cervical, thoracic, and lumbar) are all assigned to the same adjustment factor, and until more precise data are

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Burton (1987) estimated proportional earnings losses for California workers who received advisory ratings and formal ratings, but those are not comparable to summary ratings and consultative ratings. Formal ratings were, and still are, issued only upon instructions from a judge when a permanent disability rating issue has been submitted for judicial determination, so they tend reflect the most contentious and possibly the most severe injuries. The 1980s category of advisory ratings would now be divided into summary ratings and consultative ratings, depending on whether the employee is represented by an attorney.

[15] The selection of reports rated as consults could be affected by changes in attorney strategy in response to SB 899 and by changes in statute that require represented parties that cannot agree on an Agreed Medical Evaluator (AME) to use the QME process. It has been suggested that there was a rush to maneuver cases so they would receive PD ratings under the old schedule before January 1, 2005. It has also been suggested that since January 1, 2005, attorneys are now holding back the more severe cases in the hope of obtaining a more liberal rating environment.

available, the spine will be treated as one "type." This leaves 20 types. CHSWC proposes that a new adjustment factor be calculated for each type of injury. Sufficient data have already accumulated to formulate more accurate FEC factors for most types of injury. A few rare types of injury, encompassing less than 3% of all cases, will still lack sufficient data to permit any meaningful calculation of their FEC factors. Any type of injury having fewer than some minimum number of observations, such as ten observations for the first revision of the schedule after 2005, should be combined in the "other" type. Consigning an injury type to "other" means that the resulting FEC factor will probably produce less accurate ratings for that type than for most injuries, but greater accuracy is simply not possible using empirical methods. Fortunately, those "other" injuries are the least common and, despite their importance to individual injured workers, they will have minimal effect on the system as a whole. One type of injury, psychiatric, is rated so differently from the others that it should be omitted from the averages. The adjustment factor for psychiatric injuries will be discussed separately.

3. Standard error determines the required sample size.

"Standard error" can be used to evaluate the minimum sample size to obtain valid information. The standard error of a sample of size n is the sample's standard deviation divided by the square root of n. This measurement allows us to determine the required sample size depending on the variability of the data; if the cases are widely scattered, a larger sample is needed, but if they are tightly clustered, a smaller sample is adequate.

CHSWC recommends that the sample size is adequate to proceed with the revision of the schedule when the average WPI can be calculated with a standard error of less than 0.50 for enough types of injury to encompass at least 90% of all injuries. Already, this threshold has nearly been reached with the ratings reported through October 17, 2005. In that data, six types of injuries have large enough samples to obtain standard errors of less than 0.50. Those six types (spine, hand/fingers, shoulder, knee, wrist, grasping power) encompass over 85% of all injuries. Once the DWC releases the rating data for the months since October, the types of injuries that have reliable averages for WPI will encompass over 90% of all injuries.

Validity of Early Sample

This section addresses specific questions and challenges raised about making adjustments to the new schedule based on the initial claims submitted to the DEU. The following material is therefore largely duplicative, but is presented in a way that is intended to respond more directly to potential concerns about this proposal.

The fundamental assumption of the methodology in this paper is that the severity of injuries occurring every day throughout California did not change when the schedule changed. From that assumption, it follows that the relationship of ratings to earnings losses can be calculated using rating experience under the new schedule and earnings loss data collected under the pre-2005 schedule.

Observers may question the reliance on the first ratings to emerge from the DEU:

- "All the serious cases are being held out from DEU ratings." As explained in connection with the use of summary ratings, there is little opportunity to selectively withhold certain kinds of cases from the summary rating process. When the unrepresented employee's condition becomes permanent and stationary, the case proceeds to an evaluation and the medical report is sent to the DEU. Adjusters might try to settle out some cases without waiting for ratings, but there is no reason to believe that this is done in a consistent pattern that would skew the sample.

- "Hardly anything is getting rated; everything is being settled." The number of ratings has been small because of the DEU's backlog, but significant numbers of ratings are now showing up. In unrepresented cases, the only way for a case not to be rated is for the adjuster and the employee to agree to settle without obtaining a QME report or even a DEU rating on a treating physician's report. There is no reason to believe that characteristics of cases being settled without rating have changed.

- "These early cases are too new to be representative." It is a fact that the longer the time from the date of injury to the date of rating, the higher the average rating tends to be. The 2005 schedule is not limited to recent injuries, however. A substantial number of more mature cases have also received ratings under the 2005 schedule. CHSWC recommends adjusting the calculation to reflect the difference in average severity based on the difference between the average age of the cases being rated under the 2005 schedule and the average age of cases rated under the prior schedule. (See Attachment F.)

- "Ratings are going to change as people learn to work the system." This concern has been expressed from both sides. Employee representatives fear that employers will take over the medical evaluation process through medical provider network (MPN) physicians. Employee representatives also fear that physicians will rate more conservatively as they become more accustomed to the AMA *Guides*. (Most errors are on the high side, according to AMA experts.) Employers fear that attorneys and physicians will learn loopholes and tactics to increase the ratings. CHSWC's reply to these concerns is three-fold. First, AMA ratings are probably more objective and less vulnerable to evaluator bias than the old system. Second, decisions must be based on available data. Third, this revision is only temporary. An integral component of CHSWC's recommendation is that the schedule should be regularly updated with adjustment factors recalculated using the latest available data. In this way, the schedule will be self-correcting to neutralize trends in rating behavior.

Validity of Earnings Loss Data

The percentage of proportional loss of earnings for each type of injury is required for the proposed calculation of adjustment factors. These percentages were reported by RAND in a report to the Division of Workers' Compensation (DWC) in December 2004. (Seabury, et al.) The findings are based on a multi-year research project with a final report issued in 2005. (Reville, et al., 2005.) This final report is the successor to the Interim Report cited in Labor Code Section 4660(c). Reliance on these findings is mandated by Labor Code Section 4660, as amended by SB 899, which cited the interim report.[16]

The findings in the 2004 RAND report (excerpted in Attachment D) indicate the proportional earnings loss of injured employees as compared to their uninjured peers. By tracking the injured and uninjured individuals for three years after the injury, the RAND team factored out the effects of inflation or plant closings so the difference in earnings could reasonably be attributed to the injuries. The findings are expressed as the average three-year proportional earnings loss for each of 23 types of injury, including three separate regions of the spine. As discussed earlier, CHSWC proposes merging the spine into one type, at least in the initial revisions. Another type, headache, is not ratable under the AMA *Guides* and is therefore omitted from the 2005 schedule and from this recommendation. That leaves 20 types of injury, each with an average proportional earnings loss for employees who received summary ratings for that type of injury.

CHSWC proposes that these findings for each type of injury be taken as the average diminished future earning capacity, as that term is used in Labor Code Section 4660. The RAND study is the only comprehensive study of diminished earnings presently available.

An objection to reliance on the RAND study is the argument that wage losses will be different because return-to-work (RTW) incentives are different since the repeal of vocational rehabilitation and the adoption of a tiered compensation rate. CHSWC agrees that an improvement in RTW rates is certainly intended and expected. This change, however, is not expected to occur immediately. The tiered benefit system seemingly applies only to dates of injury on or after January 1, 2005, and it does not apply to small employers. CHSWC concludes that the RAND findings remain the most appropriate basis for determining diminished future earning capacity until a new empirical study of earnings losses is conducted.

Some may question reliance on average WPI percentages and average proportional earnings losses because the average relationship between WPI and proportional earnings loss might not hold true across the range of severity. For example, a 25% impairment may have more or less than five times the impact on earning capacity as a 5% impairment to the same part of the body. Because all injuries to the same part of the body are assigned to the same FEC factor, the final rating for the 25% WPI will be five times as much as the final rating for the 5% WPI. This is a necessary limitation of the schedule at this time. Sufficient data have not yet been acquired to detect the differing relationships between impairment ratings and earnings losses across the range of severity. Such detailed data collection and analysis are beyond the scope of any

[16] See Labor Code Section 4660(b)(2), in Attachment A.

research likely to be done within the next five years. To mitigate the limitations of reliance on averages, CHSWC is recommending that exceptions to the schedule be allowed for extreme cases as discussed in the section, Prima Facie Evidence or Conclusive Presumption.

Some may object that the average severity of cases being rated under the 2005 schedule cannot be compared to the average proportional earnings loss found by RAND because the populations of cases are different. Some percentage of the cases that received permanent disability ratings under the pre-2005 schedule in the RAND study would be excluded from the current impairment ratings because they do not have objective evidence of impairment recognized under the AMA *Guides.* If those cases, sometimes called the "zeros," were mostly the less severe cases, then the average proportional earnings loss for cases studied by RAND could be lower than the average proportional earnings loss for the cases that remain ratable under the 2005 schedule. The objection rests on the assumption that proportional earnings losses for the zeros were lower than the overall average. This assumption is plausible but unproven. In fact, the opposite might be true. Research has shown that return to work outcomes are heavily influenced by other factors besides the objective physiological impairment.[17] It is plausible that many of the zeros may reflect these other psychosocial factors and that they may experience larger proportional earnings than the cases that remain ratable. Until further research is done, there is no empirical way to evaluate the extent to which the average earnings loss of the population of cases obtaining ratings under the AMA *Guides* differs from the average earnings loss of the population of cases examined by RAND, or even to be certain of the direction of that difference. In the future, proportional earnings losses can be measured in the population of workers who receive ratings under the AMA-based schedule. Until then, a comparison between average WPI ratings and average proportional earnings losses is the most accurate method available for revising the rating schedule.

If the cases that drop out of the ratable population are predominantly the cases that had lower earnings losses, then the average earnings losses of the remaining population seen in the ratings under the 2005 schedule would be greater than the average earnings losses in the RAND findings. These are the "zeros," the cases with no objective evidence of disability ratable under the AMA *Guides* and the 2005 schedule but with subjective disability ratings that placed them within the population of cases studied by RAND.

Some may question reliance on the RAND percentages of proportional earnings loss due to technical issues with the RAND study. For example, the available data sources did not include post-injury earnings from self-employment. Experts have not suggested, however, that the difference would be substantial or that the RAND findings are fundamentally unsound. Moreover, as a matter of law, the RAND study is designated by statute to be the initial basis for the determination of diminished future earning capacity.

Some may object that the average earnings loss findings do not reflect the differences between workers who return to work and those who do not return. The RAND study found a significant difference in proportional earnings loss depending upon whether the worker returned to the at-injury employer. That difference has already been addressed in the tiered benefit amounts

[17] e.g., Shaw, 2005, and Sullivan, 2005.

payable under Labor Code Section 4658(d). That section provides that an employee who does not receive a qualifying offer of return to work is entitled to 35% higher weekly benefits than an employee who does receive a qualifying offer. (The differential does not apply if the employer has fewer than 50 employees.) Empirical evidence does not support a wider spread in compensation than the 30% already provided. (The spread is plus or minus 15% from the basic weekly rate, for a 30% spread. Compared to the worker receiving 85% of the basic rate, however, the worker receiving 115% of the basic rate is receiving 35.3% more.) A wider spread could lead to unintended consequences. CHSWC recommends further study of the effect of the existing differential before any further RTW modification is adopted.

The lead author of the RAND final report has predicted that a new study could produce findings by 2008 or possibly 2007.[18] Until then, the proportional earnings loss findings as reported in the existing study are the most current and accurate basis for revision of the schedule.

Exception for Psychiatric Disabilities

Psychiatric disabilities warrant a different analysis. The rationale for the proposed FEC calculations does not hold true for psychiatric injuries. Unlike the other types of injury, psychiatric impairments are not rated under the AMA *Guides*. Also unlike other types of injuries, psychiatric disability ratings under the pre-2005 schedule had little correlation with average earnings losses.

The 2005 schedule adopted the Global Assessment of Function (GAF) scores and assigned impairment ratings to these GAF scores in an effort to improve on the pre-2005 system. A high GAF score indicates no impairment, while a low GAF indicates a severe impairment. GAF has been a component of psychiatric assessments for years, although it was not developed to be an instrument for evaluating PD. GAF was not used for PD ratings in California until 2005, and GAF has not been evaluated as a tool for rating PD.

Sound discretion must be exercised to set an FEC factor for psychiatric disabilities in the absence of a meaningful baseline. It is instructive to consider which GAF score corresponds to a total disability. The GAF range of 31 to 40 is described as "some impairment in reality testing or communications (e.g., speech is at times illogical, obscure or irrelevant) OR major impairment in several areas, such as work or school, family relations, judgment thinking, or mood (e.g., depressed man avoids friends, neglects family, and is unable to work…)." By definition, a person at the bottom of this range will be unemployable. The 2005 schedule assigns impairment ratings of 69 to 51 for this range of GAF scores. Taking a GAF score at the most severe end of that range as the point at which the patient is totally unemployable, the impairment rating of 69 should produce a PD rating of 100%. Since 69 x 1.45 = 100, an FEC factor of 1.45 would produce the appropriate 100% PD rating for a person at the most severe end of that range. Accordingly, 1.45 is the recommended FEC factor for psychiatric disabilities.

[18] Public remarks by Robert T. Reville at the December 9, 2005 Meeting of the Commission on Health and Safety and Workers' Compensation.

Further research is required to validate the GAF as a tool for PD rating or else establish a more satisfactory method of rating psychiatric disability.

Modification of Age Adjustment

The schedule in California has always provided for upward adjustments with increasing age of the employee at the time of injury. The rationale was that it was more difficult for older workers to adapt to their disabilities and return to work. Some states use an age adjustment in the opposite direction based on the rationale that a younger worker will have more years of earnings losses than a worker nearer retirement age. As it turns out, empirical data show that proportional earnings losses are highest for workers under age 30, lowest for workers aged 40 to 49, and intermediate for workers aged 30 to 39 and for workers aged 50 to 65. These findings are presented in Figure 6.1 in the final RAND report. CHSWC recommends that the numeric values corresponding to that graph be obtained from RAND and that age adjustment factors be adopted that will be overall benefit-neutral (compared to the existing age adjustments) but will reflect the weighted average increase or decrease in proportional earnings losses according to age groups below 30, 30 to 39, 40 to 49, and 50 to 65. The age adjustment could be, but need not be, a constant multiplier such as (hypothetically) 1.05 for one age group and 0.95 for another. Preferably, the adjustment would be in the form of a table assigning different age-adjusted ratings to different combinations of age and disability as depicted in the RAND illustration. Unless an age adjustment can be implemented consistent with the RAND findings, CHSWC would recommend that the age adjustment be eliminated from the schedule until an empirically based age adjustment can be formulated on the basis of further research.

Biennial Revisions

CHSWC recommends revision of the schedule every two years. Because the proposed method is based on measurements of system performance, it can be objectively reviewed and corrected. The two key components in the recommended determination of the FEC factors are average impairment ratings and average proportional earnings losses. The average impairment ratings can be updated by continuing analysis of DEU data. The average earnings losses can be determined when there is a new empirical wage-loss study.[19] It is anticipated that the earnings loss research might be updated every five years.

Biennial revision of the FEC factors would have several benefits:

- Until more data is accumulated, only the most common types of injuries (accounting for over 90% of all injuries) can be individually calculated. At first, the FEC factor for less

[19] There are several plausible ways to obtain the data for updating the schedule. For example, the average WPI could be based on the last two calendar years preceding a July 1 revision, and for any less common type of injury, the window could be extended beyond two years as long as necessary to develop an average WPI with a standard error less than 0.50. The average proportional earnings loss by type of injury (or by other similarities) could be determined by CHSWC research every three to four years or as warranted by the rate of change in factors affecting earnings losses.

common types of injuries will have to be determined by the average for all types of injuries. As the number of DEU ratings increases, the less frequent types of injuries will accumulate enough experience to permit calculating individual FEC factors for these less frequent types, as well.

- There may be concern that the behavior of the system in the first year of implementation does not necessarily predict behavior over the next two to five years. Biennial recalculations of the FEC factors would correct for any ratings creep, the upward or downward drift in evaluation and rating behavior.

- There may be concern that the cases coming through the DEU summary rating process in the first year of implementation are not representative. This paper has discussed reasons to believe that any bias will be minimal. Whatever sample bias exists in the first year's experience will be corrected by recalculating the FEC factors biennially.

Biennial recalculations would reflect the reality that in an empirically based rating system, the accuracy of the ratings can be continually improved as additional data become available. Each revision of the schedule should therefore be regarded as temporary. Medical evaluation behavior may change and case handling may change, causing the distribution of ratings to shift. Biennial revisions can correct for those shifts. In addition, medical outcomes may change and RTW rates may improve, causing the distribution of earnings losses to shift. Five-year updates of the wage-loss studies can be incorporated to reflect those changes. CHSWC recommends that the California schedule be made as accurate as possible with the data available both now and in the future.

Prima Facie Evidence or Conclusive Presumption

Existing law provides that the schedule is only prima facie evidence of the percentage of permanent disability.[20] A party may introduce other evidence to establish a percentage of disability different from the percentage calculated under the schedule. This was seldom attempted under the pre-2005 schedule except in cases where an employee claimed to be totally unemployable as a result of an injury.[21] With years of familiarity and acceptance, the pre-2005 schedule acquired an almost conclusive status. Parties knew there was no point in attempting to circumvent the schedule in most cases, so the schedule provided a modicum of efficiency in the process of resolving the cases and delivering the benefits. Without the years of familiarity and acceptance, the 2005 schedule is more likely to be challenged by other evidence of the percentage of diminished future earning capacity. If parties routinely introduce or threaten to introduce other evidence of the percentage of permanent disability in the hope of obtaining more favorable awards or obtaining tactical advantage, then the schedule would not promote efficiency, consistency, objectivity and uniformity. Amending Labor Code Section 4660 to

[20] Labor Code Section 4660(c). See Attachment A for full text.
[21] These were called *LeBoeuf* cases after the precedent that supports this departure from the schedule. *LeBoeuf* v. *Workers' Comp. Appeals Bd.* (1983) 34 Cal. 3d 234.

make the schedule conclusive evidence of the percentage of PD would make the system more efficient and consistent.

An amendment to make the schedule conclusive evidence of the percentage of permanent disability would maximize efficiency at the cost of losing flexibility to meet the needs of individual cases. To achieve a balance between efficiency in general and flexibility in individual cases, there would need to be exceptions to the conclusive effect of the schedule. Appropriately defined exceptions could ameliorate the effects of applying an FEC factor based on averages to a case that is far from average. Appropriately defined exceptions could permit adequate compensation in the cases where the disparity between scheduled rating and individual disability is most pronounced. Appropriately defined exceptions could reduce the likelihood of judicially created exceptions or even judicial invalidation. Exceptions might be handled under a hybrid approach such as used in Connecticut and Texas. In a hybrid approach, workers who meet certain criteria may receive some form of individual wage-loss benefits after they have exhausted their scheduled benefits.[22] The judicial process may produce appropriate results in individual cases but, as the saying goes, "Hard cases make bad law." The legislative process offers an opportunity to clearly define the desired boundaries of the conclusive presumption consistent with public policy.

CHSWC recommends that when the schedule is amended to achieve the State's policy goals, the Legislature should amend the Labor Code to make the schedule conclusive evidence of the percent of disability in most cases. CHSWC recommends further discussion to define the appropriate exceptions to conclusive application of the schedule

Conclusions

Decisions on how to revise the schedule depend on the data available. Additional data acquired since the adoption of the 2005 schedule can be used to revise the schedule to more nearly accomplish the State's policy goals. Data that will become available in the future can be used to regularly update the schedule to accomplish those goals. Recognizing that any solution is provisional and any solution may be revised and improved as more complete data become available, CHSWC recommends that a process be established to regularly update the schedule using the latest available research to implement the State's policy goals.

[22] Reville, 2005.

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CHSWC is solely responsible for the contents of this paper.

Attachments

Attachment A	Labor Code Section 4660 as Amended by SB 899
Attachment B	Terminology
Attachment C	Initial Research on the Effects of the 2005 Schedule
Attachment D	Proportional Earnings Loss Excerpt from RAND Study
Attachment E	Analyses of Ratings under the 2005 PD Rating Schedule
Attachment F	Technical Calculations
Attachment G	Multi-State Survey of Awards for Two Example Cases
Attachment H	Illustrations of Adjustment Factors with Public Policy Options

Bibliography

ATTACHMENT A

LABOR CODE SECTION 4660
AS AMENDED BY SB 899

4660**.** (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.

(b) (1) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (fifth edition).

(2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.

(c) The administrative director shall amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years. This schedule shall be available for public inspection and, without formal introduction in evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.

(d) The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.

(e) On or before January 1, 2005, the administrative director shall adopt regulations to implement the changes made to this section by the act that added this subdivision.

ATTACHMENT B

TERMINOLOGY

Certain terms are used frequently in this discussion with distinct meanings.

"Impairment" means "a loss, loss of use, or derangement of any body part, organ system, or organ function."[23] Synonyms used in this paper include "medical impairment," "AMA impairment," "whole person impairment," and "WPI." The measure of impairment is the percentage whole person impairment, or "impairment rating," evaluated pursuant to the AMA *Guides to the Evaluation of Permanent Impairment*, fifth edition. "The **whole person impairment percentages** listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work*…."[24]

"Diminished future earning capacity" is a term introduced by SB 899. See Attachment A. The term is understood to mean the percentage reduction in an average injured worker's post-injury earnings compared to the earnings that would have been expected without the injury. See "proportional earnings loss." The statute permits consideration of other factors in addition to type of injury, but research cannot presently measure more complicated relationships such as the interactions among type of injury, severity of injury, age, and occupation.

"Disability" in the present context means an alteration of an individual's capacity to meet occupational demands because of an impairment.[25] All discussion of disability in this paper refers to permanent disability, not temporary disability. Labor Code Section 4660(b)(2) implies that the measure of permanent disability is the percentage diminished future earning capacity of persons similarly situated, that is, similarly with respect to impairment and type of injury and possibly with respect to other selected characteristics such as age and occupation.

"Earnings loss" means the dollar amount of the expected earnings that are lost as a consequence of an injury. "Uncompensated earnings loss" means the difference between the earnings loss and the indemnity benefits (temporary and permanent disability indemnity, and vocational rehabilitation maintenance allowance) paid on account of the injury.

"Rating" ordinarily means a disability rating unless the context indicates an impairment rating. Unless the context clearly indicates individual ratings, all discussions of ratings are for averages.

"Proportional earnings loss" is the percentage by which the post-injury earnings of injured persons are reduced compared to uninjured controls, as found by the RAND PD reports cited in the text. It is understood to be the measure of "diminished future earnings capacity."

"Type of injury" generally means the body part injured. Some disability ratings were previously grouped by the effect, such as grip loss, rather than by cause, such as nerve root impingement.

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[23] AMA *Guides to the Evaluation of Permanent Impairment*, fifth edition, page 2.
[24] AMA *Guides*, page 4, emphasis in original.
[25] Paraphrased from AMA *Guides,* page 8, omitting non-occupational elements from the AMA definition.

ATTACHMENT C

INITIAL RESEARCH ON THE EFFECTS OF 2005 PERMANENT DISABILITY RATING SCHEDULE

This section reviews why new research was necessary to understand the effects of the new schedule and how the initial research attempted to quantify the effects.

Historical Version of Rating Schedule

The Permanent Disability Rating Schedule (schedule) in effect prior to January 1, 2005 (which we call the Pre-2005 schedule) traces its origin back to the Workmen's Compensation Act of 1917. It contained a list of injuries and physical impairments with corresponding percentages of disability. Those "standard" disability ratings were individually adjusted in accordance with tables that reflect variations for age and occupation of the injured worker. The result of the calculation was the final adjusted rating. For many injuries, the standard rating was assigned according to work preclusions described by a physician. In some cases, subjective pain was ratable in addition to or in lieu of other factors of disability. While the majority of states adopted some version of the American Medical Association *Guides to the Evaluation of Permanent Impairment,* California retained its unique system for rating permanent disability (PD).

Reform Legislation Requirements

Senate Bill (SB) 899, signed by the Governor Arnold Schwarzenegger on April 19, 2004, required the Administrative Director (AD) of the California Division of Workers' Compensation (DWC) to develop a new schedule using the descriptions and measurements of physical impairments according to the AMA *Guides*, fifth edition, and an adjustment for the effect of the impairment on diminished future earning capacity. The full text of the revised Section 4660 of the Labor Code is shown in Attachment B.

Difficulties Encountered in Developing the First Revision to the Schedule

The AD adopted a schedule as an emergency regulation effective January 1, 2005. With minor changes, this 2005 schedule became permanent June 10, 2005. In the 2005 schedule, the AMA impairment percentage is multiplied by a future earning capacity (FEC) factor. The product of that multiplication is used in the calculation of an employee's permanent disability (PD) rating in place of the 'standard' disability rating that was used under the pre-2005 schedule. The age and occupation adjustments remain unchanged from the pre-2005 schedule.

The formulation of the FEC factor required for the schedule has been controversial. The difficulty is that the RAND study cited in the statute was conducted under the schedule in effect prior to SB 899. RAND evaluated the average percentage of earnings losses for injured employees compared to their uninjured co-workers, and RAND compared the proportional

earnings losses to the percentage disability ratings. RAND found that across different disabilities, the ratio between the PD rating percentage and the actual percentage loss of long-term earnings varied by a factor of four, from 0.45 to 1.81. Despite the variation at the extremes, the RAND study also showed that on average, the ratings were actually quite close to the average percentages of long-term earnings losses. The overall ratio of summary standard ratings over losses was 1.09. The RAND findings are summarized in Table 5 of Seabury, et al., 2004, and excerpted in Attachment D. The study was of limited use in the formulation of the 2005 schedule, however, because it did not examine the relationship between impairment ratings under the AMA *Guides* and the resulting percentages of earnings losses. The relationships that RAND found between wage losses and the old standard disability ratings would not necessarily hold true for the relationship between wage losses and AMA-based impairment ratings. To the contrary, it appeared that impairment ratings are generally lower than the old standard ratings for the same conditions, and the relationships are not consistent across different types of injuries. Without adequate data, the AD had no choice but to use her judgment in establishing the adjustment factors. Nobody could predict exactly how the new schedule would perform.

Initial Studies Attempted to Predict Performance of the 2005 Schedule

When the AD promulgated the 2005 schedule by emergency regulation effective January 1, 2005, insufficient data were available to calculate a comparison between the pre-2005 schedule and an AMA-based schedule. The early studies of the new schedule consisted of two dual-rating projects on limited samples and one theoretical comparison of the maximum ranges of ratings for each type of injury under the AMA and under the pre-2005 schedule. While informative in their own ways, none of these studies provided the sound basis for revision of the schedule that is provided by the ongoing analysis of actual ratings under the 2005 schedule in conjunction with the RAND findings on earnings losses.

At the request of the Legislature, the Commission on Health and Safety and Workers' Compensation (CHSWC) and the Workers' Compensation Insurance Rating Bureau (WCIRB) of California undertook three evaluation studies. Two studies by CHSWC and the WCIRB have been completed and the data analysis from the third study is included in this proposal. Independently, the California Applicants Attorneys' Association (CAAA) also sponsored a study which was released in December of 2004.

The first CHSWC-sponsored study, conducted by Frank Neuhauser, University of California Berkeley, compared the pre-2005 schedule to AMA impairment ratings by comparing the maximum possible rating under each system for each type of injury. This is called the relative maximum value (RMV) method. This study evaluated the effect of adjusting 218,000 pre-2005 ratings adjusted up or down in proportion to the relative maximum values of possible ratings for the respective types of injuries under the 2005 schedule compared to the pre-2005 schedule. The RMV model predicted that the 2005 schedule would reduce the average ratings by 8.2%, using certain assumptions about the prevalence of alternative methods of evaluating spinal disabilities. The RMV method does not have any way of predicting the percentage of cases that become non-ratable, or "zero," under the AMA *Guides.* The major limitation of the RMV method is its

assumption that the distribution of ratings within the maximum ranges will be proportional between the two rating systems.

The CHSWC/WCIRB-sponsored study, conducted by Christopher Brigham, M.D, compares the final adjusted ratings in 250 cases that were already rated by the DEU under the pre-2005 schedule and re-rated by Dr. Brigham under the 2005 schedule. The Brigham study found that 39% of the 250 cases that were rated under the pre-2005 schedule would no longer have a ratable impairment according to the AMA *Guides* criteria and therefore would have a zero rating in the 2005 schedule. In cases that had ratable impairment, the average rating was 24.9% under the pre-2005 schedule and 10.5% under the 2005 schedule. That is a 58% reduction in the average rating in cases that have ratable impairment.

The CAAA-sponsored study, conducted by Paul Leigh, Ph.D., and Stephen McCurdy, M.D., of the University of California Davis, took a sample of 250 cases in which medical evaluations had been written under the pre-2005 criteria and re-rated the cases using both AMA criteria and the pre-2005 schedule. Despite the differences in study designs and despite being conducted entirely independently of one another, the two dual-rating studies produced some similar results. The Leigh study found that the mean disability rating under the pre-2005 schedule was 42%, and the mean impairment rating under the AMA *Guide*s was 14%. Applying the 1.22 weighted average FEC of the 2005 schedule (as reported by Neuhauser), the mean AMA impairment rating in Dr. Leigh's sample would be adjusted to 17%. That would be a 59% reduction in average ratings for cases that have ratable impairment.

Both of the dual-rating studies are limited by the fact that the medical reports were not written to AMA criteria, and both studies attempted to mitigate that limitation by calling on the judgment of the reviewer(s) to extrapolate AMA impairments from non-AMA medical evaluation reports. Despite differences in methodology and average ratings within their samples, the average reduction in ratings (58% vs. 59%) is remarkably similar in the two studies.

The "Zeros"

As noted above, a significant fraction of cases that were ratable under the pre-2005 schedule have no ratable impairment under AMA criteria. These cases are often called the "zeros." These were often the more subjective disabilities that do not produce objective findings recognized by the AMA *Guides*. It will be difficult to determine how many of these cases never reach PD rating.

The current best estimates of the savings from the "zeros" are bracketed by the Brigham study and the Leigh study. The Brigham study found that 39% of the 250 cases that were rated under the pre-2005 schedule would no longer have a ratable impairment according to the AMA *Guides* criteria and therefore would have a zero rating in the 2005 schedule. These cases represented approximately 30% of the benefit dollars payable under the pre-2005 schedule. The Leigh study found approximately 10% of the sampled cases became zeroes. The Brigham sample was drawn from DEU summary ratings, which tend to be simpler cases, while the Leigh sample was drawn from reports of Agreed Medical Examiners in attorney-represented cases, which tend to be the

more serious and complicated cases. Because of the different sampling effects, the actual percentage of all cases that will become zeros probably falls between 10% and 39%.

It has been suggested that California should expect a larger percentage of cases to turn into zeros than other states found, because California had a larger percentage of cases being subjectively evaluated prior to adoption of the AMA *Guides*. On the other hand, in Texas where AMA 3rd edition criteria are strictly applied, benefits are low and attorney involvement is low, exactly the same percentage (53.9%) of cases with at least 7 days of TD went on to obtain PD awards as in California, where the rating schedule was highly subjective, compensation was higher, and attorney involvement was high, according to Barth, 2002.

Although the exact share of "zeros" remains a matter of opinion, these savings are expected to be significant and permanent. No matter what multipliers are adopted for the schedule, a zero impairment under the AMA *Guides* will still produce a zero permanent disability rating.

Ongoing Research

The initial research into the effects of the 2005 schedule was based on attempts to predict the behavior of the rating system under the AMA *Guides.* Each method had its limitations. The actual behavior of the rating system could not be reliably predicted until the system was actually operating. CHSWC is sponsoring ongoing analysis by Frank Neuhauser of actual ratings by the DEU under the 2005 schedule. The methods and results of that research are described in the body of this paper and in additional attachments.

ATTACHMENT D

Proportional Earnings Loss Excerpt from RAND Study

Excerpt of Table 5 from Seabury, et al, *Data for Adjusting Disability Ratings to Reflect Diminished Future Earning Capacity in Compliance with SB 899*

Table 5

Disability Ratings and Earnings Losses for Broad Injury Categories in the RAND Data

	Standard Rating	3-Year Proportional Earnings Loss	Ratio of Ratings over Losses	Number of Observations
Spine*	19.70	18.45	1.07	39,198
Lumbar	20.93	19.14	1.09	
Cervical	16.05	15.04	1.07	
Thoracic	16.80	15.69	1.07	
Knee	14.65	9.31	1.57	12,846
Loss of grasping power	11.21	8.73	1.28	11,776
General upper extremity	17.89	17.98	1.00	8,776
Shoulder	9.73	13.08	0.74	7,358
Hand / Fingers	8.86	4.89	1.81	6,895
Wrist	13.15	10.84	1.21	5,968
Ankle	14.12	9.28	1.52	4,151
Elbow	9.44	6.23	1.51	2,896
Hearing	10.71	17.69	0.61	2,068
General lower extremity	19.00	17.21	1.10	1,765
Psychiatric	22.13	49.01	0.45	1,433
Toe(s)	10.10	9.09	1.11	523
Hip	21.68	21.10	1.03	475
General abdominal	18.26	19.24	0.95	448
Heart disease	29.78	30.82	0.97	353
Vision	10.31	5.68	1.81	306
Lung disease	20.06	25.44	0.79	264
Headaches	7.75	12.35	0.63	181
Post-traumatic head syndrome	23.85	25.57	0.93	96
Other single	13.81	9.04	1.53	597
Total	15.58	14.25	1.09	108,373

ATTACHMENT E

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Memorandum

Date: **August 26, 2005**

To: **Christine Baker, Executive Officer, CHSWC**
Dave Bellusci, Senior VP & Chief Actuary, WCIRB

CC: **Ward Brooks, WCIRB**

From: **Frank Neuhauser**

Re: **Analysis of ratings under the new PD schedule, through August 17, 2005**

I have finished preliminary analyses of ratings done through August 15, 2005 under the new Permanent Disability Rating Schedule (2005 PDRS). In this memorandum, I compare the average ratings under the 2005 PDRS to comparable groups of ratings under the pre-2005 PDRS. Since the memorandum dated June 28, 2005, I have refined the comparison groups more precisely.

The primary comparison is for "summary" ratings for unrepresented workers under each schedule. We include under the heading of "summary" ratings:

- Formal ratings: ratings requested by a Workers' Compensation Judge (2)
- Treating physician reports for unrepresented workers
- Panel QME reports for unrepresented workers

The pool of claims included for this comparison groups should be quite similar for ratings done by the DEU under the old and new schedules.

The secondary comparison is for "consultative" ratings for represented workers under each schedule. We include under this heading of "consultative" ratings:

- Walk-in consultative ratings for represented workers
- Mail-in consultative ratings for represented workers
- A very small number of consultative ratings done for unrepresented workers that "walk-in" to the DEU.

This secondary comparison group may have changed substantially in the composition of the claims because of statutory changes introduced by recent reforms. Under SB-899, if the parties in represented cases cannot agree on an agreed medical evaluator (AME) they are required to request a QME panel from the DWC. These reports supposed to be submitted to the DEU for rating. This may substantially increase the portion of ratings on represented cases that are performed by the DEU, and consequently, affect the statistics calculated for these cases.

Current estimates:

- Through August 17, 2005 there were 1501 reports rated under the 2005 PDRS where the data could be analyzed. (a very small number of cases apparently rated under the new schedule had missing data, such as incomplete impairment category numbers.)
- 705 of these ratings were "summary" ratings and are included in the primary estimate.
- 796 of the ratings were for "consults" where the comparison between the two schedules should be considered more carefully.

Average ratings

- The average rating on Summary ratings was 11.14% compared to an average of 18.30% for a comparable group of claims under the pre-2005 PDRS. This represents a decline of 39% in the average rating
- The average rating for Consults was 17.45% compared to an average of 28.15 for a comparable group of cases rated under the pre-2005 PDRS.

Average Ratings			
	2005 PDRS	**Pre-2005 PDRS**	**Difference**
Summary	**11.14%**	**18.30%**	**-39%**
Consults	**17.45%**	**28.15%**	**-38%**

Apportionment

The extent of apportionment was evaluated for Summary rated claims. (Summary ratings are submitted to a judge to determine whether apportionment is appropriate. Consults are not submitted to a judge and apportionment is generally not considered by the DEU).

- 75 of the 705 summary rated cases (10.6%) included apportionment.
- The average percent of the rating apportioned to other cases or causes was 41%, that is, on average, 59% was awarded in the current case when any apportionment was applied.
- The impact was to reduce the average rating on all cases by 4.7%, from 11.14 to 10.62.
- Since prior to SB-899 there was very rarely apportionment applied in the DEU, nearly all of this change is attributable to apportionment to causation.

Apportionment—Summary Ratings		
		% of all
Number of ratings	**705**	
Number with apportionment	**75**	**10.6%**

On cases with apportionment, an average of 41% was apportioned to non-industrial cause (The DEU has not yet seen a case where a party claimed apportionment to a prior disability under the pre-2005 PDRS.) Overall, apportionment has reduced the average award on all summary ratings by 4.7%

Apportionment—Summary Ratings	
Average % apportioned to non-industrial	**41%**
Average Rating Before Apportionment (all cases)	**11.14%**
Average Rating after Apportionment (all cases)	**10.62%**
Percent impact on rating	**-4.7%**

Average ratings by impairment type:

Summary Ratings		Average Rating		
	N	2005 PDRS	Pre-2005 PDRS	Difference
Wrist/Hand	88	5.91	10.29	-42.5%
Arm/Elbow/ Shoulder	148	8.69	15.85	-45.2%
Lower Extremity	164	9.12	15.77	-42.2%
Spine	271	14.01	23.51	-40.4%
Psych	12	25.50	17.78	+43.4%
Other	22	15.42	16.22	- 4.9%

Consult Ratings		Average Rating		
	N	2005 PDRS	Pre-2005 PDRS	Difference
Wrist/Hand	36	7.06	18.13	- 61.1%
Arm/Elbow/ Shoulder	159	13.16	25.85	- 49.1%
Lower Extremity	110	10.74	23.34	- 54.0%
Spine	382	18.85	32.18	- 41.4%
Psych	45	30.76	27.99	+ 9.9%
Other	61	26.30	24.13	+ 9.0%

It is important to treat these findings as preliminary. While the estimates have remained reasonably stable over the past 3 months, the number of cases rated under the 2005 PDRS is still small, 1501 of the more than 70,000 DEU ratings done in 2005. Second, we are working with the DEU to compare all case they have identified manually as rated under the new schedule to the set of cases I identify through computer programming. This process should be completed next week. This is a new rating process and the initial ratings may be less indicative of claims than a similar sample drawn from a prior period when the rating schedule was well understood by all parties.

Data:

These data were extracted from the Disability Evaluation Unit database by the Division of Workers' Compensation. We obtained all ratings with in the database, from 1987 to the present, about 1.5 million records. However, for this analysis we restricted the ratings to those performed from 1/1/04 to 6/15/05. The most important reason for this restriction is that the coding of the rating type was changed at the beginning of 2004. Rating type refers to whether it is a formal rating (requested by a WCJ), a report by a QME, a report by a treating physician, a report mailed in, or a rating done on a walk-in basis, usually for an attorney. The type of rating was a key criterion for establishing a comparison group of ratings done under the pre-2005 schedule.

Comparison cases:

In discussion with the WCIRB and DEU, we developed four key criteria to establish comparability across the two rating schedules.

1. **Rating type**: Average ratings vary considerably by rating type, and at this early stage, the distribution of rating types for the 2005 PDRS varied from the distribution seen for all ratings done during the period. Rating types include:
    a. Formal = At request of WCJ
    b. QME reports
    c. Treating physician reports
    d. "Walk-ins" = usually reports handled on for attorneys walking in.
    e. M = Mail-in, similar to walk-in.
2. **Disability category:** Ratings vary greatly depending upon the underlying disability. At this initial stage, the distribution of disabilities is different from the long-term distribution, most important, there is a higher concentration of spinal impairments in the new PDRS ratings. There are a large number of disability categories which makes it necessary to collapse disabilities to a limited number of categories. We did this along the lines of major categories with two special cases.
    a. Group 1: wrist, hands, and fingers
    b. Group 2: all other upper extremity
    c. Group 3: lower extremity
    d. Group 4: spine
    e. Group 6: psychiatric
    f. Group 9: all other

Psychiatric cases were few, but they represent a major change between schedules. (Vision impairments might, category 5, were examined in the previous work, however they were very infrequent and in the future will be collapsed into the "all other" group.

3. **Date from injury to rating**: Previous work has shown that as the time between injury and rating increases, the average rating increases. Consequently, we broke the time from injury to rating into 100 day increments and matched on this criterion.
4. **Multiple disabilities**: This was the most difficult criterion to design. Not surprisingly, multiple disability cases receive much higher ratings on average than single disability cases. But, the listing of multiple impairments will be more frequent under the 2005 schedule because of the design of the AMA process. Consider spinal impairments. The pre-2005 schedule had only one category. The AMA process allows one to assign at least 3 different impairments (lumbar, thoracic, and cervical) to a spine disability. I decided that we would define multiple impairments as those where the impairments involved two or more of the 7 groups listed above. That is, if two impairments were listed for the lower extremity, they were treated as a single impairment case. An impairment to the lower extremity and upper extremity would be treated as a multiple case. Also, because the number of combinations created the potential for very small cell sizes or a failure to match, I defined multiple impairment on just as a dichotomous choice. This means that the primary impairment was taken as the impairment category for matching and then the additional requirement of multiple or single impairment was required. That is, a primary back impairment with a lower extremity impairment and a primary back impairment with an upper extremity impairment were both treated as a multiple back impairment.

After creating these specific cells, we failed to match the new PD rating to a comparison group in only one case. In a small number of cases (16), the comparison group had fewer than 30 pre-2005 ratings.

Apportionment: Apportionment to causation was introduced as part of the SB-899 reform package. Apportionment is identified by inclusion of the percentage apportioned to the current case (when less than 100%). This indication appeared in 10.6% of cases. We are not positive at this stage whether all DEU raters adhere to this format. We have had discussions with the DEU about being sure that this format is standardized for future ratings. At this stage, the 10.6% figure can be thought of as a lower bound estimate.

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Memorandum

Date: **December 8, 2005**
To: **Christine Baker, Executive Officer, CHSWC**

CC: **Carrie Nevans, AD/DWC, Blair Megowan, Manager/DEU,**

From: **Frank Neuhauser, Survey Research Center/UC Berkeley**
Re: **Analysis of ratings under the new PD schedule, through Oct. 17, 2005**

I have finished analyses of ratings done through October 17, 2005 under the new Permanent Disability Rating Schedule (2005 PDRS). In this memorandum, I compare the average ratings under the 2005 PDRS to comparable groups of ratings under the pre-2005 PDRS. The comparison groups used are similar to those used in the previous memo of October 5, 2005.

The primary comparison is for "summary" ratings for unrepresented workers under each schedule. We include under the heading of "summary" ratings:

- Formal ratings: ratings requested by a Workers' Compensation Judge
- Treating physician reports for unrepresented workers
- Panel QME reports for unrepresented workers

The pool of claims included for this comparison groups should be quite similar for ratings done by the DEU under the old and new schedules.

The secondary comparison is for "consultative" ratings for represented workers under each schedule. We include under this heading of "consultative" ratings:

- Walk-in consultative ratings for represented workers
- Mail-in consultative ratings for represented workers
- A very small number of consultative ratings done for unrepresented workers that "walk-in" to the DEU.

This secondary comparison group may have changed substantially in the composition of the claims because of statutory changes introduced by recent reforms. Under SB-899, if the parties in represented cases cannot agree on an agreed medical evaluator (AME) they are required to request a QME panel from the DWC. These reports supposed to be submitted to the DEU for rating. This may substantially increase the portion of ratings on represented cases that are performed by the DEU, and consequently, affect the statistics calculated for these cases. However, since the statute only affects claims with dates of injury after 1/1/05 and nearly all of

the claims rated so far under the new schedule have injury dates before 2005, I expect that the comparisons are probably valid, at least at this early stage.

Current samples:

- Through October 17, 2005 there were 3,407 reports rated under the 2005 PDRS where the data could be analyzed. (a very small number of cases apparently rated under the new schedule had missing data, such as incomplete impairment category numbers.)
- 1,587 of these ratings were "summary" ratings and are included in the primary estimate.
- 1,799 of the ratings were for "consults" where the comparison between the two schedules should be considered more carefully.
- A small number of claims were missing key data or failed to match to a similar comparison group.

Average ratings

- The average rating on Summary ratings was 11.28% compared to an average of 18.78% for a comparable group of claims under the pre-2005 PDRS. This represents a decline of 39.9% in the average rating
- The average rating for Consults was 17.62% compared to an average of 29.41% for a comparable group of cases rated under the pre-2005 PDRS, a decline of 40.1%

Average compensation

- The indemnity award for summary rated claims under the new schedule was $9,853 compared to an average of $20,338 for a comparable group of claims under the pre-2005 PDRS. This represents a decline of 51.6% in the average award
- The average award for Consults was $18,002 compared to an average of $36,092 for a comparable group of cases rated under the pre-2005 PDRS, a decline of 50.1%

Un-Apportioned Awards				
		2005 PDRS	Pre-2005 PDRS	Difference
Summary				
	Ratings	11.28%	18.78%	- 39.9%
	Dollars	$ 9,853	$20,338	- 51.6%
Consults				
	Ratings	17.62%	29.41%	- 40.1%
	Dollars	$18,002	$36,092	- 50.1%

Apportionment

The extent of apportionment was evaluated for Summary rated claims. (Summary ratings are submitted to a judge to determine whether apportionment is appropriate. Consults are not submitted to a judge and apportionment is generally not considered by the DEU).

- 174 of the 1,587 summary rated cases (11.0%) included apportionment.
- The average percent of the rating apportioned to other cases or causes was 42.3%, that is, on average, 57.7% was awarded in the current case when any apportionment was applied.
- Since prior to SB-899 there was very rarely apportionment applied in the DEU, nearly all of this change is attributable to apportionment to causation.

Apportionment—Summary Ratings		
		% of all
Number of ratings	**1587**	
Number with apportionment	**174**	**11.0%**

Apportionment—Summary Ratings	
Average % apportioned to non-industrial	**42.3%**

Average Rating by Impairment Type:

Summary Ratings		Average Rating			
	N	2005 PDRS	Pre-2005 PDRS	Difference	Std. Er.
Wrist/Hand	190	6.0%	10.5%	-42.9%	0.49
Arm/Elbow/ Shoulder	345	8.8%	14.8%	-40.5%	0.41
Lower Extremity	348	8.2%	16.4%	-50.0%	0.48
Spine	575	14.0%	23.6%	-40.7%	0.38
Psych	27	30.0%	22.6%	+32.7%	4.00
Other	33	17.2%	21.6%	- 20.4%	3.20

Consult Ratings		Average Rating			
	N	2005 PDRS	Pre-2005 PDRS	Difference	Std. Er.
Wrist/Hand	68	7.3%	16.7%	- 56.3%	0.73
Arm/Elbow/ Shoulder	282	12.8%	25.4%	- 49.6%	0.65
Lower Extremity	167	10.9%	26.8%	- 59.3%	0.75
Spine	607	18.5%	33.2%	- 44.3%	0.46
Psych	66	33.6%	32.1%	+ 4.7%	2.10
Other	86	27.8%	29.4%	- 5.4%	2.50

It is important to treat these findings as preliminary. While the estimates have remained reasonably stable over the past 8 months, the number of cases rated under the 2005 PDRS is still small, 3,407 of the more than 100,000 DEU ratings done in 2005. Second, this is a new rating process and the initial ratings may be less indicative of claims than a similar sample drawn from a prior period when the rating schedule was well understood by all parties.

Data:
These data were extracted from the Disability Evaluation Unit database by the Division of Workers' Compensation. We obtained all ratings with in the database, from 1987 to the present, about 1.5 million records. However, for this analysis we restricted the ratings to those performed from 1/1/04 to 9/17/05. The most important reason for this restriction is that the coding of the rating type was changed at the beginning of 2004. Rating type refers to whether it is a formal rating (requested by a WCJ), a report by a QME, a report by a treating physician, a report mailed in, or a rating done on a walk-in basis, usually for an attorney. The type of rating was a key criterion for establishing a comparison group of ratings done under the pre-2005 schedule.

Comparison cases:
In discussion with the WCIRB and DEU, we developed four key criteria to establish comparability across the two rating schedules.

5. **Rating type**: Average ratings vary considerably by rating type, and at this early stage, the distribution of rating types for the 2005 PDRS varied from the distribution seen for all ratings done during the period. Rating types include:
    a. Formal = At request of WCJ
    b. QME reports
    c. Treating physician reports
    d. "Walk-ins" = usually reports handled on for attorneys walking in.
    e. M = Mail-in, similar to walk-in.
6. **Disability category:** Ratings vary greatly depending upon the underlying disability. At this initial stage, the distribution of disabilities is different from the long-term distribution, most important, there is a higher concentration of spinal impairments in the new PDRS ratings. There are a large number of disability categories which makes it necessary to collapse disabilities to a limited number of categories. We did this along the lines of major categories with two special cases.

Group 1: wrist, hands, and fingers

a. Group 2: all other upper extremity
b. Group 3: lower extremity
c. Group 4: spine
d. Group 6: psychiatric
e. Group 9: all other

Psychiatric cases were few, but they represent a major change between schedules. (Vision impairments might, category 5, were examined in the previous work, however they were very infrequent and in the future will be collapsed into the "all other" group.

7. **Date from injury to rating**: Previous work has shown that as the time between injury and rating increases, the average rating increases. Consequently, we broke the time from injury to rating into 100 day increments and matched on this criterion.
8. **Multiple disabilities**: This was the most difficult criterion to design. Not surprisingly, multiple disability cases receive much higher ratings on average than single disability cases. But, the listing of multiple impairments will be more frequent under the 2005 schedule because of the design of the AMA process. Consider spinal impairments. The pre-2005 schedule had only one category. The AMA process allows one to assign at least 3 different impairments (lumbar, thoracic, and cervical) to a spine disability. I decided that we would define multiple impairments as those where the impairments involved two or more of the 7 groups listed above. That is, if two impairments were listed for the lower extremity, they were treated as a single impairment case. An impairment to the lower extremity and upper extremity would be treated as a multiple case. Also, because the number of combinations created the potential for very small cell sizes or a failure to match, I defined multiple impairment on just as a dichotomous choice. This means that the primary impairment was taken as the impairment category for matching and then the additional requirement of multiple or single impairment was required. That is, a primary back impairment with a lower extremity impairment and a primary back impairment with an upper extremity impairment were both treated as a multiple back impairment.

After creating these specific cells, we failed to match the new PD rating to a comparison group in only one case. In a small number of cases (16), the comparison group had fewer than 30 pre-2005 ratings.

Apportionment: Apportionment to causation was introduced as part of the SB-899 reform package. Apportionment is identified by inclusion of the percentage apportioned to the current case (when less than 100%). This indication appeared in 11.0% of cases. We are not positive at this stage whether all DEU raters adhere to this format. We have had discussions with the DEU about being sure that this format is standardized for future ratings. At this stage, the 11.0% figure can be thought of as a lower bound estimate.

[

ATTACHMENT F

TECHNICAL CALCULATIONS

Adjusting for the Maturity of the Observed Cases

A difference in the average age of the cases (time from date of injury to date of rating) can affect the observed average rating. Experience teaches us that the longer the time from date of injury to date of rating, the higher the rating is likely to be. The average rating of cases in the RAND study that were rated more than two years after date of injury was about 1.25 times the average rating of cases rated less than two years after the date of injury. Under SB 899, a significant number of pre-2005 injury cases are subject to disability rating under the 2005 PDRS, so the available data are not confined to the younger cases but the older cases are still underrepresented. To compensate for the fact that the younger cases (rated closer to the date of injury) showing up in DEU ratings are likely less severe injuries compared to the cases in the wage-loss study, we can refine our method by adjusting the value used for the average whole person impairment. In place of average WPI, we would use an Age-Corrected WPI.

$$\text{Avg observed WPI} \quad * \frac{\text{Avg std in all cases}}{\text{Avg std in age-matched cases}} = \text{Age-corrected WPI}$$

where:

> "Avg observed WPI" is the average Whole Person Impairment for the given type of injury in the cases observed under the 2005PDRS,
>
> "Avg std in all cases" is the average standard disability rating in all the cases in the database of cases rated under the pre-2005 PDRS,
>
> "Avg std in age-matched cases" is the average standard disability rating in a set of cases rated under the pre-2005 PDRS that is weighted to the same age distribution as the set of cases observed under the 2005 PDRS, using ages grouped in increments of 100 days.

This age-correction calculation will not be necessary after the 2006 revision of the PDRS if the fully-matured cases are normally represented by the time data is collected for later revisions.

ATTACHMENT G

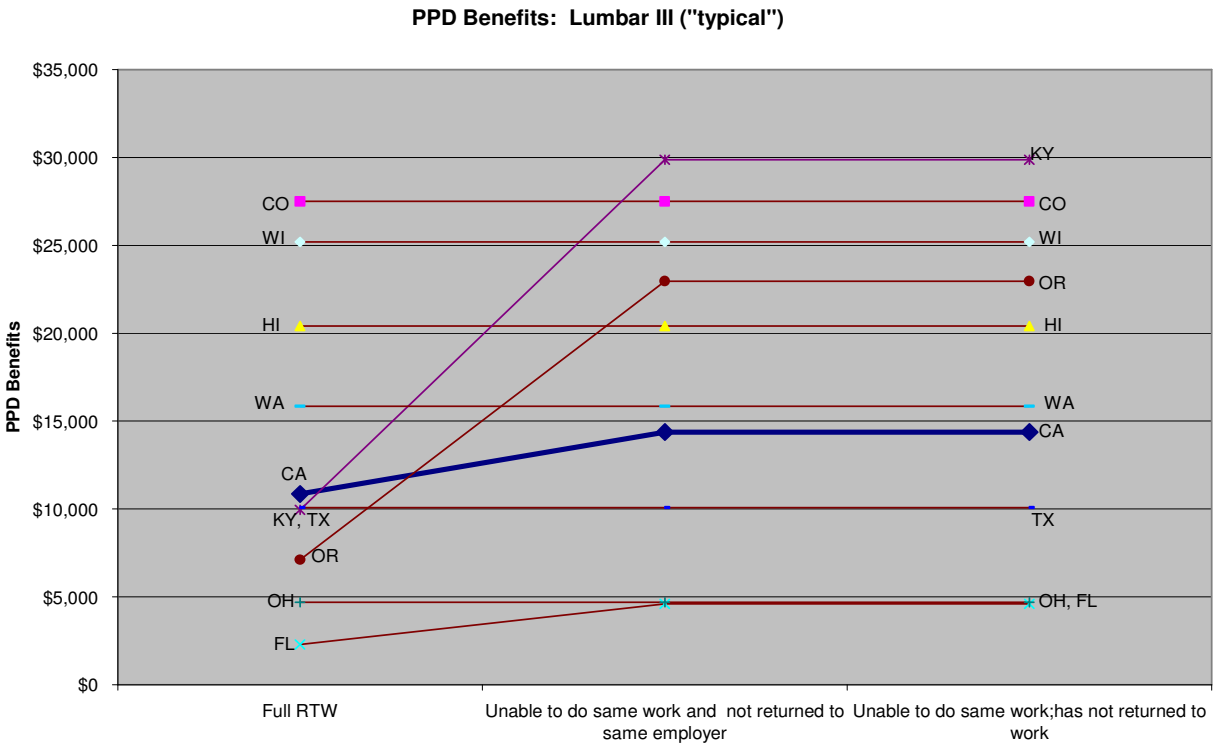
Multi-State Survey of Awards for Two Example Cases

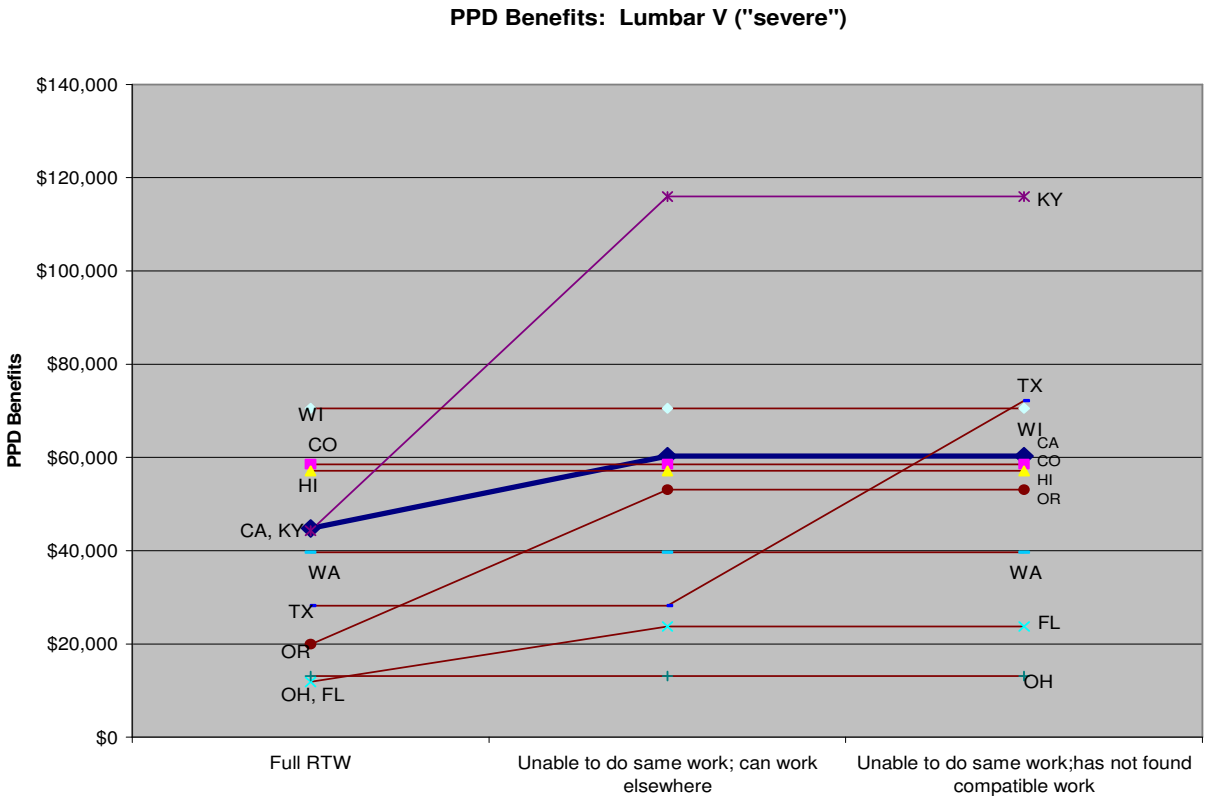
In order to estimate how California now compares to other jurisdictions in providing permanent disability benefits to injured workers, CHSWC staff conducted a survey of nine states, Colorado, Florida, Hawaii, Kentucky, Ohio, Oregon, Texas, Washington, and Wisconsin. These states were chosen in order to compare California to a sample of states that use various editions of the AMA *Guides* such as Kentucky, Ohio, and Hawaii (5th edition), Texas (4th edition) and Colorado (3rd edition revised), as well as to states that use their own guides for rating permanent disabilities such as Florida, Wisconsin, Washington, and Oregon. In addition, CHSWC wanted to have some geographic representation in the survey.

Each respondent was asked to calculate permanent disability benefits based on two hypothetical examples provided by CHSWC to illustrate a "typical" spinal impairment and a "severe" spinal impairment under varying return-to-work scenarios. (See the final page of this attachment for the hypothetical case descriptions.) Spinal injuries were chosen because these are the most common type of permanent disability award. The hypothetical impairment ratings were Lumbar Category III with few complications and Lumbar Category V with maximal complications. These were selected to represent a fairly typical spinal impairment and the most severe spinal impairment ratable by the Diagnosis-Related Estimate (DRE) method of the AMA *Guides* 5th edition. Respondents from states that do not use the 5th edition were asked to make their best guess as to how the cases would be rated in their states.

To capture different states' handling of RTW adjustments, four scenarios were presented ranging from full RTW at the same job with the same employer and same or similar pay to inability to find any work within residual capacities. Florida, Kentucky, and Oregon differentiate according to RTW status in both examples, while Texas differentiates only for the more severe of the two examples.

This limited survey is intended only to convey a general illustration of how California compares with other states. The ranking could be different with different types of injuries, different age or different earnings assumptions, or different methods of comparison. A comprehensive comparison is beyond the scope of this survey. While these estimates offer a partial answer to the question of how California compares with other states, they do not take all possible variables into account and they do not take into account the differences in cost of living among the states.


PPD Benefits: Lumbar III ("typical")
PPD Benefits
$35,000
$30,000
$25,000
$20,000
$15,000
$10,000
$5,000
$0
CO
WI
HI
WA
CA
KY, TX
OR
OH
FL
KY
CO
WI
OR
HI
WA
CA
TX
OH, FL
Full RTW
Unable to do same work and not returned to same employer
Unable to do same work;has not returned to work


PPD Benefits: Lumbar V ("severe")
PPD Benefits
$140,000
$120,000
$100,000
$80,000
$60,000
$40,000
$20,000
$0
WI
CO
HI
CA, KY
WA
TX
OR
OH, FL
KY
TX
WI
CA
CO
HI
OR
WA
FL
OH
Full RTW
Unable to do same work; can work elsewhere
Unable to do same work;has not found compatible work

QUESTIONAIRE FOR CHSWC MULTI-STATE SURVEY OF P.D. VALUES

Please estimate the permanent disability benefits payable for two hypothetical injuries, using varying assumptions about return to work, for an injury occurring in January 2006.

Assume wages of $480 per week at time of injury.

Two levels of severity should be evaluated, one typical and one severe:

- Typical: 10% whole person impairment for DRE Lumbar Category III, per AMA 5th edition:
  - radicular pain and numbness in a dermatomal distribution, loss of reflexes and loss of muscle mass below the knee compared to contralateral side, abnormal EMG, radiographic evidence of unilateral L4-5 nerve root impingement.
  - symptoms minimally impact activities of daily living (ADL) and light activities, but standing and walking for more than one hour is precluded by increasing fatigue, pain and fasciculations, requiring an hour of non-weightbearing before returning to walking or standing.
  - Assume any other rating criteria applicable in an individual state that appear to be consistent with the minimal impact on ADL but the preclusion of prolonged weightbearing.
- Severe: 28% whole person impairment for DRE Lumbar Category V, per AMA 5th edition.
  - persistent radiculopathy after single surgical fusion of L4-L5, objective findings as in DRE Category III example above.
  - major interference with ADL: unable to find a position of comfort to perform sustained activity whether seated or standing; sleep is interrupted.
  - Assume any other rating criteria or add-on ratings applicable in an individual state that appear to be consistent with maximal impact of the impairment on the patient's ADL and on activities of work, but do not add multiple impairments involving other chapters besides the spine.

Return to work status may be divided in several ways if it is considered at all. Any state probably uses fewer than four groupings, so please pick the one(s) that come(s) closest and make a note of any further assumptions required to fit your state's criteria.

- RTW, same work, same employer, same or similar pay
- Medically able to RTW same work, but not rehired by employer at similar pay
- Unable to do same work and not rehired by employer at similar pay.
- Unable to do same work, has not found work within residual capabilities.

For states that consider occupation, use janitor.

For states that consider age, use 42.

For states that consider education, use High School graduate.

ATTACHMENT H

Illustrations of Adjustment Factors with Public Policy Options

In this section, empirical data is used to calculate adjustment factors using the methods recommended in the paper. The illustrations are completed for the most common types of injuries, those for which sufficient data was available at press time. It is expected that additional data will rapidly accumulate to permit calculation of adjustment factors for more types of injuries so that over 95% of all cases would be covered by injury-specific adjustment factors. The remaining types would use an overall average factor.

While the paper does not recommend a particular choice for the overall level of average ratings, the three options mentioned in the paper are illustrated, and others are possible.

Type of Injury (Impairment # in 2005 PDRS)	Average Earnings Loss %	Average WPI %	Unmodified Adjustment Factor	Public Policy Option (three options shown)	Final Adjustment Factor
Spine (15.xx.xx.xx)	18.45	9.27	1.99	1.09	2.17
				1.00	1.99
				0.55	1.09
Shoulder (16.02.xx.xx)	13.08	4.87	2.69	1.09	2.93
				1.00	2.69
				0.55	1.48
Elbow (16.03.xx.xx)	6.23			1.09	
				1.00	
				0.55	
Wrist (16.04.xx.xx)	10.84	4.19	2.59	1.09	2.82
				1.00	2.59
				0.55	1.42
Hand/Fingers (16.05.xx.xx – 16.06.xx.xx)	4.89	3.11	1.57	1.09	1.71
				1.00	1.57
				0.55	0.86
Arm – grip/pinch strength (16.01.04.00)	8.73	7.54	1.15	1.09	
				1.00	
				0.55	
Arm – other (16.01.01.01 – 16.01.03.00 and 16.01.05.00)	17.98			1.09	
				1.00	
				0.55	
Hip (17.03.xx.xx)	21.10			1.09	
				1.00	
				0.55	
Knee (17.05.xx.xx)	9.31	4.31	2.16	1.09	2.35
				1.00	2.16
				0.55	1.19
Ankle and Foot (17.07.xx.xx – 17.08.xx.xx)	9.28			1.09	
				1.00	
				0.55	
Toes (17.09.xx.xx)	9.09			1.09	
				1.00	
				0.55	

Commission on Health and Safety and Workers' Compensation
PERMANENT DISABILITY RATING SCHEDULE ANALYSIS

Type of Injury (Impairment # in 2005 PDRS)	Average Earnings Loss %	Average WPI %	Unmodified Adjustment Factor	Public Policy Option (three options shown)	Final Adjustment Factor
Gen. lower ext. (17.01.xx.xx – 17.02..01.00 and 17.04.10.00 and 17.06.10.00)					
Hearing (11.01.xx.xx)					
Gen. abdominal (06.xx.xx.xx)					
Heart (03.xx.xx.xx – 04.03.02.00)					
Vision (12.xx.xx.xx)					
Lung (04.04.00.00 – 05.xx.xx.xx)					
PT Head (13.01.00.00 and 13.03.00.00)					
Other					
Psyche (14.01.xx.xx)	49.01	22.6	1.45 (see text for derivation of psyche FEC)	1.09 1.00 0.55	1.45

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ADDENDUM: COMMENTS, REVIEWS, UPDATED DATA

This addendum to the CHSWC paper, Permanent Disability Rating Schedule Analysis, contains the following materials added to the document approved by the CHSWC commissioners at the February 9, 2006 meeting:

Part 1 All public comments received through February 16, 2006, together with a CHSWC staff digest and response to the comments.

Digest by CHSWC staff.

Comments from:

American Insurance Association (AIA)	February 15, 2006
American International Companies (AIG)	February 8, 2006
Association of California Insurance Companies (ACIC)	February 16, 2006
Boeing Company (Boeing)	February 8, 2006
Butts & Johnson	February 15, 2006
California Applicants' Attorneys Association (CAAA)	February 7, 2006
California Restaurant Association	February 13, 2006
California Chamber of Commerce (Chamber)	February 8, 2006
California Coalition on Workers' Comp. (CCWC)	February 8, 2006
California Manufacturers and Technology Assn (CMTA)	February 8, 2006
Kammerer & Company (Kammerer)	February 14, 2006
Octagon Risk Services (Octagon)	February 15, 2006
Voters Injured At Work (VIAW)	February 8, 2006

Part 2 Independent peer reviews of the document in its December 16, 2005 draft form, requested by CHSWC prior to final editing and publication.

Jeff Biddle, Professor of Economics, Michigan State University
Leslie Boden, Professor of Public Health, Boston University
John Burton, Professor Emeritus, Rutgers University School of Public Health

Part 3 Updated analysis of rating data through January 30, 2006 which was released to CHSWC on February 3, 2006.

Frank Neuhauser memorandum	February 8, 2006
Frank Neuhauser memorandum	February 20, 2006

Part 4 Updated version of Attachment H, showing potential FEC modifiers using three of the potential options for overall public policy, expanded to include more types of injury based on the larger data set of ratings released February 3, 2006.

ADDENDUM PART 1.

Digest of Public Comments with Responses Prepared by CHSWC Staff

The CHSWC Permanent Disability paper was released for public comment on February 1, 2006. On February 9, 2006, CHSWC voted to adopt the report but to accept public comments for one additional week, after which the staff was to prepare an addendum including all comments received plus a digest and response to the comments.

All comments that were received from February 1 through February 16, 2006 are attached. The following digest identifies the general themes of the comments. The reader should review the attached letters and messages for the complete text of the comments. The general themes of the comments are:

1. Questioning reliance on summary ratings, excluding consultative ratings.
2. Questioning the comparison group of cases.
3. Questioning whether the sample is statistically valid.
4. Concerns about changes in ratings and in wage losses.
5. Overall public policy issues.
6. Conclusive evidence.
7. Psychiatric disabilities.
8. Timing to implement recommendations.
9. Comparison to pre-2005 rating schedule.
10. Undoing the reforms.
11. Support for CHSWC proposal.

1. Questioning Reliance on Summary Ratings, excluding Consultative Ratings

Several comments object to the use of summary ratings as the basis for evaluating the average medical impairment rating under the AMA Guides. The objections point out that summary-rated cases are probably less serious cases than consultative-rated cases because summary ratings are issued in cases without representation by attorneys. Some assert that summary-rated cases are a small and non-representative share of all cases. The objections contend that consultative ratings should be included.

CHSWC staff response:

- Only summary ratings can be compared to wage losses because only summary ratings were used for the RAND findings on proportional wage losses for each type of injury. SB 899 requires using the RAND study findings. It would be an apples-to-oranges comparison if ratings in represented cases were compared to the wage loss data in non-represented cases.

- Although only summary ratings are used in the recommended method for revising the schedule, both summary and consultative ratings are used in the analysis of the impact of the existing schedule. The sample through January 1, 2006 includes 3342 summary ratings and 3761 consultative ratings. Both types show approximately a 43% drop in average ratings and a 54% drop in overall dollar values of the non-zero cases.

2. Questioning the Comparison Group of Cases

Several comments questioned whether the rated cases are comparable to the baseline cases in terms of severity, maturity (elapsed time from date of injury to date of rating), age and occupation.

CHSWC staff response:

- Matching severity is not possible on a case-by-case basis because there is no satisfactory way to compare individual cases.[1] Instead, the CHSWC analysis and recommendation are based on matching the averages for whole populations.

- For the purpose of analyzing the impact of the 2005 schedule, a baseline of ratings from 2000 to 2004 is used in the 2/8/06 memorandum in this Addendum (expanded from the 2004 baseline used in the 8/26/05 and 12/8/05 memoranda in Attachment E).

- For the purpose of revising the schedule, the earnings loss data is from injuries studied by RAND that occurred prior to 4/1/97 (Reville, et al., 2005, pages 44-45). Long term changes in the economic consequences of injuries, including those driven by the new return-to-work incentives, will be captured by future research. Until then, the RAND report is the only existing basis for evaluating long term earnings losses, and the use of that report is required by SB 899.

- The maturity of the observed cases differs somewhat from the historical distribution of maturities, but that difference can be corrected by appropriately weighting the samples.[2]

- The age and occupation distributions of the rated cases are similar to the baseline.[3] The differences will not affect the recommended revision of the FEC factors because adjusted ratings are not used in the recommended method for developing new FEC factors. The difference may slightly affect the analysis of the impact of the 2005 schedule, possibly underestimating the size of benefit reductions produced by the 2005 schedule.

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[1] See dual-rating studies described in Attachment C.
[2] See Neuhauser memo 2/20/06 in Part 3 of this Addendum.
[3] See Neuhauser memo 2/20/06 in Part 3 of this Addendum.

3. Questioning Whether the Sample is Statistically Valid

Some comments contend that there is not yet statistically valid rating data accumulated under the 2005 schedule.

CHSWC staff response:

- As the number of observations has grown from 1501 cases to 3407 cases and to 7134 cases,[4] the averages have changed very little. The average AMA impairment for over 95% of all injuries is now known within a standard error of less than half a point.[5]

- More valid data exist now than when the 2005 schedule was adopted. Empirical data on the distribution of AMA-rated impairments among types of injuries did not exist then.

4. Concerns about Changes in Ratings and in Wage Losses

Several comments point out that both rating behavior and average wage losses are likely to change over time for a variety of reasons.

CHSWC staff response:

- Change is expected, especially in the first several years after major reforms. That is why the recommendation calls for fine-tuning the FEC factors using the latest available data every two years. (The paper has been corrected to recommend updates "biennially.")

5. Overall Public Policy Issues

Some comments focused on the public policy question of overall level of ratings. Employers often contend that the current level is appropriate, while workers and their attorneys contend that overall levels should be restored to levels at least equal to the pre-2005 schedule. Some comments urge fundamental changes in the approach to compensation, particularly emphasizing individual wage losses. One comment took issue with the proposition that PD benefits are inadequate, a proposition which the commentator attributed to CHSWC. One comment objected to inclusion of the survey of other states' compensation for hypothetical cases.

CHSWC staff response:

- The CHSWC paper does not make a recommendation as to overall levels of ratings. The paper defers to policymakers to decide the appropriate balance between adequacy and affordability and it mentions some of the considerations

[4] Attachment E-1 and E-7 to the CHSWC paper and Neuhauser 2/8/06 in Part 3 of this Addendum.
[5] See page 13 of the CHSWC paper and page 2 of Neuhauser memo 2/20/06 in this Addendum.

that may bear on that decision. The recommended method for developing new FEC factors includes a place to insert the result of that public policy decision to achieve the desired balance between competing priorities.

- The paper maintains the basic structure of the 2005 schedule in which the adjustment factor for a particular type of injury is applied to all injuries of that type. Labor Code Section 4660 requires that diminished future earning capacity be empirically determined in the aggregate for workers similarly situated, not on an individual basis. Existing data are grouped by type of injury. There are currently no empirical data to support further differentiation according to the severity of a particular impairment or an individual's work status beyond the existing benefit adjustment for return-to-work offers.

- It has been noted that nothing in the CHSWC paper would prevent another administration from setting a different overall public policy goal. The paper contemplates revisions based only on updated data. The potential for arbitrary administrative changes affecting the overall level of ratings warrants further discussion.

6. Conclusive Evidence

Several comments object to the proposal to make the schedule conclusive.

CHSWC staff response:

If and when there is consensus that the schedule achieves the state's goals, conclusive application would reduce litigation, and more of the money paid by employers would reach workers in the form of benefits rather than being consumed by frictional costs.

7. Psychiatric Disabilities

One comment contends that the recommended method for rating psychiatric injuries is arbitrarily based on a single data point.

CHSWC staff response:

- The report explains the reason for limiting the FEC for psychiatric cases to no more than 1.45.

- The paper fails to mention that 1.45 is an upper limit. If the FEC turns out lower than 1.45 when it is calculated according to the same method that applies to other types of injury, then the lower figure would be appropriate for psychiatric injuries.

8. Timing to Implement Recommendations

Several comments questioned the recommended timing of a revision to become effective July 1, 2006.

CHSWC staff response:

> The timeline for administrative rulemaking or legislative changes will have to be reexamined to determine whether the July 1, 2006, target is still feasible.

9. Comparison to pre-2005 Rating Schedule

Some comments object to any comparisons to the pre-2005 schedule because that schedule was regarded as excessively subjective.

CHSWC staff response:

- Comparison to the old schedule is not part of the recommended method for revising the new schedule. The recommended revision would be based only on proportional earnings losses, average AMA impairments, and overall public policy goals.

- Comparison to the old schedule is used solely to analyze the impact of the new schedule. The subjective ratings under the old schedule have presumably been eliminated by the AMA *Guides,* and the analysis shows the impact of the 2005 schedule on the cases that remain.

10. Undoing the Reforms

Some comments express concern that the CHSWC recommendation is "the first step to along a path to undoing the reforms."

CHSWC staff response:

- The CHSWC recommendation is a tool to accurately carry out the reforms of the PD system without necessarily changing overall costs.

- According to the Bickmore report,[6] 48% of the reform savings come from medical reforms and 12% from the repeal of vocational rehabilitation and its replacement by a voucher system. The remaining 40% of reform savings is attributed to PD reforms. Of that 40%, one-third is due to AMA zeros, changes in weeks, apportionment, and return-to-work incentives. The CHSWC recommendations do not affect those savings. Another one-third of that last 40%

[6]http://www.dir.ca.gov/dwc/Study_legislativeReformsCaWCInsuranceRates/Study_legislativeReformsCaWCInsuranceRates.html

is due to reduced benefits under the 2005 PD schedule, and the CHSWC recommendation does not require that the average level of these benefits be changed, either, unless policymakers choose to do so.

11. Support for CHSWC Proposal

Some comments expressed partial or complete support for the CHSWC recommendations.

CHSWC staff response:

This paper would not have been possible without the analyses contributed by employers, labor, insurers, attorneys, rating experts, physicians and economists who helped identify many aspects of this complex issue.

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February 15, 2006

Christine Baker
Executive Officer
Commission on Health and Safety and Workers' Compensation
1515 Clay Street, Suite 901
Oakland, CA 94612

Dear Ms. Baker,

The American Insurance Association is responding to the Commission's solicitation for comments on its retitled Permanent Disability Rating Schedule Analysis. AIA's 435 member companies combined share of the workers' compensation market exceeds 17%, so we maintain an abiding concern about the health and stability of the California workers' compensation system.

The *Permanent Disability Rating Schedule Analysis*, drawing on conclusions from studies of long-term earnings losses, proportional earnings losses and a few thousand permanent disability ratings under the new PDRS, recommends fundamental and far-reaching changes in rating methodology and treatment of the ratings that result. We cannot endorse the recommendations for two overriding reasons. First, we are troubled by the limitations and assumptions of the underlying studies and data. Second, we are equally troubled – and perplexed – by the assumption that benefit adequacy can be achieved by periodically "adjusting" or "fine tuning" the permanent disability ratings themselves and thereby "backing into" a desired result while corrupting the entire FEC approach to ascertaining prospective wage loss.

With these recommendations, we believe the Commission has come to a fork in the road – and taken the wrong path, a path that unless altered will subject the permanent disability rating approach to speculation and uncertainty, and reconstituting a flawed PD system. That the Commission can recommend an approach with potentially adverse and unmeasured consequences to the PD framework, itself, illustrates the challenge insurers encounter in underwriting California workers' compensation business. We are concerned the Commission's recommendations could be the first step along a path to undoing the reforms.

Data Limitations

The analysis of ratings performed by the Survey Research Center at UC Berkeley is based on a relatively small sample of summary rating reports completed through October 2005. The update of February 8 asserts that the decline in average awards and dollars for injuries rated under the old and new PDRS has remained consistent over the last several months. But there are too many factors which could influence the findings, factors about which we know nothing from the materials in hand. For example:

- Are age and occupation evenly distributed among the claims rated under the old and new system? If not, how would uneven distribution influence the results?
- Are the types of injuries included in the sample the same for the comparison groups? In other words, were the comparison groups matched on severity as well as injured body part? If not, how may this have affected the results and conclusions?
- Do the indemnity dollars for 2005 "awards" include the ± 15% adjustment required by Labor Code §4658(d)? If not, how may these adjustments, as well as the faster re-employment the adjustment is designed to encourage, have affected the outcome and expectations for benefit adequacy and equity?

Without more information, there is no way to test the validity of the findings upon which a significant modification in the rating formula is recommended.

Ratings Under the Old vs. New PDRS

As a result of the assumed impact of the 2005 rating formula, your analysis invites policymakers to clarify whether average ratings should increase, decrease or maintain the ratio between earnings losses under the old PDRS and the new. *The question disregards the subjectivity of and consequent inflation of disability ratings that led to overwhelming support for and passage of the SB 899 reforms.*

As explained in the 2005 RAND report, "The reliance on subjective criteria to measure disability was the most controversial feature of the California system and what most distinguished it from the systems used in other states."[1] The study authors, however, acknowledge that "we cannot separately identify disability ratings that do or do not include a subjective component."[2]

Disability ratings under a system in which the skills of the evaluating physician report writer influenced the ultimate rating and which required the rater to select the higher of a combination of objective and subjective findings or the decidedly subjective work capacity guidelines and a system based entirely on objective medical findings simply cannot be compared in any meaningful way. Yes, of course, average ratings will decline if subjective factors are removed. *That was precisely the intent of the permanent disability reforms of 2004*

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[1] *An Evaluation of California's Permanent Disability Rating System*, Reville *et. al.*, Rand Institute for Civil Justice, 2005, Summary, Page XX
[2] *Ibid.*

If the rating methodology is appropriate (and we strongly endorse the use of AMA Guides), and the Future Earning Capacity (FEC) formula can be used to achieve equity across different types of injuries, the policy judgment is what level of benefits is both adequate and affordable – and that decision ultimately is for employers and employees to make. The answer does not lie in a distorting change in the formula itself, a change whose consequences have not been anticipated much less evaluated in the current analysis, and which cannot therefore, form the basis for the significant revision you recommend.

Might you not expect that increasing the FEC modifier for the purpose of benefit adequacy, while at the same time attempting to maintain equity across injury types, will inevitably lead to a considerably higher proportion of life pension cases? This is just one possible outcome. Before any recommendations for revision of the schedule are approved and implemented, it would be not merely prudent, and not merely fair to employers and employees, but incumbent upon the proponents to provide far more complete data upon which to base any new policy options.

Thank you for the opportunity to comment on the proposal. We urge the Commission to reconsider the approach it has chosen, so as to not endorse changes that would jeopardize the future reliability of the permanent disability benefit system.

Sincerely,

Steven Suchil
Assistant Vice President, Western Region

cc: Ken Gibson, AIA
Bruce Wood, AIA
Debby Nosowsky, DJN Consulting
Carrie Nevans, DWC, Acting Administrative Director

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February 8, 2006

Ms. Christina Baker, Executive Officer
COMMISSION ON HEALTH AND SAFETY
AND WORKERS' COMPENSATION
1515 Clay Street, Room 901
Oakland, CA 94612

Re: Draft Report on "Permanent Disability Schedule Recommendations"

Dear Ms. Baker and Members;

On behalf of the American International Companies (AIG), I want to express my appreciation to the Commission for the opportunity to respond to the proposed significant revisions to the permanent disability rating schedule. While the proportionate wage loss concept for objectively calculating permanent disability has been studied for many years, and likely will be for years to come, the report now under consideration by the Commission represents a significant departure from both the direction and debate on those studies. Instead, the proposed report entwines a provocative series of policy observations and recommendations within its justification of the results of empirical studies, leaving both wanting.

First, the discussion of rate adequacy is simply not appropriate for a number of reasons. Starting with AB 110 (Peace and Brulte), the California Legislature has consistently made the policy decision that those with a low degree of disability should not receive benefits that will encourage the filing of workers' compensation claims. Prior law made this point by dividing PPD into several categories, each with increasing benefits. The lowest of these categories, less than 15% PPD, received no benefit increase in AB 110.

AB 749 (Calderon), as we all know, expanded benefits considerably, increasing both the number of weeks for benefit payments as well as the maximums in terms of weekly wages for which benefits were paid. That being said, the maximum weekly wage for PPD purposes as set forth in Labor Code Section 4453(b)(6)(D) is still only $345.00, which equates to a $17,940 annual salary well below that which many Californians earn. Even the weekly wage for purposes of life pensions [Labor Code § 4453 (b)(7)] was only increased to $405. The final AB 749 PPD benefit increases were effective January 1 of this year.

The focus on AB 749 was the temporary disability (TD) benefit and benefits for individuals with ratings above 70%, including life pensions and permanent total disability. Death benefits were also increased. A recent report by the California Workers' Compensation Institute (CWCI) indicates that the benefit increase for temporary disability is having its intended effect. While the PPD benefits were increased, clearly the increase was not one that would have approximated benefit adequacy for those making at or near the statewide average weekly wage. The SAWW for 2006, is $838.42, or $43,597.84 in annual salary. That will give you a sense of how much a gap there is in terms of PPD benefits and 2/3 of SAWW as is the case for TD and other benefit calculations.

By the time SB 899 was enacted, the number of weeks of paid benefits for injuries under 10% PD was reduced to 3 weeks rather than the 4 previously enacted. For injuries with a rating of more than 10% but less than 15% the number of weeks were reduced from 5 to 4. This again shows that the focus on benefit payments was to create an incentive to return to work, especially for those with relatively minor disabilities.

These policy decisions have been made for over a decade, and by three different administrations. To now take the result of these policy decisions and state that benefits are inadequate is commentary that either seeks to rewrite history or to ignore it.

Benefit adequacy cannot be a function of the future earning capacity modifier within the PDRS. Frankly, none of the factors in the PDRS promote benefit adequacy, instead they are promoting benefit equity. These factors are intended to define what constitutes a disability, and the value attributed to these factors are designed to create a numeric representation of disability that is sensitive to the impairment, the age and occupation of the worker, and the aggregate long-term loss of income from each type of injuries for similarly situated employees. [Labor Code §§ 4660(b)(1) and (b)(2)]

It would appear instead that the proposal contemplates an "overall public policy modification" or OPPM, that is apparently intended to implement public policy decisions which, apparently, would be made by the Administrative Director on a bi-annual basis. Will the OPPM need to be adjusted to reflect California's benefit levels vis-à-vis other states? More study will be needed to make that decision, but it appears to be a consideration that is within the penumbra of the OPPM. The report already calculates the numeric equivalent of another possible component of the OPPM, that being an adjustment to make certain that ratings prior to the enactment of SB 899 should be replicated by an adjustment to the OPPM. The replication factor is 1.09 in this study. As more data become available, that number would likely need to be changed. As more data become available, it would also seem that the FEC could become more discriminating. In other words, will we at some point be able to develop separate FEC modifiers based on gender, geographic location, occupation, or other criteria that are considered relevant to a particular AD at a particular point in time?

The possibilities are virtually endless.

Rather than engage in any more speculation, let us instead look at the language in Labor Code § 4660(b)(2), the definition of diminished future earning capacity:

> "For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies."

There is nothing in this report, nor in any other previous report, that adequately discusses the relationship between loss of future earning capacity and the already existing occupational modifier. Yet, Labor Code § 4660(b)(2) states that the loss of income percentage is to be calculated for each type of injury for *similarly situated* employees. What constitutes a "similarly situated employee?"

This is more than a rhetorical question. There is no mention in any study of the relationship between occupation, loss of future earning capacity, and frequency of specific injuries by occupation. In other words, the wage loss data that has to date been referenced in the RAND and Commission reports could arguably be characterized as measuring the frequency of specific injuries by high wage classifications. Not all occupational classifications have the same distribution of injuries. Consequently, without factoring that into the future earning capacity modifier there will be an inherent bias in the number that will erode its claim of promoting equity within the ratings. Because the "similarly situated" language is separate from the occupational modifier in subdivision (a) of Section 4660, it must be afforded a separate meaning if for no other reason than the requirements of statutory interpretation. To date, it would appear not to have been afforded the independent consideration it warrants.

<u>It thus can be argued that the draft report continues to fail to meet the criteria in Labor Code § 4660(b)(2) because it fails to define or take into account what constitutes "similarly situated workers."</u>

To affect the benefit adequacy either the weekly wages upon which benefits are calculated have to be increased (Labor Code § 4453), or the number of weeks of payments have to be increased (Labor Code § 4658). If the Commission is ultimately going to be compelled by data to make this recommendation, then it should by-pass this incessant collection, manipulation, and interpretation of data and make that recommendation as soon as possible.

Second, once again the community is faced with looking at a very complicated report in very little time. The comments likely to come from others will be reflective of the ongoing concerns about the quality of data and the process by which the empirical elements of this study were developed. Unfortunately, the history of this issue does not

lend us to think that time will allow us to see more clearly, but rather only see different conclusions at the same level of obscurity.

The result from these analyses will always be a number, likely an ever changing number as more data are obtained and more specificity in the data is developed. That, in and of itself, does not create uncertainty. What does create uncertainty, however, is that significant policy decisions will be made and implemented through modifications of rating factors without an opportunity for public comment and without the appropriate level of debate from both the executive and legislative branches. This is not a plane on auto-pilot. It is a plane that takes on new cargo, adds an engine, and changes pilots at every stop. That creates uncertainty as to what the final destination will be. Consequently, the legislative changes contemplated by this report should be resisted.

Furthermore, to the extent that changing the evidentiary standard afforded the schedule is a response to threatened efforts to morph Labor Code § 4660 into something it clearly is not, the solution is to join with affected parties to overcome such litigation efforts rather than to try to preempt them legislatively. The more serious concern should be the length of time necessary to transition to the AMA Guides and what issues will arise during this process.

Thank you for this opportunity to comment.

Sincerely,

Mark E. Webb
Assistant General Counsel

Association of California Insurance Companies

An affiliate of the Property Casualty Insurers Association of America

The leading voice of California insurers since 1954.

February 16, 2006

Ms. Christine Baker
Executive Director
The California Commission on Health and Safety and Workers' Compensation
1515 Clay Street, Room 901
Oakland, CA 94612

RE: Report on the Permanent Disability Rating Schedule

Dear Ms. Baker,

The Association of California Insurance Companies (ACIC) is an association comprised of more than 300 property/casualty insurance companies that are doing business in California. ACIC members are responsible for approximately 43 percent of the private workers' compensation insurance market in California. ACIC is an affiliate of the Property Casualty Insurers Association of America.

ACIC believes that the permanent disability rating schedule and other components of the workers compensation system should be studied and legislators should be guided by well-grounded research and analysis when they review the operation of the system. The Commission's report falls short of the type of study that should guide important public policy decisions. Specifically, the data and methodology used in the report are inherently flawed. In addition, the Commission failed to provide adequate time to deliberate on the report. Finally, ACIC is concerned that the recommendations in the report would disrupt the stability of the workers compensation system.

The report is based on unreliable data.

The report acknowledges on page 11 that its analysis was limited to summary ratings. This limitation undermines the report's validity. Summary ratings involve less complex and less serious injuries that are not representative of the overall workers compensation system. Page 12 of the report notes that consultative rating cases, which generally involve more complex and more serious injuries, outnumber summary rating cases in the workers compensation system. Conclusions based on cases that are not representative of the overall composition of workers compenation cases are necessarily suspect.

In addition to limiting itself to summary ratings under the new permanent disability rating schedule, the report restricted its comparison to disability ratings under the old schedule that were produced during 2004. This approach skews that reliability of the report's conclusions because 2004

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cases were characterized by severe inflation and extreme subjectivity. Thus, the report's methodology is faulty.

The Commission adopted the report too quickly.

The Commission adopted the report seven days after it was submitted. This rush to adoption did not give the public adequate opportunity to fully analyze the report and to develop suggestions for improvements. Moreover, hasty adoption of the report prevented the Commission members from studying the public's comments and deliberating on the report's findings and conclusions.

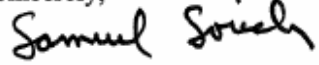
The recommended timeline for the adoption of a new rating schedule is unreasonable.

During the Commission's February 9 meeting, the Commission received a summary of the Bickmore study of California workers compensation insurance rates. The study notes that "cost stability and predictability are keys to fostering a fully competitive environment." Section VI of the Bickmore study concludes that there has been dramatic improvement in the competitiveness of California's workers compensation insurance market, but that improvement is threatened by concerns about the disposition of major components of the recent reforms.

The Commission's report recommends a significant departure from the current rating schedule and sets forth a timeline for the adoption of the new schedule that would require the new schedule to be implemented by July 1, 2006. The implementation of a new rating schedule in such a short time frame would disrupt the stability of the workers compensation system and would undermine insurers' ability to make sound judgments about future risks. This would hurt the health and competitiveness of the workers compensation insurance market.

We believe any change in the rating schedule should be undertaken only after thorough study and analysis of sound, reliable and complete data. Such data was not part of the Commission's report.

Sincerely,



Samuel Sorich
President

SS/mesa

February 8, 2006

Sent via e-mail

Christine Baker
California Commission on Health, Safety & Workers' Compensation
1515 Clay Street, Room 901
Oakland, CA 94612

Dear Christine:

Thank you for the opportunity to review and comment on the Draft PDRS Recommendation. Please let me know if you have any questions relative to the comments made below.

We support the statute which requires a periodic review of the PD benefit process; however, it's important that we not rush into any modification of the PDRS until a proper methodology is chosen and updated empirical data is applied to the adjustment formula. This Draft falls short of reaching that goal. It is not a valid decision making tool. Also, it's too early to measure loss of earnings without current earnings data, and, particularly, base recommendations on only 400 cases.

For example, consultative ratings were excluded, which are typically high dollar cases, so the averages are slanted. We need a mix of both consultative and summary ratings to determine the critical adjustment factor. The report assumes that the drop in ratings is attributable to the AMA Guides. There are other factors which go into the PD equation that should be included.

In that the applicant attorneys were trying to get their high dollar cases in prior to 1/2005, the data on page E-5 is artificially high. The early ratings are typically for low cost cases, which skew the averages.

CHSWC recommends bi-annual (every 6 months) revision of the schedule. (pg. 18) LC 4660 requires amendments to the schedule be made at least every 5 years.

Comment: Claims involving permanent disability typically do not mature for at least 3 to 5 years; consequently, an update every 5 years is reasonable; every 2 years is not.

"Further study of earnings losses (request the "years" be defined) in relation to impairment ratings. (pg. 6) " The average earnings losses can be determined when there is a new empirical wage-loss study (pg. 18). Five year updates of the wage loss studies can be incorporated to reflect those changes. (pgs. 17 &19)"

"Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings & Capacity in Compliance with SB 899" Seth A. Seabury, Robert T. Reville, Frank W. Neuhauser WR-214-ICJ, December, 2004. Funded by DWC. "The data used in this

report are the same used previously by Reville (2002) and Reville, Seabury and Neuhauser (2003). The earnings data are from the Base Wage file maintained by the California Employment Development Department (EDD). They matched roughly 95% of the employees in CA covered by the UI system, the matched DEU-EDD data for PD claimants. They had data for every matched worker from the first quarter of 1991 through the first quarter of 1999."

"Evaluation of California's PDRS – Interim Report" Robert Reville, Seth Seabury, Frank Neuhauser; December, 2003. This report reads, "In this study they use data on over 300k PPD ratings; all cases rated by the DEU, with an injury date between 1/1/1991 and 4/1/1997. Since several years of post-injury earnings must be observed to estimate earnings losses, injuries occurring after 4/1/1997, are not used. We are able to match most (over 69%) of the injured workers in this sample to both (1) similar workers and (2) to administrative data on wages from the EDD to estimate the impact on earnings experienced by these workers."

RAND plans to use the findings and data from the RAND Interim report published in December, 2003 entitled "Evaluation of CA's PDRS." (pg. 5)

Comment: Concern that the earnings data is not updated. The highlighted sentence above says that they need several years of post-injury earnings. Studying 2005 PDRS cases against pre-2005 PDRS doesn't provide earnings data even one year post injury. In addition, benefits from AB 749 for the max. benefit paid for TTD alone increased 71.4% from 2002, as of 2006. Salaries have increased significantly as well during that time. Six years (1999 – 2005) goes against RAND's recommendation to update the wage information every 5 years. We recommend that the study be prolonged until updated wage information is available and analyzed.

CHSWC survey of the compensation payable in nine other states for two hypothetical cases. (pg. 10)

Comment: We recommend that the CHSWC survey of the compensation payable in nine other states for two hypothetical cases be excluded from this report. There are too many variables between the states (e.g., benefit levels, use of vocational rehabilitation services and wage loss states with caps).

At the bottom of page 16, the footnote refers to "Shaw, 2005, and Sullivan, 2005."

Comment: Recommend that the exact title of the research report be provided so we may access it.

Psychiatric impairment (pg. 17)

Comment: It seems arbitrary to assign the FEC based on a single data point, i.e., the rating of 69.

At the top of page 19, RAND states that "there may be concern that the behavior of the system in the first year of implementation does not necessarily predict behavior over the

next 2 to 5 years. Bi-annual recalculations of the FEC factors would correct for any ratings creep, the upward or downward drift in evaluation and rating behavior."

Comment: We disagree – with all of the new changes since 1/1/2005, what with the new RTW incentives, DEU staff training for consistency in ratings, rescinding the primary treating physician presumption and educating physicians on how to rate per AMA Guides, there will undoubtedly be a substantial difference between 2005 and 2008 or 2010.

As a result of our concerns noted above, we recommend strongly that this study not be presented to stakeholders, regulators, and policymakers as an accurate tool in making policy changes to the PDRS.

Sincerely,

Tina Coakley
Regulatory & Legislative Analyst
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February 15, 2006

State of California
Commission on Heath and Safety and Workers' Compensation
Attn: Christine Baker, Executive Officer
1515 Clay Street, Room 901
Oakland, CA 94612

Dear Ms. Baker:

We understand that following the Hearing 2-9-2006, seven days was allowed for comments on the Commission's recommendations.

My partner, Tom Butts, and myself, Art Johnson, have prepared our response. This is based on our many many years of "working in the trenches" with injured workers.

The reality is that if you talk to others "in the trenches", whether they be physicians working with the AMA Guides, defense attorneys, claims adjusters, applicant attorneys, or particularly injured workers, the AMA Rating Schedule is seen as an incredible "boon doggle". The ratings are far more disparate than under the old system. The amount of litigation that is being produced is going to be immense. Taking people with serious disabilities and call them only minor "impairments", makes no sense in reality.

Please attach our Response to the Commission's report, as we believe our Response should be given serious merit and consideration.

Sincerely,

ARTHUR L. JOHNSON

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encl

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Response to Draft Permanent Disability Rating Schedule Recommendations for Reform

The undersigned, Tom Butts and Art Johnson, have collectively practiced Workers' Compensation law in California for over 70 years. This is stated to show we have some lengthy experience in the handling of Workers' Compensation cases.

We have read carefully the recommendations made in the report of 2-12-2006. We feel the following are very, very important considerations that are being totally overlooked in these recommendations:

Recommendation #1: Utilize a DFEC methodology that recognizes and measures true "loss of earning capacity".

1) Any "empirical" evaluation of loss of earning capacity should be based on whether or not a claimant can return to his job or a similar job. If a person returns to his job, there may be no loss of earnings or earning capacity. If a person cannot return to his job and has no immediately transferrable skills, there may be substantial loss of earnings and earning capacity. Such a loss is simply not measured under the Rand recommendations or the Commission's recommendations.

2) Instead, Rand and the Commission mandate a continued use of a DFEC modifier based on a comparison of "body parts". See article by Tom Martin as to the schedule's FEC modifier attached. While it is true that with a general comparison of injuries based on the old pre-1-1-2005 schedule, there were some disparities in comparing certain body parts on the aggregate (shoulders in comparison to knees, for example) such body part comparisons have no real validity under the AMA Rating Schedule, because the AMA ratings are not comparable to the pre-1-1-2005 scheduled ratings.

Secondly, the methodology of comparing body parts to determine DFEC is fatally flawed. For example, a person with a 30% AMA spinal disability has a major spine impairment, probably comparable to a 70% or 80% rating under the old schedule. If that person is a banker and returns to work with <u>no loss</u> of earning capacity, he still gets a DFEC modifier under the current AMA Rating Schedule (and under the proposed draft revisions) which raises the 30% to 38%. The laborer who has a <u>total loss</u> of earning capacity will receive the same DFEC modifier as the banker (8% increase), even though he has a total loss of earning capacity. This is totally inequitable, and the reality of that inequity should be faced.

3) The solution to this problem is quite straightforward:

a) For those persons who return to employment, with no loss of earnings or earning capacity, they receive their AMA rating at an appropriate level of benefits comparable to the old schedule.

b) For those persons who do not return to their employment, and therefore do have a verifiable loss of earnings and/or earning capacity, a valid measurement of that loss of earnings and earning capacity will need to be made by methodologies to be devised by experienced vocational experts in consultation with the commission. Those workers should be compensated for two-thirds of their actual wage loss as measured by their predicted loss of earnings over the next ten years.

c) That is exactly what Rand recommended in its 2005 report–i.e., that permanent disability compensate for 2/3 of actual wage loss for ten years.

4) Thus, diminished future earning capacity should be based on the reality of the worker's true earnings loss, not on a fictional "comparison of body parts".

Recommendation #2: Payment for "disability" that actually exists as a handicap–rather than rating impairments at "zero".

Secondly, the commission draft study cites the "zeros". Those are ratings that would have occurred under the old system, but have no rating under the new system, because the AMA Guides measure "impairment", and not "disability". (These are two vastly different concepts–although on first reading they sound the same. "Impairment" measures the loss of the body to function. "Disability" measures one's loss of ability to work. Terri Schivo (although obviously totally disabled) was only 90% "impaired". This is because her heart beat and her blood flowed, even though she was brain dead.)

Any intelligent and cogent observer must recognize and acknowledge that "pain disables". To "outlaw pain" as a consideration in the rating process is to denigrate our humanity, and treat us all like machines, where we measure the range of motion and the diagnosis of the mechanic (i.e. doctor). Veterinarians look at subjective complaints when they are vetting horses. They look for a limp. They look for tenderness. They look for signs of pain. If horses have those signs, they are pulled from the race. To treat humans on a lower par than horses is simply wrong.

We would suggest that subjectives be measured by the effect of the subjectives on the person's functioning. There are objective criteria for measuring functional capacities. The most widely used disability system in the United States, the Social Security system, does not disregard subjective disability, but simply demands objective correlation to the validity of the subjective complaints. That should be true of the California rating system as well. Zero "impairment" does not mean zero "disability". We should not perpetuate such a fiction by mandating "impairment" ratings in place of "disability" ratings.

Recommendation #3: "Consistency, uniformity, and objectivity"–not achieved by AMA ratings.

There is only one consistent uniform and objective result of the Andrea Hoch AMA Rating Schedule. All ratings are consistently, uniformly, and objectively lower. Our prediction is that they will be even lower than what currently CHSWC has measured at 50% to 60%, because the

most serious disabilities occurring on or after 1-1-2005 have not medically stabilized as yet, and have not been measured. Additionally, the "zeros" have not accurately been factored in. We have seen "impairments" that rate 3% under the AMA that would rate for "disabilities" under the old system at 50% to 60%. This on a rather routine basis (i.e. 95% decrease in rating value).

Additionally, the studies that we have seen so far show that the "margin of error" for doctors utilizing AMA impairment ratings is in the range of 80% error. In addition, there are over 300 errors in the AMA Guides, 5th Edition. That certainly does not seem to be "consistent and uniform and objective".

The point is that the new Rating Schedule in reality is no more consistent or uniform or objective than the old Rating Schedule, and serious consideration should be given to "tossing" the whole new Rating Schedule methodology and returning to the pre-1-1-2005 Rating Schedule, with modifications as necessary to meet valid policy objectives.

After all, there have been savings to carriers of immense proportions based on the changes mandated by SB228 and SB899, before the new ratings effective 1-1-2005 have even materialized. The carrier profit margin is now in the range of 40%. The concern of the Commission in "striking a balance" between benefit adequacy and affordability has already been struck. Benefits have been reduced to a level of total inadequacy, and affordability for employers and carriers has been achieved by sacrifice of any fairness in the Rating System. Bear in mind that Rand has consistently found that PD benefits were too low under the old system, and now we have the AMA Rating System cutting those inadequate benefits by 50%, 60%, and often 100% (the zeros).

Recommendation #4: "Conclusive evidence" in place of "prima facie evidence"–probably unconstitutional restriction on due process right to present rebuttal evidence.

This is probably an unconstitutional impairment of the right to due process, the right to cross-examine, and the right to present rebuttal evidence. To state that any "Rating Schedule" can be made conclusive, even though rebuttal evidence can be produced to show the rating produced is wrong, inaccurate, unfair, or inappropriate in any individual case, should not be tolerated. We should not place all workers into a cookie cutter mold and stamp them out. We are all humans and should be treated individually based on our individual disabilities. No one of us receives the same injury with the same effects of that injury as every other one of us. Ratings should not be put "on the assembly line" and cranked out as if humans were machines. We should be treated as humans and given some human consideration.

It is difficult enough to overcome the "prima facie evidence" presumption of correctness. To insert a conclusive presumption of correctness should never be allowed.

Philosophical considerations/policy considerations:

The above suggestions reflect the philosophy that those people who return to work with no loss of earning capacity or earnings, should receive an AMA rating, modified with some rating

consideration for valid subjective factors, and at a comparable financial level as under the old schedule.

The above recommendations reflect that those who do not return to pre-injury employment and have a demonstrable loss of earnings and/or earning capacity, need to be compensated more for permanent disability and with higher dollar value recoveries than those who do not sustain a loss of earning capacity.

Philosophically, we should be looking at how to compensate those who have a true loss of earning capacity greater than those who do not have a true loss of earning capacity. The current Rating Schedule and the current DFEC modifier, by simply comparing body parts, in no way achieves that goal of equity and fairness. The overriding policy considerations should be to provide permanent disability benefits to those who are most in need of economic help–those who lose earnings and earning capacity. The current AMA rating system does not do this. Nor do the CHSWC proposed modifications.

We recommend you focus on the reality of true loss of earning capacity in your recommendations. We recommend the above recommendations be mandated by statutory amendment. ("Fine tuning" a flawed system is not a solution.)

Art Johnson

Tom Butts

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February 7, 2006

Ms. Angie Wei, Chairperson
Commission on Health & Safety & Workers' Compensation
1515 Clay Street, Room 901
Oakland, CA

RE: Draft Report "Permanent Disability Schedule Recommendations"

Dear Ms. Wei,

The California Applicants' Attorneys Association has reviewed the draft CHSWC report "Permanent Disability Schedule Recommendations." We believe several of the findings of this draft report are extremely important, and that these findings help define the scope and extent of the problems caused by the adoption of the 2005 rating schedule:

> The draft report finds that there was not adequate empirical data available to permit accurate calculation of the relationship between impairments evaluated according to the AMA *Guides* and diminished future earning capacity. This finding confirms that the 2005 schedule *does not and cannot assign consistent, empirically-based ratings to injured workers.*
>
> The draft report also confirms that the 2005 schedule reduced permanent disability benefits by more than 50%, *independently of all other statutory changes*. This finding confirms that the severe benefit reductions being reported by injured workers are not merely "anecdotal examples" but are in fact a substantial and unintended take-away from the most severely injured workers.

This finding that permanent disability benefits have been reduced by more than 50%, independently of all other statutory changes, clearly violates the legislature's intent in revising Labor Code § 4660. Both Senate President *Pro-Tem* Perata and Assembly Speaker NuZez have repeatedly stressed that introduction of the AMA *Guides*

impairment ratings, of and by itself, was not intended to result in any change in average ratings.

However, the draft report notes that analysis of 3,407 actual 2005 ratings confirms that the use of a non-empirically based FEC factor has reduced benefits by more than 50%. And as pointed out in the draft report, this +50% reduction is *in addition to other statutory changes that will also significantly reduce permanent disability benefits*. These other changes include a reduction in the number of weeks assigned for each rating point under 15% from 4 weeks per point to 3 weeks. Also, the majority of workers return to work following their injury, and these workers will see their benefits cut by 15%. According to the draft report, apportionment changes are expected to cut permanent disability benefits by an average of over 5%. Consequently, *even without considering the unintended +50% reduction verified in this draft report,* the majority of injured workers will see their permanent disability benefits cut by almost 40%. Adding in the unintended reduction due to the use of unjustified FEC factors, *the total reduction is over 70%!*

Furthermore, the draft report notes that the adoption of the AMA *Guides* also severely restricted the compensability of permanent disability. This is a direct result of the fact that the *Guides*, by its own definition, *excludes consideration of work when determining the impairment percentage to be assigned*. Consequently, some workers who have work restrictions and who are not be able to return to their old jobs will nevertheless receive a zero rating under the AMA *Guides*. For example, the draft report describes a worker with a chronically dislocating shoulder – a condition that would keep many workers from returning to their previous job. Despite the obvious work disability of this employee, and despite the fact that this employee will have diminished future earning capacity, because work activities are not considered in assigning the AMA *Guides* impairment rating, this injured worker would be assigned a zero rating. According to the draft report, such zero impairment cases could reduce permanent disability benefits from 7% to 30% – and this reduction is in addition to all of the other cuts described above!

Draft Report Recommendations

We believe that the draft report's description of the reductions in permanent disability benefits, both intended *and* unintended, should help dispel fears that correcting the problems will somehow "roll back" the reforms of SB 899. Although we believe reductions such as the 25% decrease in weeks awarded for ratings under 15% are both unfair and unnecessary, there has been no suggestion that these *intended* benefit reductions should be reversed. However, we strongly believe that the *unintended* consequences which followed adoption of a rating schedule that is *not* empirically based and which is in direct conflict with the authorizing statute must be corrected.

We have reviewed the proposals offered in the draft report, but because useable data is available only for a limited number of injury categories we are not able to determine whether the proposals meet the goals as described. However, *we strongly support adoption of a formula that will maintain the same average rating as was assigned under the pre-SB 899 rating schedule.* Because numerous RAND wage loss studies – studies that were done at the direction of your Commission – repeatedly confirmed that indemnity benefits under the pre-SB 899 rating schedule were inadequate, we strongly

urge that the draft report be amended to recommend that the adopted formula provide for no reduction in the average rating.

We also believe that any correction of this problem must involve a statutory change. Strong evidence was presented to the Administration even prior to the adoption of the 2005 rating schedule that the unintended consequences of this action would reduce permanent disability benefits for injured workers by nearly 70%, but this evidence was ignored. Similarly, the Legislative leadership has repeatedly informed the Administrative Director that these severe reductions were not the intent of the Legislature, but there has been no change to the schedule. We do not believe that the Administration will adopt a schedule that fully complies with statute unless statutory changes are adopted requiring such amendment, or unless ordered by a court. We will continue supporting efforts by our members to challenge the legality of the 2005 rating schedule before the WCAB, but we also urge that this draft report be amended to support enactment of a statutory change that requires the adoption of a rating schedule that fully complies with the provisions of § 4660 as amended by SB 899.

We also strongly disagree with the proposal in the draft report that a revised schedule apply only to claims that occur on or after the adoption of the revised schedule. There are more than 120,000 permanent disability ratings issued during a year. Consequently, even in the best case scenario, under the proposal offered in the draft report nearly 200,000 injured workers will be forced to accept grossly inadequate ratings under the improper, non-empirically based 2005 rating schedule. This is unacceptable. That rating schedule does not comply with law, and no worker should be forced to accept the inadequate and completely unjustified rating assigned under that schedule. We strongly recommend that the draft report be amended to either (1) provide that any revised rating schedule shall become effective and apply to all cases to which the 2005 rating schedule was applied, or (2) require that the pre-SB 899 rating schedule shall apply to all injuries that occur prior to the date the revised schedule is adopted.

We also strongly disagree with the recommendation that the rating schedule be given a limited conclusive presumption of correctness and urge that this proposal be eliminated from the draft report. This recommendation flies in the face of both common sense and legal precedent. Common sense shows that conclusive presumptions provide neither stability nor predictability for the system. The presumption of the treating physician introduced at the insistence of the employer community in 1993 quickly became the single most important cost driver in the system. And the conclusive presumption added to § 4664 in SB 899, which is also a presumption affecting the burden of proof (and thereby rebuttable), will likely cause litigation and uncertainty for many years to come. Conclusive presumptions have no place in our workers' compensation system.

The proposal to make the schedule conclusive evidence of the percentage of disability also significantly and improperly constrains the fundamental due process rights of both parties. As noted by the Supreme Court in the *LeBouef* case cited in the draft report, "a permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market." Of course, the standard in § 4660 has now been amended to require consideration of the employee's "diminished future earning capacity," but the principle remains unchanged. The courts allow both

parties to introduce any and all relevant evidence of permanent disability, and have consistently ruled that where that evidence shows that a rating assigned under the rating schedule does not reflect the true disability of the worker, the schedule rating is not conclusive and should not be followed.

We see no reason to change this important right that protects both parties. There has never been abuse of the right to rebut the pre-SB 899 rating schedule, and we do not believe that there will be any abuse of a rating schedule based on the AMA *Guides* impairment ratings where those ratings have been properly adjusted to consider diminished future earning capacity. However, no schedule will ever equitably assign ratings to all of the myriad disabilities that will be experienced by injured workers. Where the schedule does not accurately describe the worker's disability, both sides must continue to have the right to submit all relevant evidence in rebuttal of the schedule rating.

Summary and Conclusion

California's workers' compensation system has seen dramatic changes since the enactment of SB 899 on April 19, 2004. Employers' costs are falling – perhaps not as rapidly as they should, but rates are down more than one-third on average – and workers' compensation insurers are now earning record profits that can only be described as ludicrous. Injured workers, however, are paying a high price as the lower rates and higher profits are far too often merely a direct reflection of benefit take-aways.

Most disturbing, however, is the fact that many of these benefit take-aways *were not intended by the Legislature*. The Administration's continued failure to adopt the treatment guidelines as recommended by your Commission over one year ago is one example of a major problem affecting workers that is not caused by statute but is the direct result of the Administration's actions – or in this case, inaction.

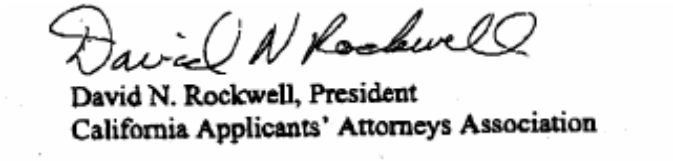
The Commission's draft report, "Permanent Disability Schedule Recommendations," provides overwhelming evidence of another major problem caused by the adoption of improper and illegal regulations by the Administrative Director. The draft report confirms that the 2005 permanent disability rating schedule is *not* based on the empirical data and findings of the RAND Interim Report, as required by statute. Furthermore, the draft report confirms that there has been an *unintended cut of more than 50%* in permanent disability benefits under this non-empirically based schedule, despite the fact that numerous RAND studies have shown that indemnity benefits under the old rating schedule were already significantly inadequate.

The draft report also clearly demonstrates that correction of this unintended +50% cut in permanent disability benefits will not "roll back" the "cost saving" reforms in SB 899. As noted in the draft report, the *intended* statutory changes will reduce permanent disability benefits by at least 40%. Slashing benefits further through adoption of a non-empirically based schedule and by excluding truly disabled workers from the system is far beyond the intent of SB 899 and must be reversed. *The California Applicants' Attorneys Association strongly urges that the draft report be amended to propose enactment of a statutory change that mandates adoption of a revised schedule under which the average modified*

impairment rating will be equal to the average disability rating under the pre-SB 899 rating schedule. We further urge that the report be amended to propose that this revised rating schedule be made effective for all injuries rated under the 2005 rating schedule, or that the pre-SB 899 rating schedule be made applicable to all injuries that occur before adoption of this revised rating schedule. Finally, we strongly urge that the recommendation regarding changing the *prima facie* status of the rating schedule be deleted from the report, as this proposal would significantly restrict the due process rights of both parties.

If you have any questions about our comments, please feel free to contact our legislative advocate in Sacramento.

Sincerely,



David N. Rockwell, President
California Applicants' Attorneys Association

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CALIFORNIA Restaurant ASSOCIATION SINCE 1906

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February 13, 2006

Christine Baker
The California State Commission on Health and Safety and Workers' Compensation
1515 Clay Street, Room 901
Oakland, CA 94612

RE: Permanent Disability Rating Schedule Recommendation

Dear Ms. Baker:

The California Restaurant Association (CRA), founded in 1906, is the leading business trade association for the California restaurant industry. The restaurant industry is one of the largest private employers in California, representing over 1.3 million jobs. Restaurants produce $51.5 billion in sales annually and generate over $4 billion in sales tax for the state. On behalf of our over 22,000 members, we would like to thank you for the opportunity to review and comment on the draft version of the CHSWC Permanent Disability Rating Schedule Recommendation, which was adopted by the Commission at the February 9, 2006 hearing.

As stated at the hearing, CRA shares many of the concerns that have been raised with regard to the soundness of the recommendation. We are especially concerned that there is not enough appropriate data to accurately draw conclusions about the adequacy of the new permanent disability rating schedule, and that the data used to form the recommendation does not represent all the ratings and timeframes that need to be considered. Specifically, the report reflects only a small number of claims that were ratable under the old and the new system, cover only nine months' limited data, and focus on PD claims that are typically less complicated cases and may not be geographically represented.

California's workers' compensation system has improved dramatically since the reforms were passed in 2003. The regulations authorized as part of SB 899 provide for an ongoing review of the system and give the Division of Workers' Compensation (DWC) the authority to make adjustments to the PD schedule, as necessary. It is too soon to determine if fine-tuning of the system is needed and we would urge you to wait for more appropriate data—and a thorough analysis of this data—before trying to evaluate the performance of the new PD schedule and make recommendations based on premature findings.

If you have any questions regarding our concerns, please contact me at (916) 431-2721.

Sincerely,

Kerry Lee
Senior Legislative Director

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CALIFORNIA CHAMBER of COMMERCE

February 8, 2006

TO: Angie Wei, Chair
California Commission on Health and Safety and Workers' Compensation

FROM: Marti Fisher, Legislative Advocate
California Chamber of Commerce

The California Chamber of Commerce is a non-profit organization whose membership is made up of over 16,000 member companies employing approximately 3 million employees - - one-fourth the private sector workforce in California. Founded in 1890, the California Chamber is the largest broad-based employer advocate in the state.

Thank you for the opportunity to review and provide our comments on the Draft Permanent Disability Rating Schedule Recommendations report.

In response to the California workers' compensation crisis, the California Chamber of Commerce actively supported measures to control costs and provide quality medical care to employees with the ultimate objective of returning employees to work. One of the key components of the workers compensation reforms was to address inequity and imbalance in the permanent disability rating system, to ensure that erroneous ratings were not made and that the employees with the greatest disabilities were provided with an appropriate level of future earning replacement.

The process and function of permanent disability ratings are complex requiring technical expertise and forethought to examine their structure and impact. Many factors come into play other than the rating schedule itself. Outcomes in this post-SB 899 environment must be taken in context, looking at influences from many directions. This report specifically states it is based entirely on the ratings, excluding outside influences. In addition to the lack of consideration for outside influences, peer review comments are absent from the report. Absent the appropriate data, considerations and analysis, the Chamber cannot support any decision-making that would occur as a result of this study.

A complex system such as California's permanent disability rating and the workers compensation system do not operate or create results at breakneck speed and it is overly optimistic to think we should evaluate and revise it at that speed.

The California Chamber of Commerce URGES the California State Commission on Health and Safety and Workers' Compensation to hold off on taking any action regarding permanent disability ratings recommendations at this time due to the following concerns:

The Report Was Rushed

The California Chamber of Commerce is concerned that this very important study and findings were withheld from public comment until one week from the due date for comments. This time frame is not adequate to technically review and understand the implications and methodology of this study as well as its draft recommendations. This rush for action is questionable. For a matter so technically complex with such far-reaching implications more time is unquestionably deemed appropriate. Although, additional time to evaluate the report would not have caused us to reverse our conclusion.

The draft report states that public policy issues remain to be addressed regarding the balance of cost and benefits for injured workers. These public policy decisions appear to have been made by the authors of the report evidenced by the recommended changes to the rating schedule to result in a specific level of earnings replacement compared to that of 2005. This is a much broader policy issue that cannot be answered in the short seven days provided the public to respond to the draft report. Important public policy questions regarding the level of benefit award that maximizes return-to-work rates while providing an appropriate income level remains to be answered. This is a policy question that must be addressed in a thoughtful manner and in a time frame much longer than seven days.

System Experience is Lacking

The Permanent Disability Rating System Recommendation report is based on a statistically insignificant span of experience data based solely on summary ratings. The business community as well as the legislature during Hoch confirmation hearings agreed that a study of eighteen months of experience under the new rating system is most appropriate for an evaluation.

In 2004, old cases were reportedly queued up, carried by applicant attorneys attempting to earn the highest possible permanent disability awards for their clients prior to the implementation of the new SB 899 rating schedule and requirements. Comparing fresh, new system data to 'old' cases is not representative. Also, consultative cases were not included in this study. Your study cites this apparent weakness as well, footnote page 12:

[15] The selection of reports rated as consults could be affected by changes in attorney strategy in response to SB 899 and by changes in statue that require represented parties that cannot agree on an Agreed Medical Evaluator (AME) to use the QME process. It has been suggested that there was a rush to maneuver cases so they would receive PD ratings under the old schedule before January 1, 2005. It has also been suggested that since January 1, 2005 attorneys are now holding back the more severe cases in the hope of obtaining a more liberal rating environment.

The Chamber holds that this is a significant weakness in the data. Findings based on a comparison of a non-representative year to a brief period of summary data in a new system are not significant.

Significant Change in Incentives

Prior to reforms, the 'old' system of Workers' Compensation in California included incentives for employees to stay off work longer, rather than to return to work. In the absence of objective medical guidelines that guide medical professionals to declare an employee permanent and stationary, an unending parade of medical procedures that delayed the employee's return to work wre encouraged. New system incentives encourage employers to bring the injured workers back and new medical guidelines encourage medical practitioners to discontinue medical procedures that have no merit.

Eighteen Month Study

The California Chamber of Commerce supports a study of the new permanent disability rating system that includes eighteen months of experience. A study with less experience cannot be significant and in no way can a new system be based on such a short term of experience. The Division of Workers' Compensation is currently collecting data on the new permanent disability rating system and its results. The data collection includes elements such as multiple injury ratings, serious injuries as well as consultative ratings. This is data absent from the draft report and should be included in order to increase the predictive value of the data. This data will allow significant comparisons and analysis on which to base decisions.

The California Chamber of Commerce urges the California Commission on Health and Safety and Workers' Compensation to provide their study data, methodology, results and all background material to the Division of Workers' Compensation to consider in the final study that will include eighteen months of collected, empirical data.

Conclusion

On behalf of our 16,000 member businesses contributing to the growth and flourishing of the California economy, the California Chamber of Commerce

urges the California Commission on Health and Safety and Workers' Compensation to hold this draft report until such time as more complete data is available to compare a more representative sample in order to develop a study which results in valid conclusions on which significant and important decision can be based.

You may contact me at anytime to further discuss our position. My phone number is (916) 930-1265, email Marti.Fisher@calchamber.com.

Thank you.

Cc: Commission Members; Christine Baker, Executive Director
California Commission on Health and Safety and Workers' Compensation
Richard Costigan, Governor's Office
Moira Topp, Governor's Office
Cynthia Bryant, Governor's Office
Mike Prosio, Labor and Workforce Development Agency

California Coalition on Workers' Compensation
Supporting and Safeguarding California's Economic Future

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Website: www.ccwcworkcomp.org

February 8, 2006

Ms. Christine Baker
Executive Director
California Commission on Health, Safety, and Workers' Compensation
1515 Clay Street, Room 901
Oakland, CA 94612

Re: Permanent Disability Rating Schedule Recommendation

Dear Ms. Baker:

The California Coalition on Workers' Compensation's (CCWC) mission is to achieve and maintain a California workers' compensation system that is equitable and efficient for injured workers and employers. For more then twenty years CCWC has represented the workers' compensation interests of over three hundred individual public, private and not for profit employers and several statewide trade associations representing thousands of additional employers.

The California Coalition on Workers' Compensation appreciates the opportunity to review and comment on the Permanent Disability Rating Schedule Recommendation as submitted in draft by the Commission. As requested, the California Coalition on Workers' Compensation has provided the attached comments for your consideration prior to approval of a final document. Please feel free to contact CCWC directly at 916.441.4111 with any questions you may have regarding the enclosed comments.

Again, thank you for the chance to comment on the draft recommendation prior to its adoption by the Commission and distribution to the Legislature.

Best Regards,

Suzanne Guyan

Suzanne Guyan
Chairperson, CCWC Board of Directors

California Coalition on Workers' Compensation
Supporting and Safeguarding California's Economic Future

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The California Coalition on Workers' Compensation

Comments on: **The California Commission on Health and Safety and Workers' Compensation**
"Permanent Disability Rating Schedule Recommendation"

The California Coalition on Workers' Compensation's Government Affairs Committee and Board of Directors have reviewed and analyzed the full scope of the Commission's recommendation. CCWC is providing these comments to illustrate our concerns regarding the Commission's *"Permanent Disability Rating Schedule Recommendation."* Prior to the release of this draft several employers and employer organizations expressed concerns regarding the need for this report, the political environment in which this report was requested, and the methodology used to create this report; and it is unfortunate that these concerns have been realized in this draft. Due to the lack of meaningful and representative data used in the quantitative analysis, the conclusions contained in these draft recommendations are not well founded.

CCWC has divided its comments below into topic areas and has referenced the study and other materials as appropriate. We hope that the Commission will review these concerns and utilize our thoughts in its decision whether to adopt a recommendation.

Appropriate Use of Data by CHSWC

CCWC would like to convey its serious concerns surrounding the data and methodology used to derive conclusions in this recommendation. In order to have a serious policy discussion it is necessary to utilize sufficient data and methods of analyzing that data. Upon release of this draft of the *"Permanent Disability Rating Schedule Recommendation"* it is evident that the data used in reaching the conclusions and recommendations are limited and inconclusive.

Commission used only permanent disability summary ratings in its evaluation

CCWC questions the conclusions and recommendations reached by this study due to the researchers' arbitrary decision to limit their evaluation to only summary ratings. As is noted on page 11 of the report, summary ratings are received only on those cases where the injured worker is not represented and therefore likely has experienced a much less complicated and less serious injury then those found elsewhere in California's workers' compensation system. By choosing to select and evaluate a very small aggregate number of summary ratings from only six months since the inception of the new schedule, the Commission has, in our view, dramatically decreased its ability to draw any reasonable conclusion from its analysis. Some of our specific issues with the data selected and the methodology used in analysis of the data by the Commission's researchers are:

- The use of summary ratings isolates the shorter tailed, less complicated, and often disputed claims by an injured worker. Using those claims and their analysis of the PDRS ratings in

those claims and attempting to apply it as conclusive upon the entire permanent disability rating schedule presents a skewed result. Without also using consultative ratings, and therefore the entire spectrum of the PD ratings in California, CCWC believes that it is difficult at best to objectively and accurately evaluate the performance of the current PDRS.

- As noted by Commission's research on page 12 of the draft recommendation, consultative ratings account for 6% more of the ratings during the research period than summary ratings, which is significant when dealing with only 3,407 ratings in the time period as also detailed on Page 12 of the draft recommendation. This seems to indicate that the Commission's researchers used a minority population of the data in achieving conclusions regarding the PDRS and as such makes the report's recommendation suspect based upon the data utilized in support of the Commission's findings.
- Additionally on page 12 of the draft recommendation, the Commission attempts to explain/justify the exclusion of the more complex and represented claims by stating, "Although the analysis is limited to summary ratings for the purposes of calculating new future earning capacity factors, both groups appear to be similarly affected by changes in the rating schedule." Unfortunately, zero justification for this, either quantitative or qualitative, can be found in the draft recommendation or its appendices. Therefore, without changes to this recommendation, CCWC is unable to endorse the recommendations findings and conclusions.

The CCWC's analysis has concluded that the reliance on summary ratings as opposed to a combined evaluation of all ratings is flawed on its own as demonstrated above. Unfortunately, the issue becomes more severe when the only other justification for the utilization of only summary ratings – that these ratings have acted the same as consultative ratings under the current PDRS – is suspect at best and severely flawed at its worst. CCWC strongly encourages the Commission to withhold this draft from adoption and perform a new study with a larger number of summary and consultative ratings in order to achieve the most comprehensive results. This encouragement comes in the interest of obtaining the most accurate and appropriate data sample despite political pressures to complete this study on an inappropriate timeline.

Ratings under the old PDRS are limited to January 1, 2004 through December 31, 2004

In appendix E, there is a memorandum from Frank Neuhauser at the University of California, Berkeley, titled "Analysis of ratings under the new PD schedule, through August 17, 2005." On page five of that memorandum, Mr. Neuhauser indicates that only permanent disability ratings under the old PDRS from January 1st, 2004 to December 31st, 2004 were used as a comparison against the current PDRS. Mr. Neuhauser notes in this memorandum that the reasoning behind this selective dataset is due to a change in coding by the California Disability Evaluation Unit that made evaluations from the above indicated timeframe, thereby making it easier to determine the type of rating (summary or consultative) that was used as opposed to those ratings prior to January 1, 2004.

As the Commission acknowledges on its own on page 14 of the recommendation, the use of rating data only from 2004 is a significant factor in the skewing of the data. Page 14 acknowledges that view and its attempts to pacify the concern are troubling. 2004 is a period of time when abuse in California's workers' compensation system was at its height of abuse, when some injured workers and parties outside of the injured worker and the employer were excessively "gaming" the system to

their own benefit. The issues surrounding the subjective PDRS prior to January 1, 2005 were at their peak in 2004 and as such, so were the permanent partial disability ratings during that timeframe. It is the belief of CCWC that a dataset limited to this peak of abuse timeframe creates and artificially inflated data is inappropriate to use in a comparative study. This issue is a serious one for CCWC as we believe that it further adds to the invalidity of the findings and conclusions of this recommendation.

Data limitations and methodology choices do not support Commission's conclusions

It appears that the study and its resulting recommendations were conducted too soon after the reforms of April 19th, 2004 and the new PDRS which was effective less than fourteen months ago. While CCWC does support a data and timeframe appropriate analysis of the PDRS, we believe that it should only be completed when sufficient rating data exists after January 1, 2005 under the new PDRS. Without an evaluation of sufficiently appropriate data, the conclusions and public policy recommendations made in this recommendation cannot be endorsed by the California Coalition on Workers' Compensation.

Additionally, the Coalition has grave concerns regarding the ability of the Commission's researchers to successfully reach conclusions about the entire post January 1, 2005 PDRS due to the overtly tainted data set and questionable methodology. Because the Commission based the stated 51% reduction in benefits on their analysis of this questionable dataset, CCWC has significant doubts as to the validity of the reported reduction.

RAND Future Earnings Capacity Study is outdated and inappropriate for evaluation of current PDRS

The Commission continues to utilize the RAND study and its subsequent conclusions on future earning capacity despite the study's reliance on data from the late 1990's that represent ratings well before the passage of AB 749, AB 227, SB 228, and SB 899. While it is understood that the Legislature referenced the RAND FEC study as a tool in determining the new PDRS under SB 899, we believe that its continued reliance is inappropriate. As is the case in any period of significant reform, the environment in which an injured worker navigates California's workers' compensation system has changed dramatically. The following are just a few examples of these changes:

- AB 749 statutorily implemented a series of Temporary and Permanent Disability benefit increases that dramatically reduced the loss of earnings for an injured worker.
- Medical care provided to an injured worker in California prior to AB 227 and SB 228 was considered in itself disabling and is no longer allowed due to utilization review and treatment guidelines.
- Under the system in California prior to SB 899, return to work was not considered a priority for the injured worker and/or employer and resulted in a pattern of litigation that prevent resolution of claims.

As the Commission indicates on page 16 of the draft recommendation, "The RAND study found a significant difference in proportional earnings loss depending upon whether the worker returned to the at-injury employer." Given your own conclusions from the RAND study in this regard and the status of the reforms, the reforms have significantly improved the proportional earnings loss for

most injured workers. Because of this improvement, CCWC holds that the Commission should delay any future analysis on the adequacy of temporary or permanent disability benefits until a new future earnings capacity study can be completed.

Revised PDRS adoption timeline is not in the interest of public policy

On page 11 of the recommendation, the Commission proposes that a revised PDRS based upon its study be published no later than March, 2006 and that it be implemented no later than July 1, 2006. The idea that a new PDRS be implemented to coincide with the rate-making process might make sense; however, such an accelerated timeline does not afford stakeholders and policymakers the time and debate necessary to articulate an informed and cogent debate.

At several points in its recommendation the Commission suggests that a "public policy decision" be made regarding the balance of cost and benefit levels. In order for transparent and informed debate regarding these "public policy decisions," a greater amount of time then the suggested two months is necessary. In comparison, the former Administrative Director spent the better part of six months with an advisory group of over twenty-five stakeholders to assist in the development of the PDRS currently used. CCWC strongly recommends that a similar process and timeline be used IF changes to the PDRS are considered.

Prior to the passage of AB 227, SB 228, and SB 899, employers across California were in a very serious condition, dealing with a system rampant with abuse and subjectivity, disallowing employers to effectively communicate with an injured worker and tying their hands when trying to return that injured worker back to the jobsite. While the entirety of the statutory reforms is not in jeopardy based upon the recommendation, it is necessary to reiterate that CCWC and the general employer community will demand an exhaustive discussion of any attempt to further change the system. This position is even more adamant when potential attempts may be based upon what we believe to be a flawed and tenuous report. The recommendations timeline does not approach a principle of reasonableness in consideration of the type of exhaustive discussion that must take place.

CCWC would also like to express its significant concerns as to the timeline requested for public comment and the extremely short period of time between the deadline for submission of comment and the prospective adoption meeting of the Commission. The "Permanent Disability Rating Schedule Recommendation" was released to the Commission's website and in e-mail to interested parties mid morning on Thursday, February 2, 2006. This date of release reasonably afforded only three working days to review a document over fifty pages in length and provide reasonable and thoughtful comment. Additionally, the Commission's deadline is less than two business hours prior to when the Commission and its members are set to review the written comments of interested parties and take those comments into account before it potentially adopts this recommendation for release to the requesting parties. This extremely short turn-around time is troublesome and for CCWC gives the impression that the Commission is less interested in thoughtful discussion and more interested in achieving a political goal.

CCWC requests access to comments from peer reviewers

Page 21 of the recommendation acknowledges numerous individuals who provided peer review for the study and its resulting recommendations prior to the recommendations public comment period. These individuals included Dr. Peter Barth, Dr. Leslie I. Boden, Dr. Jeffrey Biddle, Dr. Christopher Brigham, M.D., and former California State Senator John Burton. CCWC respectfully requests that in the interest of transparency and full public disclosure these comments be made available to interested parties immediately.

Conclusion

CCWC continues to, as it has done since SB 899 was approved on April 19th, 2004, to recognize the need for policy makers to continuously review the effects of recent reform measures and, as necessary, provide changes to those reform that serve the interest of achieving and maintaining and effective and efficient workers' compensation system in California for both the injured worker and employer. However, the public policy recommendations included in this report along with the at best questionable data and evaluation methodology only serves to cloud the extremely complex issue before the Commission and before the Legislature this year. Because of this, CCWC is extremely distressed that this study, if adopted, would be used as a tool for arriving at complex policy changes to the current permanent disability rating schedule.

Should the Commission on Health, Safety, and Workers' Compensation have any questions or desire clarification on the contents of these comments, please feel free to contact Scott Lipton directly at slipton@ccwcworkcomp.org or 916.441.4111 x1015.

February 8, 2006

Christine Baker
The California State Commission on Health and Safety and Workers' Compensation
1515 Clay Street, Room 901
Oakland, CA 94612

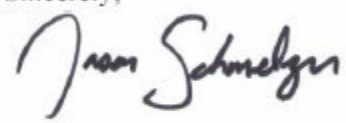
RE: Permanent Disability Rating Schedule Recommendation

Dear Ms. Baker:
The California Manufacturers and Technology Association (CMTA) works to improve and preserve a strong business climate for California's 30,000 manufacturers, processors and technology based companies. For more than 85 years, CMTA has worked with state government to develop balanced laws, regulations and policies that stimulate economic growth and create new jobs. CMTA represents businesses from the entire manufacturing community - a segment of our economy that contributes more than $250 billion annually and employs more than 1.5 million Californians.

Thank you for the opportunity to review and comment on the draft version of the CHSWC Permanent Disability Rating Schedule Recommendation. As requested, the California Manufacturers and Technology Association is submitting the attached comments for your review. Should you have any questions with regards to the enclosed document, please feel free to contact me directly at 916-498-3322.

Again, thank you for the opportunity to review and comment on the draft study prior to its adoption and distribution.

Sincerely,



Jason Schmelzer
Legislative Director – Human Resources, Health and Safety and Workers' Compensation

The California and Manufacturers and Technology Association

Comments on: **The California Commission on Health and Safety and Workers' Compensation**
"*Permanent Disability Rating Schedule Recommendation"*

We have reviewed and considered the contents of the Commission's *"Permanent Disability Rating Schedule Recommendation"* and have several comments and concerns. After our review and analysis of the study it is absolutely clear that this is not the time to alter the permanent disability rating schedule. Many of the concerns expressed by the employer community prior to the study have been realized in the release of this draft version and, because of the lack of appropriate and representative data, the conclusions contained in the CHSWC study are suspect.

Below I have divided my comments into topic areas and referenced the study where it is appropriate. We hope that CHSWC will consider these concerns as the decision to adopt this study is finalized.

Problematic data selection by CHSWC
CMTA has serious concerns with the data relied upon by researchers in this study. In order for an accurate evaluation of the permanent disability rating schedule (PDRS) to be completed, appropriate data must be gathered and studied. This is even more important when the study is to be used as a policy making tool on an incredibly important issue. When we were initially made aware of the study we expressed this concern to CHSWC staff and we were assured that there was sufficient data to complete this study. Since that time we have reserved judgment on the issue. However, with the release of this draft version we feel stronger than ever that CHSWC has relied on an inappropriate dataset in it's evaluation of the current PDRS.

CHSWC examines only summary ratings in its study
CMTA is concerned that the data sample is tainted because of the researchers chose to limit their evaluation to summary ratings. As is noted in the report, summary ratings are received only on the less complicated, non-litigated claims in the California Workers' Compensation system. By selecting and evaluating a very small number of unrepresentative ratings from the vast pool of ratings available, CHSWC has hindered their ability to realistically draw conclusions from their analysis. Some of the specific issues we see with the data selected by researches are:

• By using only summary ratings researchers are isolating the less complicated, shorter, and undisputed claims and then taking their analysis of that data and attempting to apply

it to the entire PDRS. Without studying the entire spectrum of ratings, CMTA doubts the ability of this study to accurately evaluate the performance of the current PDRS. Consequently, the conclusions and recommendations made in this report are seemingly groundless.

• As is noted on page 12, consultative ratings actually account for a larger percentage of claims than do summary ratings. This means that in addition to a limited type of rating being considered, the data selected accounts for a minority of claims in the overall system. The report does not sufficiently support their dependence on the data used.

• On page 12 the study attempts to justify the exclusion of consultative ratings – "Although the analysis is limited to summary ratings for the purposes of calculating new FEC factors, both groups appear to be similarly affected by changes in the rating schedule." This statement is made with absolutely no supporting documentation or analysis. Without adequate justification of this statement, CMTA cannot support the resulting findings. The statement in the report that summary ratings and consultative ratings are reacting similarly under the permanent disability schedule is troubling specifically because of reasons the reasons that are cited on page 12 and 14 of the study:

• On pages 12 and 14 of the study it is admitted that there is a strong feeling that all of the serious cases are being held out from DEU ratings until changes in the PD schedule are made. This means that there are fewer serious cases currently receiving consultative ratings, which would indicate that any sample of consultative ratings would be artificially low. This would have the effect of artificially lowering the average PD rating and increasing the apparent reduction in benefits. There is an attempt to simply dismiss this issue on page 14 of the study, however we feel that this issue needs thorough examination and discussion if the CHSWC study is to have any credibility.

• Similarly, just prior to the new schedule being adopted it was a known fact within the claims adjusting community that attorneys were pushing claims to a permanent and stationary status so they could be rated under the old PD schedule. This issue is also mentioned in passing in a footnote on page 12 of the study. This would mean that the majority of serious cases would have received consultative ratings under the old system before the current schedule were in place, which would further diminish the number of serious cases receiving consultative ratings under the new schedule. There is not even an attempt to discuss this issue in the study despite the fact that it could very well have serious potential to skew to body of consultative ratings.

CMTA has serious problems with the data that CHSWC researchers have chosen to analyze in this study. We believe that the reliance on summary ratings is flawed on its own as we have explained. However, the issue becomes much more troubling when the only other justification – that the summary ratings have acted the same as consultative ratings under the current PDRS – is suspect at best. CMTA believes that CHSWC should repeat this study with a considerably larger number of both summary and consultative

ratings in order to get the most representative dataset. This recommendation is made in the interest of obtaining the most accurate and representative data, despite the clear pressure from some to complete this study prematurely.

Pre-1/1/2005 ratings are limited to one year
On page E-5 of the CHSWC report – which is a page from a memorandum sent from Frank Neuhauser at UC Berkeley – it seems to indicate that there was only one year of pre-1/1/2005 rating used as a comparison against the current schedule. The reason given is that there was a change in coding at the beginning of 2004 that would have made it difficult to determine what type of rating (summary or consultative) was being used if the ratings predated 1/1/2004.

CMTA believes that limiting the comparison data to ratings from 2004 is inappropriate. This was the period in time in which abusive behavior was at it's highest in the California workers' compensation system. The problems with the subjective permanent disability rating schedule that led to exorbitant ratings were at their apex during this timeframe. A dataset limited to this time period would be provide a dataset for comparison that consists of artificially inflated permanent disability ratings. The result, of course, would be the appearance of an overly dramatic decline in benefits that results from an unrepresentative and unreasonably limited sample of pre-1/1/2005 summary ratings. This issue is extremely troubling for CMTA because we feel that it further taints the findings of the CHSWC study.

Data limitations and choices do not support CHSWC conclusions
CMTA is very concerned about the ability of CHSWC researchers to effectively make conclusions about the performance of the entire permanent disability rating schedule when the data they have relied upon is so clearly tainted. Because CHSWC bases the stated reduction in benefits on their analysis of this dataset, we cannot be even remotely certain that the reported 51 percent reduction in permanent disability benefits is accurate. Moreover, we can not be certain that the actual reduction in benefits is anywhere near 51 percent.

It appears that this study was conducted too early after the reforms to accurately study the issue, let alone draw conclusions from that study. While CMTA does support an analysis of the permanent disability rating schedule, we feel that it should be completed when there is sufficient data that has been collected from the post SB 899 era. Without an evaluation of appropriate data, the conclusions and policy recommendations made in the CHSWC study cannot be supported by CMTA.

RAND FEC Study is outdated and inappropriate for evaluation of the current schedule
In addition to the long held concerns about the methodology of the RAND study on loss of future earnings capacity, CMTA is concerned that that data used to conduct the study is outdated. The RAND study data was taken from claims in the late 1990's, well before the passage of AB 749, AB 227, SB 228 and SB 899. While we understand that the legislature did reference the RAND study in SB 899 as a tool to consider the FEC in the

PDRS, we feel that a new study on loss of future earnings capacity is needed to accurately evaluate the adequacy of permanent disability benefits. The simple fact of the matter is that the situation of your typical injured worker has changed significantly since the data used in this study was gathered. The following are just a few examples of how things have changed:

- AB 749 instituted numerous benefit increases that would have reduced the loss of earnings for injured workers in the system.
- Medical care that was provided under the old workers' compensation system that was considered disabling by many is not longer allowed because of the implementation of treatment guidelines.
- The system of litigation that discouraged return to work has been significantly reformed.
- SB 899 instituted a more efficient return to work program and promotes return to work through permanent disability increases/decreases.

All of the above changes in the workers' compensation system would have the effect of improving outcomes for injured workers and reducing the amount of lost future earnings capacity. As you indicate on page 16 of the study "The RAND study found a significant difference in proportional earnings loss depending upon whether the worker returned to the at-injury employer." This means that the reforms have very well improved the proportional earnings loss for most injured workers. Because of this, CMTA believes that CHSWC should wait until a new FEC study can be completed to attempt any further analysis on the adequacy of benefits with respect to compensating for loss of future earnings capacity.

Timeline for adoption of a new schedule is unreasonable

One of the most troubling recommendations in the study is the relative speed at which the Commission believes a revision of the PDRS should take place. On page 11 the report indicates that a new permanent disability rating schedule (PDRS) should be published by 3/2006, and implemented by 7/1/2006. While CMTA surely understands the importance of having the schedule implemented at a time that corresponds with rate-making processes, we believe that this does not afford policymakers and stakeholders a sufficient amount of time to carefully consider all of the issues involved.

Because of the complex, and relatively controversial nature of the topic being debated, CMTA does not believe that this timeline is appropriate. Despite the best efforts of CHSWC, there are still a number of unanswered questions concerning the need to revise the permanent disability rating scheduled (PDRS) in any form. As we have discussed in the previous sections of this response to the study, we feel that the data and conclusions are fatally flawed and need considerable attention. Considering this fact, the timeline for revision is not practical.

In a number of instances the CHSWC report indicates that a "public policy decision" needs to be made regarding the balance of cost and benefit levels. Stakeholders, regulators and policy makers would have less than two months to have a meaningful debate on the issues involved and draft a new schedule if the CHSWC timeline was

adopted. Andrea Hoch, the former Administrative Director of the Division of Workers' Compensation, convened an advisory committee of over 25 individuals to assist in the development of the current schedule. CMTA would like to see that same type of open and transparent process take place if changes are being considered. Again, the timeline recommended in the study does not afford enough time to engage in this type of process. Employers, as you surely understand, were in an incredibly unfortunate situation prior to the passage of SB 899 and the resulting revision of the PDRS. While the entirety of the reforms is clearly not at stake based on the contents of your report, it must be understood that the employer community will demand a thorough and thoughtful discussion of any recommendation to roll back even a small portion of those reforms. This is especially true when the basis for change is as tenuous as this report. The timeline recommended by the CHSWC report clearly does not provide sufficient time for that type of thorough and thoughtful discussion to take place.

CMTA would like access to comments from peer reviewers

On page 21 of the CHSWC study it is acknowledged that multiple individuals reviewed the study before the draft was submitted for public comment. Included are Dr. Peter Barth, Dr. Leslie I. Boden, Dr. Jeffery Biddle, Christopher Brigham, M.D., and John Burton. CMTA believes that any written communications between CHSWC and these parties should be made available to stakeholders immediately in the interest of full disclosure.

Examples of how the new formula would work are needed

One major recommendation of the study is to develop a new calculation that would divide the average proportional earnings loss by the average whole person impairment established according to the AMA Guidelines.

(average proportional earnings loss for type of injury) * (overall public policy modification) (average WPI for type of injury) Because the basic public policy question that needs to be answered is one of cost versus benefits, it would help policy makers and stakeholders if CHSWC could give examples of how this formula would function under a variety of circumstances. Without actual examples of this proposed formula being included in the study it may be difficult for policymakers and stakeholders to look at the formula and accurately understand how it will perform if adopted and put into use. In order to dispel some of the mystery that is likely to surround this concept, CMTA would suggest that CHSWC include, in an appendix, some illustration of the possible values for the "overall public policy modification" and how those values may affect the overall cost on the workers' compensation system.

Conclusion

While CMTA does recognize that there is a serious debate brewing over the adequacy of the current permanent disability rating schedule, we are concerned that this study will only serve to muddy the complex issue at hand. We have deep concerns with the data selected for analysis, the accuracy of the conclusions, and the direction of the recommendations. Because of this, we would be extraordinarily troubled if this study were presented to stakeholders, regulators and policymakers as an accurate tool for making complex policy changes to the current permanent disability rating schedule. Should CHSWC have any questions regarding the contents of this response, please feel free to contact Jason Schmelzer directly at jschmelzer@cmta.net or 916-498-3322.

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February 14, 2006

Ms. Christine Baker
Executive Officer
State of California Department of Industrial Relations
Commission on Health and Safety and Workers' Compensation
1515 Clay Street, Room 901
Oakland, CA 94612

RE: Public Comments on the CHSWC Permanent Disability Anaysis Released on 2/14/06

Dear Ms. Baker:

On behalf of our employer and provider clients, we applaud the Commission's efforts to streamline our state's permanent disability system by providing recommendations to implement a more accurate and consistent rating schedule for injured workers and insurers and employers who ultimately pay the costs of our permanent disability system.

Modificatons to the existing schedule are needed because it was **never the intention** by the stakeholders, the Legislature or the Governor, to **reduce benefits at the upper end** of the PD scale. **Under the current schedule, we are actually increasing benefits by 30% for psychiatric claims which are reportedly growing in number.**

After careful review of the Commission's recommendations by our counsel, we agree that the recommendations derived from your study should be provided to the policymakers as they requested and to the Governor so that they can analyse your data and choose a specific ratio between percent earnings and percent disability rating.

By way of background, the permanent disability rating system determines how much compensation a worker will get if the worker cannot completely recover from an on-the-job injury. Most permanent disabilities are partial; few are total. Statutory reforms completely exclude some people from receiving permanent disability benefits and reduce the average amount for those who still qualify.

The statutory changes are:

- An estimated 15% reduction due to cases that become zero-rated under AMA Guides. (Working estimate, range of 7% to 30%.)
- Approximately 10% reduction due to changes in the number of weeks of benefits payable for a percentage disability rating.
- Approximately 5% reduction due to apportionment of permanent disability partially resulting from nonindustrial causes.
- Approximately 3% due to adjustments that encourage return-to-work.

With the enactment of SB 899 (Poochigian), California adopted AMA *Guides to the Evaluation of Permanent Impairment* effective in 2005. In 2004 and 2005, RAND published results of a multi-year study of wage losses resulting from industrial injuries in California.

The reform legislation of 2004 (SB 899) requires the rating schedule combine the AMA Guides and the RAND findings. The schedule had to be adopted by 2005. The Administration could only estimate how AMA ratings and earnings losses were related to earnings losses because there was no data on that relationship.

Now that the data is available, it is now possible to develop permanent disability ratings based on American Medical Association Guides that are linked to the average wage losses resulting from industrial disabilities.

Your analysis discovered that statutory changes made by SB 899 reduce PD costs by about one-third; and that the current rating schedule reduces what is left by about half. This leaves overall PD costs down by about two-thirds from 2004 levels, while increasing psych benefits at 30% across the board.

We agree with the Commission's recommendations to amend the permanent disability rating schedule using empirical data combined with a public policy decision on how ratings should relate to earnings losses for two reasons.

The ratings that would be used in the recommended revision are ratings where the workers were not represented by attorneys. These 3342 ratings are slightly less than half the total sample. The average of cases without attorneys is not expected to be influenced by the tactics of attorneys to get cases rated under a more liberal schedule. Also, the comparison data for earnings losses was based on a study of unrepresented case ratings, so ratings in represented cases would not be comparable to the earnings loss data.

It is important to note that the ratings data analyzed by CHSWC are the same data available to the Division of Workers' Compensation. **The data include all 7,134 ratings performed by the DWC using the AMA Guides through January 30, 2006.** We believe that this sample is already large enough to calculate the average rating under the AMA Guides within half a percentage point for all the common types of injury and that modifications need to be addressed now so that employers and insurers will not experience any unexpected increases in the future, i.e., PD benefits increasing or even decreasing again.

Also, a revision of the rating schedule based on this sample would produce a more accurate and consistent schedule than the one now in effect which did not have the benefit of any data.

The CHSWC's recommended schedule includes adjustment factors that accomplish two things:

- Adjustment factors level out the ratio between ratings and earnings losses for various types of injuries, so one type of injury is not consistently over- or under-compensated compared to another type (e.g., knees and shoulders).
- Adjustment factors determine the overall level of ratings. Reductions in ratings are not caused by the AMA Guides (except for the cases that are not eligible for rating at all). The AMA says that its Guides are not for rating permanent disability. **That's why we have adjustment factors.** The choice of those adjustment factors is the reason for the 50% drop in the value of cases that are ratable under the 2005 schedule.
- The analysis illustrates three of the potential ratios between average earnings losses and average ratings. One illustration shows an option that would return the average ratings to where they were before 2005 (for the truly injured workers who are still eligible for compensation under AMA Guides), and another illustration shows an option that would keep the averages where they are today. All of the options would correct for disparities that exist among different types of injuries – such as shoulder or knee injuries – that are over- or under-compensated in comparison to one another.

We agree that the PD schedule should be updated regularly to account for changes in average ratings and average earnings losses. Initially, revisions would be made every two years with updated average rating data. Wage loss studies would also be updated, but less frequently.

We also support the recommendation that when the schedule is amended to achieve the State's policy goals, the Legislature should make the schedule conclusive evidence of the percent of permanent disability (with limited exceptions to be determined).

The CHSWC recommends that the age adjustment in the current schedule, which has been carried over from the past, should be either revised in accordance with RAND findings or deleted entirely, depending on which recommendation is adopted.

However, ratings were reduced only in the cases that are eliminated by AMA in the lower PD ratings which immediately yielded a 10% to 30% savings in overall system costs.

We would also like to express our gratitude to the CHSWC and its staff coordinating the studies with other independent research groups that provided our state's policymakers and Governor with the tools to enact the reforms included in AB 749, AB 227, SB 228 and SB 899. Your studies provided data that, among many other things, **established our Medical Provider Networks; recommended caps on TD; limited Chiropractic visits; developed recommendations for the regulation of the high cost of outpatient surgery centers; identified the exhorbitant costs that employers and insurers were paying in pharmaceuticals; recommendations for the apportionment of PD; and the importance of implementating incentives for workers' and employers through reductions in PD awards for employers who return their employees to work earlier.**

In closing, we would like to thank the CHSWC for providing us this opportunity to comment on your analysis of California's Permanent Disability Rating Schedule. We are confident that with the **Department of Industrial Relations' data and with your efforts,** our policymakers and Governor will now have the tools to establish a better PD Rating Schedule based on the known rather than the unknown.

Respectfully,

Lori C. Kammerer
Philip M. Vermeulen
Kammerer & Company

From: Malcolm.Dodge@OctagonRS.com
Sent: Wednesday, February 15, 2006 5:40 PM
To: CHSWC
Cc: Dira.Pelmore@OctagonRS.com; Carolyn.Bradford@OctagonRS.com
Subject: Re: PD Study

Hi Christine and others at CHSWC,

As a follow-up to the PD report presentation at the Commission hearing on 2/9, I wanted to send a few comments to you about the PD study. I apologize for not responding to earlier studies but hope the Commission can consider these comments in the context of the current PD evaluation process.

One of the things that you are charged with doing is coming up with rating methodologies that are consistent, uniform and objective. Inherent in the current rating methodology is a future earning capacity multiplier that does not appear to take into account whether a worker has or has not returned to work. It would seem that the most signficant factor in assessing future earning capacity is whether or not an injured worker has returned to work. What suggestions might you have for this apparent shortcoming in determining how RTW impacts an injured worker's future earning capacity?

Also, under the old PDRS it was common for medical providers to use pain descriptors to establish disability. For instance, a PD description of constant moderate pain on light work would produce a 25% standard rating. In today's world, pain is limited to 3% and only if objective factors of disability exist to support the pain component. I wonder if in your studies of old PD ratings any effort was made or could be made to distinguish the amount of PD that could be attributed to pain. Given the potentially extreme differences that exist in PD ratings due to the treatment of pain in the ratings, it would seem you would want to make this distinction.

For the subset of claims that would have ratings under both the old and new system, I would want to know how much the new rating differs from the old just because pain is treated differently. Is it possible to develop data along those lines?

Malcolm Dodge
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Oakland, CA 94612
510-302-3043

February 8, 2006

Christine Baker, Executive Officer
Commission on Health & Safety & Workers' Compensation
1515 Clay Street, Room 901
Oakland, CA 94612

RE: Response to Draft CHSWC Report on Permanent Disability Schedule Recommendations

Dear Ms. Baker,

Thank you for the opportunity to comment on the draft recommendations from the Commission on Health & Safety & Workers' Compensation that address the shortcomings of the Permanent Disability Rating Schedule. ***VotersInjuredatWork.org*** is a non-profit organization representing injured workers.

The draft report accomplishes some very important tasks. First of all, it clearly documents that the schedule, as adopted, cuts permanent disability benefits over and above the cuts that were specified in statute. **The fact that workers are experiencing permanent disability compensation cut by over 50% *before* apportionment is the most important finding**. We are also appreciative and supportive of the recommendation that there is sufficient data to warrant changing the schedule sooner, rather than later, because of the severe impact it has on those who have suffered a workplace injury or illness.

We are also pleased that you have clearly stated that, under the former schedule, benefit adequacy was still an issue for consideration; that the former schedule did *not* achieve adequacy levels generally considered to be the goal of workers' compensation programs across the country.

Further, we are happy to see that the Commission sets aside criticisms of the Rand Interim Report. These criticisms are indeed irrelevant because of the requirements in Labor Code Section 4660(b)(2).
The draft report includes a discussion of the important public policy issues of "benefit adequacy and affordability". We agree that these are important concepts for lawmakers to consider. As such, **we recommend that the report therefore include a discussion of the affordability of an increase in the Diminished Future Earnings Capacity adjustment in light of the WCIRB data that shows massive profits as a result of the changes in the law**. For the most part, it appears that the savings passed to employers do not reflect the cuts in the schedule. It is therefore critical that the policy makers

understand that premiums will be largely unaffected. In short, changing the schedule to generally reflect the payment levels under the old schedule is indeed affordable and California should further consider increasing the PD schedule to achieve adequacy as defined by Rand.

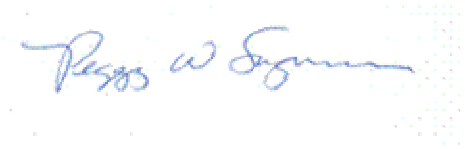
We object to the recommendation that the schedule should enjoy a conclusive presumption. The Commission is suggesting that injured workers should not have the opportunity to prove the true disability levels in their cases, notwithstanding that the schedule, as it stands today, is grossly inadequate. If the administration had listened to all parties and tried to come up with a fair, non-partisan solution, we wouldn't have the problems that we see today. We do not believe that short circuiting the rights of injured workers to prove their cases is the solution to fairness or adequacy. A reasonable schedule is the best route to limiting litigation except in the *LeBoeuf* type cases. It worked under the old system and, with proper adjustments to the schedule, will work under the new system.

We are troubled by the "zeros" where injured workers have lost their jobs and/or cannot perform their old jobs. Clearly, these workers have diminished future earnings capacity and were included in the calculations in the Rand study on earnings losses. On the human side, we have members who have severe limitations and cannot do their old job who will get nothing. The draft report suggests that there is no solution for the "zeros" because of the limitations of the *AMA Guides* to measure these restrictions. We disagree. Some discussion of an adequate benefit for those people who clearly have diminished future earnings capacity is in order. The basis for this lies in the Rand report findings on which the diminished future earnings capacity is required to be based.

Lastly, we believe that there should be some discussion of the need to address the discretion of the administrative director. By her own admission, Ms. Hoch made a policy decision that the DFEC be a positive factor, and that it should begin at 10%. This is a very slippery slope for employers and has proved devastating to injured workers in this case. It also means that another administrative director could make a policy decision that the factor should be 400%. Benefit levels are too important to both employers and employees to be subject to this level of discretion.

Thank you for considering our comments.

Sincerely,



Peggy Sugarman, Executive Director
VotersInjuredatWork.org

Cc: VIAW BoardMembers

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(printedin house)

ADDENDUM PART 2

Independent Peer Reviews

Jeff Biddle, Professor of Economics, Michigan State University

Leslie Boden, Professor of Public Health, Boston University

John Burton, Professor Emeritus, Rutgers University School of Public Health

Comments on CHSWC's 12/16/2005 Draft Permanent Disability Rating Schedule Proposal

Jeff Biddle, Professor of Economics
Michigan State University

In general, I think the proposal offers an excellent set of recommendations for achieving the goals of SB 899. It outlines a procedure for constructing a permanent disability rating schedule that is workable and reasonable given the data currently available, and includes a well thought out plan for revising the rating schedule as new and better data become available.

Some specific points:

1. I found the section on "Costs and Interplay of Disability Ratings. . ." (p. 3-4) a good treatment of a potentially complex matter, in that it left me with a clear understanding of how several different aspects of the reform affected the overall level of benefits. However, I found the quantitative information a little vague -- are the percentage reductions in total benefits referred to additive, cumulative, or something else? For example, one way to read the information might be to say that if the old level of benefits was 100, the "zeros" reduce it by (say) 18% to 82, apportionment reduces that another 5% to about 78 (.95X82), the RTW incentive to .97X78=75.67, the change in weeks to .91X75.67 or about 69, and then the 2005 PDRS takes that down to about 35. But I think there are several other reasonable ways to read these numbers and the accompanying text. Also, most reasonable readings suggest that the revision of the PDRS was by far the biggest single factor in reducing benefits. Is this so? If it is, a little more might be said as to why – in particular, about how the 31% drop in average ratings for injuries ratable under both systems turns into a 51% drop in benefits (I am taking these two numbers from Neuhauser's letter, p. I-8).

2. On a related point, I like the section supporting the recommendation for a public policy discussion on the level of benefits. Although it appears that the new PDRS has, in practice, lowered the level of benefits, that is not why it was promulgated. Instead, it is meant to apportion the total level of benefits provided for PD more equitably among recipients, and it is good for readers of the proposal to know that accepting the proposed approach to further revising the PDRS does not mean accepting a lower level benefits.. The total level of benefits is a matter that can and should be decided separately. That having been said, I think readers might want to know why, in practice, the ratio of disability rating to percentage earnings loss has fallen to .67. Also, would the CHSWC be willing to suggest the use of some empirically derived measure of benefit adequacy (say, a ratio of total PD benefits to one of the various measures of earnings loss described in the RAND reports) as benchmark for evaluating the performance of the reformed system with respect to overall generosity of benefits?

3. SB 899 speaks of measuring diminished earnings capacity by aggregating average percentage of long term loss from "each type of injury for similarly situated employees". The CHSWC proposal describes a procedure for adjusting WPI to reflect the aggregate experience of all those with a certain injury type, but says relatively little about making further adjustments for workers who may have the same injury type but are "differently situated." From looking at the terminology section, I assume that CHSWC would argue that the legislature's concern with accounting for the different "situations" of workers with the same injury type is addressed by the fact that the WPI varies within injury type and that ratings are adjusted for age and occupation after making adjustments for injury type. If so, I think the proposal might be more explicit on this point, and perhaps clarify the discussion of the phrase "similarly situated" in the terminology section. In the absence of such clarifying language, readers might wonder why CHSWC has not proposed that ratios of disability ratings to earnings loss ratios eventually be constructed for each age/injury type combination or each age/injury type/occupation combination.

4. I have some questions about the proposed bi-annual revision of the PDRS. The first concerns the "window" for injury data. That is, will the bi-annual revision use only new rating data from the two previous years, or will it add two years of new data to some of the rating data used to calculate previous FECs? There is a tradeoff here between the desire to have a large sample of ratings, and the desire to have the FECs change in a timely way to reflect changes in the nature of work-related injury. Second, how exactly is information from the periodic wage surveys going to be integrated into the revision schedule? The earnings loss surveys are likely to emerge at irregular intervals. Will the rule be that each bi-annual revision of the PDRS will use the earnings loss data from the most recently completed earnings loss survey? Finally, has the CHSWC considered making a more specific proposal about the timing of new earnings loss studies? As the proposal is written now, there does not seem to be any mechanism for insuring that new studies of acceptable quality really will get done every 4 to 5 years.

Possible typos:

page 1, first para of executive summary: "requiring that the impairment be"

page 4, second para. of Recommended Methods section: "place of the eight f FEC"

page 7, under the heading 2: "number of samples" should perhaps be "size of samples"

page 11, first para.: "any further RTW is adopted"

page 14, first para: I believe the saying is "*Hard* cases make bad law".

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DECEMBER 30, 2005

CHRISTINE BAKER
EXECUTIVE OFFICER
THE CALIFORNIA COMMISSION ON HEALTH AND SAFETY AND WORKERS' COMPENSATION
1515 CLAY STREET, SUITE 901
OAKLAND, CALIFORNIA 94612,

DEAR MS. BAKER,

ATTACHED IS MY REVIEW OF THE DRAFT DOCUMENT: "PERMANENT DISABILITY RATING SCHEDULE PROPOSAL OF THE CALIFORNIA COMMISSION ON HEALTH AND SAFETY AND WORKERS' COMPENSATION." OVERALL, I FIND THAT THIS REPORT CAN PROVIDE A SOLID BASIS FOR A CONSTRUCTIVE REVISION OF THE PERMANENT DISABILITY RATING SCHEDULE (PDRS) TO MAKE IT MORE CONSISTENT WITH THE INTENT OF LABOR CODE SECTION 4660 TO BASE PD RATINGS ON EMPIRICAL DATA, GIVEN THE DATA AND STUDIES THAT ARE CURRENTLY AVAILABLE. I HOPE THAT YOU FIND MY REVIEW USEFUL.

SINCERELY,

LESLIE I. BODEN, PH.D.
PROFESSOR OF PUBLIC HEALTH

TECHNICAL REVIEW OF PERMANENT DISABILITY RATING SCHEDULE PROPOSAL OF THE CALIFORNIA COMMISSION ON HEALTH AND SAFETY AND WORKERS' COMPENSATION

Prepared by:
Leslie I. Boden, Ph.D.
PROFESSOR OF PUBLIC HEALTH
DEPARTMENT OF ENVIRONMENTAL HEALTH
BOSTON UNIVERSITY SCHOOL OF PUBLIC HEALTH

Overall, this proposal is a carefully considered guide to revising the Permanent Disability Rating Schedule (PDRS). It carefully lays out not only recommendations but also the legal, public policy, and empirical basis of these recommendations. This review focuses on the recommendations for revising the PDRS effective July 1, 2006. These include:

1. Data to assist policymakers in implementing the intended level of average overall ratings
2. A method to formulate new future earning capacity (FEC) factors by injury type
3. A change in the age adjustments.

The proposal is based on careful reasoning, and it is also based on the best data and research available on lost earnings and on the relationship between these earnings and PD ratings.

SB 899 appears to have been designed to improve equity among workers receiving PD benefits, reduce dispute over PD ratings, and reduce PD costs (by reducing benefit payments). The Commission draft proposal provides a clear review of the aspects of SB 899 aside from the PDRS that have reduced benefit payments. It then goes on to cover the three issues raised above.

Data to Determine Average Disability Ratings

The first aspect of the PDRS discussed by the proposal is the decision about the average disability rating over all PD cases. The underlying notion is that this decision drives the average benefits per case and therefore both the average disability costs per case and the overall adequacy of benefits (the replacement rate). The proposal suggests that this public policy decision be implemented through a ratio: the ratio of the average rating under the new PDRS to the average proportional earnings loss (derived from pre-reform injuries). A ratio of 1.09 would yield average ratings equal to average ratings under the old PDRS for cases with a non-zero rating under the AMA Guides system. This is a satisfactory way of summarizing this policy decision and can be implemented based on current research. The current PDRS does not address the issue of average ratings at all, so the proposal would represent a significant improvement in the basis of the PDRS because it would make explicit the target impact on costs and PD benefits.

Still, if the underlying policy goal is a specified level of benefit payments or a specified replacement of lost earnings under the revised PDRS, future research could provide a more direct measure of these policy goals. This measure would also be a more accurate measure of these goals than the ratio of the average disability rating in the PDRS to

average proportional earnings losses under the old system. This is because this ratio is limited in two ways: (1) it uses a multiplier that is based on all PD cases in the old system, so it assumes that the proportional earnings losses for cases with non-zero ratings in the current system have the same ratio of average PD ratings to average proportional earnings losses as in the old system. This may be the case, but it has not been studied. The second issue is that the relationship between PD ratings and benefit payments is mediated by other factors like payments per point of PD and adjustments like the age adjustment. These will affect the relationship between benefit payments and earnings losses and should be accounted for in determining the overall level of benefit payments. If feasible, the expected ratio of benefit payments to losses should be determined and provided to policymakers as part of the process for determining how the average disability rating affects both total PD benefits paid and benefit adequacy (the replacement rate). If this is not feasible at this time, the CHSWC approach is adequate as a basis for an initial improvement in the PDRS, but additional research should be conducted on this issue to assist in future revisions.

Determining FEC Factors by Injury Type

The next step in modifying the PDRS is to take into account differences by type of injury in the ratio of average PD ratings to average proportional losses. The AMA Guides are not constructed to achieve equality of this ratio across injury types, and the authors of the Guides explicitly state that lost earnings are not considered in constructing the Guides. The CHSWC proposal suggests that the ratio between average PD ratings and average proportional losses *by type of injury* be used to adjust ratings. This seems like an excellent idea.

The data used for calculating the overall and injury-type ratios include only summary ratings, primarily (in my understanding) because of data availability. This is satisfactory in the near term and much better than simply using unadjusted AMA Guides ratings. Still, in the longer run, it would be preferable to use ratings on which PD is based for all cases, including disputed ones. Disputed cases may be quite different from cases with summary ratings. They certainly tend to be more severe. In addition, we do not know if they may have a different relationship between ratings and lost earnings. I would recommend that the DWC consider requiring that WPI data be provided for each case, whether disputed or not. This would enable a more complete evaluation of the relationship between ratings and losses in the future.

The proposal also discusses a different method to determine the FEC factor for psychiatric disabilities. The approach by and large is a cautious one, which seems appropriate, given that the Global Assessment Function approach is new and has not yet been subject to empirical verification. The use of an FEC factor of 1.45 seems reasonable as a starting point, but, as the proposal suggests, this should be subject to updating in the reasonably near future, as more data become available. It would be useful to have wage loss information on psychiatric disability cases that have been evaluated under the PDRS as soon as is feasible.

Modification of the Age Adjustment

The age adjustment in the current PDRS is not empirically based. The proposal's recommendation for age adjustment factors rely on data from the RAND report: "An Evaluation of California's Permanent Disability Rating System (2005)." Alternatively, if the data from that report are not used, the proposal suggests eliminating the age factor currently used. I think that the RAND data are helpful and strongly suggest that a factor that increases monotonically with age does not comport with the actual relationship between lost earnings and age at injury. Still, the method used in the RAND report assumes that earnings of all age groups are equally affected by injuries with PD ratings of 1% to 5%. It may be that younger workers can either recover more completely or compensate more fully for such impairments, while older workers cannot. We do not know. I would therefore suggest that no age adjustment be used until additional research can be done. One possible approach that could be developed in the future involves using cases with no PD and relatively short-term temporary disability as the comparison group in place of cases with 1% to 5% PD ratings. I understand that data problems stand in the way of doing this, but alternate data sources might be used to overcome those problems.

Summary

Overall, "Permanent Disability Rating Schedule Proposal of The California Commission on Health and Safety and Workers' Compensation" provides an empirically-based proposal which, if adopted, would make the PDRS closer to the stated intentions of SB 899. Additional improvements could me made in the future based on more research to support better targeting of PD benefits in California.

Permanent Disability Rating Schedule Proposal

The California Commission on Health and Safety and Workers' Compensation
Draft January 5, 2006

Comments by John Burton
January 10, 2006

1. This is an excellent report, which is well written and substantially strong. My comments are limited and relatively minor.

2. Page 2, 1st full para, line 6. Substitute "data that have" for "data which has." [Data are plural; "that" is a limiting modifier; and "which" is preceded by a comma, so a triple error!]

3. Page 7, discussion of cases with summary ratings versus cases with ratings in which workers are represented. It would be useful to provide data on the relative proportion of these two types of cases. My impression is that the PPD cases with summary ratings are much less common than cases in which workers are represented. I understand that you are probably limited to cases with summary ratings in this report, but you should at least acknowledge the limits of your approach.

In Berkowitz and Burton (1985), we compared proportional earnings losses for informal cases (Table 10.5) with the earnings losses for formal cases (Table 10.6). For a given level of PPD rating (e.g. 6-10 percent), the earnings losses were much higher for the formal cases. I think the distinction between informal and formal is similar to the distinction you are drawing between workers who received summary ratings and workers who received consultative ratings. If so, then the earnings losses you are showing in your results are relatively conservative (low) compared to what you would expect for workers with consultative ratings. Do you have any data from earlier RAND studies that deals with this point that you could mention here? If not, then perhaps you want to cite the 1985 study to emphasize the point that your procedure is probably conservative in its estimates of wage losses.

4. Page 11, 1st full para (which begins with "Some may question reliance . . ."). I am not 100 percent sure I know how your procedure works. Suppose you have two injuries involving the arm. The first arm is rated at 25% using the *AMA Guides*, and the second arm is rated at 5% using the *AMA Guides*. My understanding of your explanation is that you don't know the relative earnings losses of 25% arms versus 5% arms, and so you don't make adjustments whereby (for example) the 25% arm gets 8 times as much as the 5% arm. But I presume the first arm receives a PD rating that is five times the rating of the second arm. I suggest you provide an example (perhaps in a footnote) of how the approach you are suggesting treats these two arms in order to make your scheme clearer.

5. Page 14, discussion of "prima facie evidence or conclusive presumption." You could add a note referring to the hybrid approach to PPD benefits, which potentially pays

two types of PPD benefits on a sequential basis. The Hybrid Approach is described as System 5 in Reville et al 2005, pages 109-110. This is one way to deal with the serious equity problems that occur when the benefits provided by the scheduled PPD benefits are grossly inadequate compared to the actual and continuing wage losses.

6. Attachment B, 2nd para. In the 2nd and 3rd sentences, I suggest you substitute "assumed" for "taken." I am not clear what the last sentence means. Perhaps this sentence should be substituted:

> The statute permits consideration of other factors that affect diminished future earning capacity in addition to type of injury, but research cannot presently measure more complicated relationships, such as those involving the interactions among type of injury, severity of injury, and occupation.

7. Attachment H. The information in the Average WPI% and Unmodified Adjust Factor columns is missing. The admonitions: "Not final! Do not quote!" presumably should be removed and actual results inserted before this is released.

ADDENDUM PART 3.

Updated analysis of rating data through January 30, 2006

Frank Neuhauser memorandum	February 8, 2006
Frank Neuhauser memorandum	February 20, 2006

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Memorandum

Date: **February 8, 2006**

To: **Christine Baker, Executive Officer, CHSWC**
Dave Bellusci, WCIRB

CC: **Carrie Nevans, AD/DWC, Blair Megowan, Manager/DEU,**

From: **Frank Neuhauser, Survey Research Center/UC Berkeley**

Re: **Analysis of ratings under the new PD schedule, through January 30, 2006**

I have finished analyses of ratings done through January 30, 2006 under the new Permanent Disability Rating Schedule (2005 PDRS). In this memorandum, I compare the average ratings under the 2005 PDRS to comparable groups of ratings under the pre-2005 PDRS. The comparison groups used are similar to those used in the previous memo of December 8, 2005. There was virtually no change in the average rating and average dollar awards for claims rated under the new schedule. The averages have been unchanged over the first year of ratings. However, because the average maturity (time from injury to rating) of the new schedule ratings has increased, the comparison groups of claims rated under the prior schedule have slightly higher average ratings and average indemnity awards. Consequently, the differences between old and new schedule ratings have increases slightly.

The primary comparison is for "summary" ratings for unrepresented workers under each schedule. We include under the heading of "summary" ratings:

- Formal ratings: ratings requested by a Workers' Compensation Judge
- Treating physician reports for unrepresented workers
- Panel QME reports for unrepresented workers

The pool of claims included for this comparison groups should be quite similar for ratings done by the DEU under the old and new schedules.

The secondary comparison is for "consultative" ratings for represented workers under each schedule. We include under this heading of "consultative" ratings:

- Walk-in consultative ratings for represented workers
- Mail-in consultative ratings for represented workers

- A very small number of consultative ratings done for unrepresented workers that "walk-in" to the DEU.

This secondary comparison group may change, over time in composition because of statutory changes introduced by recent reforms. Under SB-899, if the parties in represented cases cannot agree on an agreed medical evaluator (AME) they are required to request a QME panel from the DWC. These reports supposed to be submitted to the DEU for rating. This may substantially increase the portion of ratings on represented cases that are performed by the DEU, and consequently, affect the statistics calculated for these cases. However, since the statute only affects claims with dates of injury after 1/1/05 and the majority of the claims rated so far under the new schedule have injury dates before 2005, I expect that the comparisons are probably valid, at least at this stage.

Current samples:

- Through January 2006, there were 7,134 reports rated under the 2005 PDRS where the data could be analyzed. (a very small number of cases apparently rated under the new schedule had missing data, such as incomplete impairment category numbers.) [There were also a little over 100 claims that were submitted to the DEU and we could identify as rated 0% under the new schedule. These will be evaluated and reported on separately. For several important reasons, it is not appropriate to use these numbers to estimate the portion of claims that will be rated zero under the new schedule]
- Of the claims with positive ratings and complete information 3,342 were "summary" ratings and are included in the primary estimate; 3,761 were for "consults" where the comparison between the two schedules should be considered more carefully.
- A small number of claims were missing key data or failed to match to a similar comparison group.

Average ratings

- The average rating on Summary ratings was 11.32% compared to an average of 19.80% for a comparable group of claims under the pre-2005 PDRS. This represents a decline of 42.8% in the average rating.
- The average rating for Consults was 17.82% compared to an average of 31.90% for a comparable group of cases rated under the pre-2005 PDRS, a decline of 44.1%

Average compensation

- The indemnity award for summary rated claims under the new schedule was $9,737 compared to an average of $21,435 for a comparable group of claims under the pre-2005 PDRS. This represents a decline of 54.6% in the average award.
- The average award for Consults was $18,150 compared to an average of $36,419 for a comparable group of cases rated under the pre-2005 PDRS, a decline of 54.0%

Un-Apportioned Awards				
		2005 PDRS	Pre-2005 PDRS	Difference
Summary				
	Ratings	11.32%	19.80%	- 42.8%
	Dollars	$ 9,737	$21,435	- 54.6%
Consults				
	Ratings	17.82%	31.90%	- 44.1%
	Dollars	$18,150	$36,419	- 54.0%

Apportionment

The extent of apportionment was evaluated for Summary rated claims. (Summary ratings are submitted to a judge to determine whether apportionment is appropriate. Consults are not submitted to a judge and apportionment is generally not considered by the DEU).

- 373 of the 3,342 summary rated cases (11.2%) included apportionment.
- The average percent of the rating apportioned to other cases or causes was 42.5%, that is, on average, 57.5% was awarded in the current case when any apportionment was applied.
- Since prior to SB-899 there was very rarely apportionment applied in the DEU, nearly all of this is attributable to apportionment to causation.
- The total impact of apportionment across all 3,342 summary ratings was to reduce the average rating by 5.5% and the average dollar award by 4.3%

Apportionment—Summary Ratings		
		% of all
Number of ratings	**3,342**	
Number with apportionment	**373**	**11.2%**

Apportionment—Summary Ratings	
Average % apportioned to non-industrial	**42.5%**
Average change in ratings across all cases due to apportionment to causation	**-5.5%**
Average change in dollar awards across all cases due to apportionment to causation	**-4.3%**

Average Rating by Impairment Type:

Summary Ratings		**Average Rating**			
	N	**2005 PDRS**	**Pre-2005 PDRS**	**Difference**	Std. Err. of 2005 PDRS
Wrist/Hand	**422**	**6.2%**	**12.0%**	**-48.3%**	0..31
Arm/Elbow/ Shoulder	**829**	**10.1%**	**16.6%**	**-39.3%**	0.31
Lower Extremity	**728**	**8.0%**	**17.6%**	**-54.3%**	0.28
Spine	**1,226**	**14.9%**	**25.9%**	**-42.4%**	0.27
Psych	**35**	**28.2%**	**24.4%**	**+15.6%**	2.61
Other	**94**	**16.9%**	**19.1%**	**- 11.4%**	1.60

Consult Ratings		**Average Rating**			
	N	**2005 PDRS**	**Pre-2005 PDRS**	**Difference**	Std. Err. of 2005 PDRS
Wrist/Hand	**272**	**9.8%**	**21.3%**	**- 53.8%**	0.63
Arm/Elbow/ Shoulder	**889**	**14.6%**	**28.0%**	**- 48.0%**	0.42
Lower Extremity	**513**	**11.5%**	**29.0%**	**- 60.4%**	0.48
Spine	**1,741**	**19.8%**	**36.1%**	**- 44.9%**	0.32
Psych	**142**	**33.4%**	**36.2%**	**-7.9%**	1.45
Other	**192**	**31.0%**	**32.2%**	**- 3.6%**	1.85

Weighting the results to represent mature claims:
At the request of the Commission and the WCIRB we developed a method of weighting the claims to represent the distribution of mature claims, that is, the average length of time for date of injury to rating for the new schedule claims was made to match that of a cross section of claims under the prior schedule. This had almost no impact on the results. For summary rated claims, the average rating for summary rated claims increased to 11.5% for 2005 schedule claims and 20.1% for a similar group of claims under the prior schedule. This had a very slight impact on the change in the average rating. We are still working on this methodology, so these results should be treated with caution. Most important, we had to drop some comparison groups from the prior schedule ratings and delete some categories under the new schedule because the number of cases in the cells were too small and the estimates on old schedule comparison claims were too unreliable or the weight placed on a very small number of claims under the new schedule was to high. We will continue discussions on this methodology with the Bureau and the Commission and report on the results.

Data:
These data were extracted from the Disability Evaluation Unit database by the Division of Workers' Compensation. We obtained all ratings with in the database, from 1987 to the present, about 1.5 million records. However, for this analysis we restricted the ratings to those performed from 1/1/00 to 12/31/04.

Comparison cases:
In discussion with the WCIRB and DEU, we developed four key criteria to establish comparability across the two rating schedules.

1. **Rating type**: Average ratings vary considerably by rating type, and at this early stage, the distribution of rating types for the 2005 PDRS varied from the distribution seen for all ratings done during the period. Rating types include:
    a. Formal = At request of WCJ
    b. QME reports
    c. Treating physician reports
    d. "Walk-ins" = usually reports handled on for attorneys walking in.
    e. M = Mail-in, similar to walk-in.
2. **Disability category:** Ratings vary greatly depending upon the underlying disability. At this initial stage, the distribution of disabilities is different from the long-term distribution, most important, there is a higher concentration of spinal impairments in the new PDRS ratings. There are a large number of disability categories which makes it necessary to collapse disabilities to a limited number of categories. We did this along the lines of major categories with two special cases.
    a. Group 1: wrist, hands, and fingers
    b. Group 2: all other upper extremity
    c. Group 3: lower extremity
    d. Group 4: spine

e. Group 6: psychiatric
f. Group 9: all other

Psychiatric cases were few, but they represent a major change between schedules. (Vision impairments might, category 5, were examined in the previous work, however they were very infrequent and in the future will be collapsed into the "all other" group.

3. **Date from injury to rating**: Previous work has shown that as the time between injury and rating increases, the average rating increases. Consequently, we broke the time from injury to rating into 100 day increments and matched on this criterion.
4. **Multiple disabilities**: This was the most difficult criterion to design. Not surprisingly, multiple disability cases receive much higher ratings on average than single disability cases. But, the listing of multiple impairments will be more frequent under the 2005 schedule because of the design of the AMA process. Consider spinal impairments. The pre-2005 schedule had only one category. The AMA process allows one to assign at least 3 different impairments (lumbar, thoracic, and cervical) to a spine disability. I decided that we would define multiple impairments as those where the impairments involved two or more of the 7 groups listed above. That is, if two impairments were listed for the lower extremity, they were treated as a single impairment case. An impairment to the lower extremity and upper extremity would be treated as a multiple case. Also, because the number of combinations created the potential for very small cell sizes or a failure to match, I defined multiple impairment on just as a dichotomous choice. This means that the primary impairment was taken as the impairment category for matching and then the additional requirement of multiple or single impairment was required. That is, a primary back impairment with a lower extremity impairment and a primary back impairment with an upper extremity impairment were both treated as a multiple back impairment.

After creating these specific cells, we failed to match the new PD rating to a comparison group in only one case. In a small number of cases (16), the comparison group had fewer than 30 pre-2005 ratings.

Apportionment: Apportionment to causation was introduced as part of the SB-899 reform package. Apportionment is identified by inclusion of the percentage apportioned to the current case (when less than 100%). This indication appeared in 11.2% of cases. We are not positive at this stage whether all DEU raters adhere to this format. We have had discussions with the DEU about being sure that this format is standardized for future ratings. At this stage, the 11.2% figure can be thought of as a lower bound estimate.

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Memorandum

Date: **February 20, 2006**
To: **Christine Baker, Executive Officer, CHSWC**
Judge Lach Taylor, CHSWC
CC: **Carrie Nevans, Blair Megowan, Bill Kahley, DWC**
Dave Bellusci, Ward Brooks, WCIRB
From: **Frank Neuhauser**
Re: **Comparing standard ratings between the previous and current PD schedules**

As requested by the Commission on Health and Safety and Workers' Compensation (CHSWC), I have prepared estimates for the average standard ratings under the 4/1/1997 PD Schedule and the 1/1/2005, AMA-based PD Schedule. These data are comparable to the data used in the RAND wage loss study that was identified by the Legislature as the basis for the future earnings loss (FEC) in the new schedule.

Standard ratings under the 1997 schedule are adjusted for the objective modifier, if present. This is consistent with the procedure that RAND and I designed for the wage loss study. The "standard rating" under the 2005 schedule is the Whole Person Impairment percent derived from the AMA Guides. The 2005 schedule does not include an objective modifier. The ratings estimates made here are not adjusted for age and occupation. In addition, the 2005 estimates are before application of the FEC.

The sample of 2005 schedule ratings, included all 7,134 ratings done by January 31, 2006 that had non-zero standard ratings. Each 2005 schedule rating was matched to a group of similar claims under the 1997 schedule and rated by the DEU between 1/1/2000 and 12/31/2004. These claims were also limited to ratings that involved non-zero standard ratings. The match was based on rating type (summary, consult), the impairment category (as defined in the RAND study), whether there is a second impairment, and the time between injury and rating. If the comparison category under the 1997 schedule had fewer than 30 observations, the rating under the 2005 schedule and those under the 1997 schedule were not included in the analysis.

The results under the 2005 schedule were also weighted to adjust for differences in the "maturity" of the claims, that is, the time from injury to rating. The standard errors for the averages under the 2005 schedule estimated using the weighted estimates and the "n" for the unweighted data.

Average Whole Person Impairment Percent—2005 PD Schedule Summary Ratings, Weighted to reflect distribution of maturity under 1997 Schedule				
RAND Impairment Category	WPI under 2005 Schedule	Number of observed ratings	Standard Error	
SPINE	9.99	1221	0.15	
SHOULDER	4.93	463	0.17	
ELBOW	3.98	74	0.44	
WRIST	4.96	131	0.37	
HAND	3.83	290	0.19	
GRIP STRENGTH	9.17	91	0.33	
OTHER UPPER EXTREMITY	6.88	197	0.35	
HIP	9.49	25	2.02	
KNEE	4.95	546	0.18	
ANKLE/FOOT	4.51	104	0.36	
TOES				Insufficient sample
OTHER LOWER EXTREMITY	7.95	41	1.15	
HEARING	4.92	33	0.84	
INTERNAL ORGANS/SYSTEMS				Insufficient sample
HEART	19.10	25	1.92	
EYES				Insufficient sample
PULMONARY/RESP				Insufficient sample
PTSD				Insufficient sample
PSYCH	16.80	44	1.53	
OTHER	7.15	38	1.23	

WPI calculations under the AMA based schedule were aggregated when the AMA guides result in greater disaggregation. For example, impairments of the spine are defined under a single rating under the 4/1/97 schedule. The 2005 schedule requires rating each of several areas of the spine (cervical, thoracic, and lumbar) separately. Similarly, individual digits of the hand are disaggregated under the AMA approach, where they were aggregated under the 4/1/97 schedule. The above averages were constructed after adjusting for differences in aggregation.

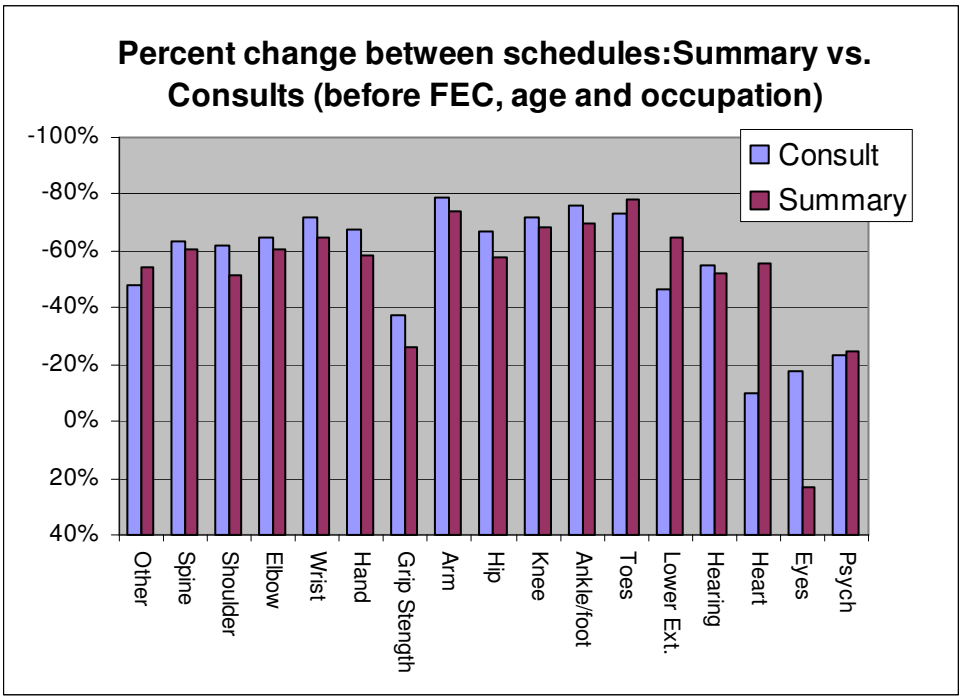
Comparing the change in standard rating between summary and consultative ratings.

The RAND study was based on summary ratings only. The reason for this is that for these unrepresented cases, the summary rating is very likely to be indicative of the final rating and, in the majority of cases, will be the only rating on the case. For Consults, there are typically more than one rating, the ratings are often very far apart and may represent shopping by the parties for relatively more generous or conservative evaluating physicians (cite), and no single report can be assumed an accurate representation of the actual rating received by the worker.

I followed this same approach here so that the Commission could match the results under the AMA-based schedule to the wage loss data in the RAND study.

Some observers have raised concerns that the average ratings for consults may be changing in a manner different from that of summary ratings. While this does not affect the comparison of ratings under the new schedule to wage loss calculated by RAND because the RAND study was also based on summary ratings, I felt it would be useful to compare the percent change in the average rating for consults and summary ratings. I did this analysis separately for each impairment category in the above table.

The graph of the results is presented below. It shows that the percent change for consults was nearly identical to the percent change in summary ratings across nearly all of the categories with samples large enough to yield reasonable statistics.

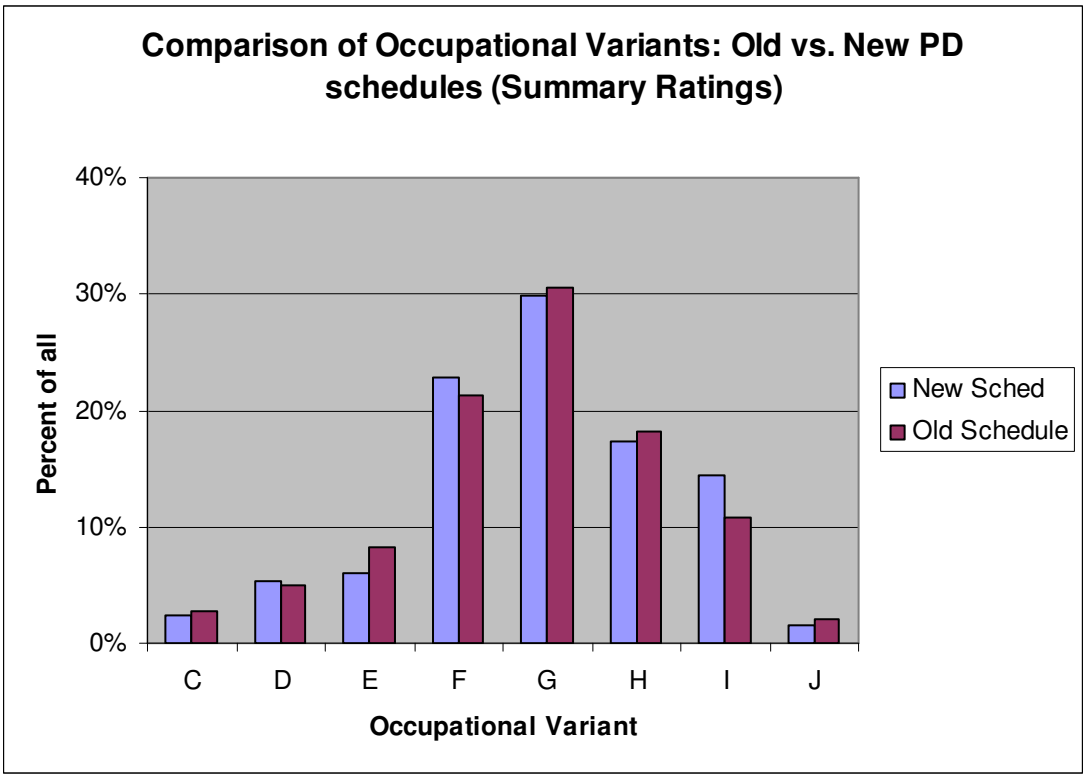


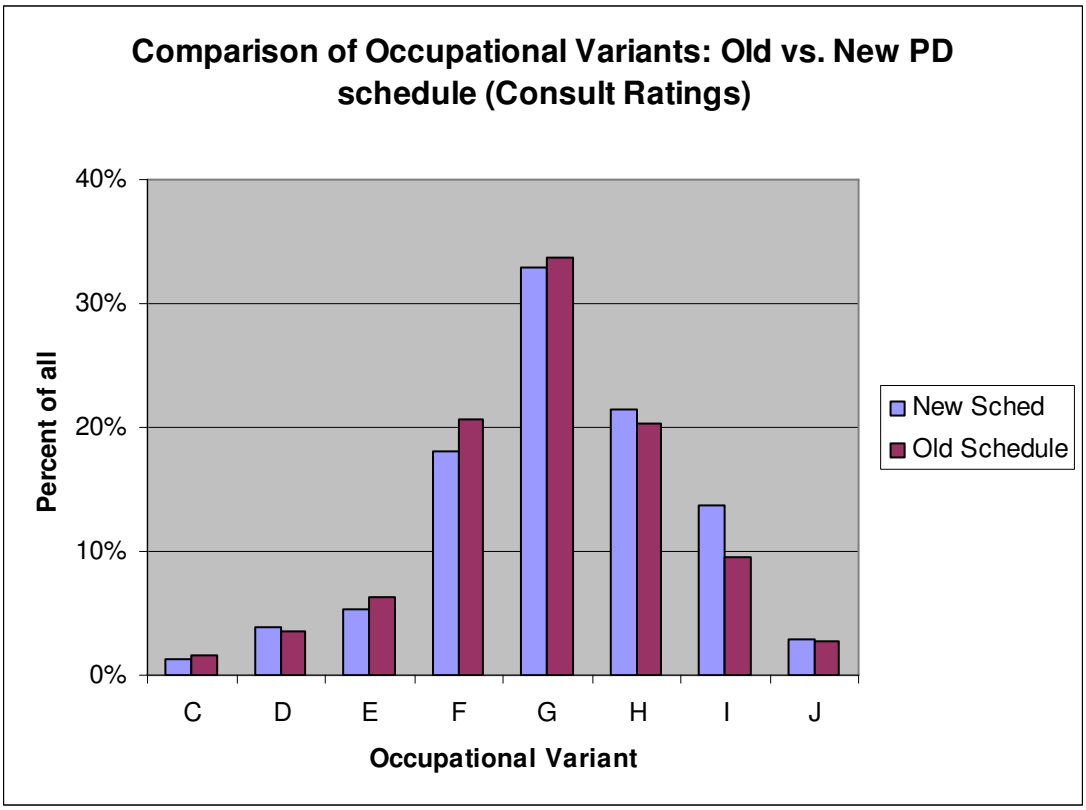
Distribution of Age and Occupation:
Some observers have raised concerns that the distribution of age and occupation adjustments may vary for the new schedule in ways that affect the average adjusted rating and indemnity payments. More specifically, the concern seems to be that the cases initially rated under the 2005 schedule may differ in age and occupation composition from more mature claims.

I examined the average age of injured workers rated by the DEU for the new and prior schedules. I also split the categories by type of rating, summary or consult. The results in the table below indicate there was no important change in the average age of workers.

Average Age of Workers Rated by the DEU		
	4/1/97 Schedule (2000-2004 rating dates)	1/1/2005 Schedule
Summary	44.66	43.25
Consult	41.58	41.58
Sample limited to workers aged 15-74		

The occupation of the worker in combination with the impairment type determines the Occupational Variant. Occupational Variants are letters between C and J. Variants C-E reduce the rating, F is neutral, and G-J increase the rating. A graph of the distribution of occupational variants under the old and new schedules is presented below for both summary and consult ratings. Again, there is almost no change in the distributions between schedules.

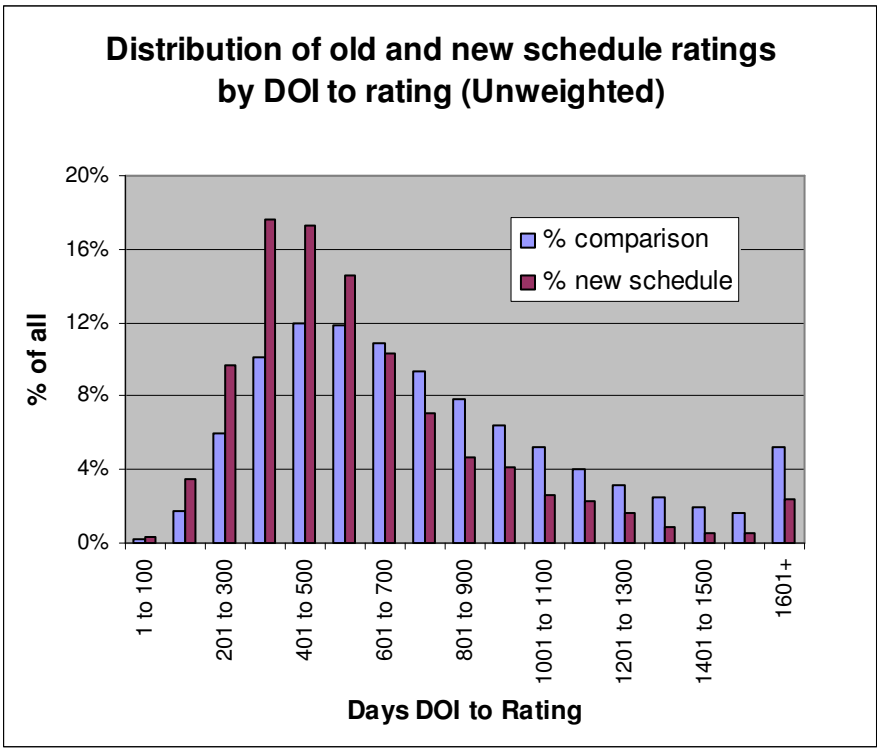


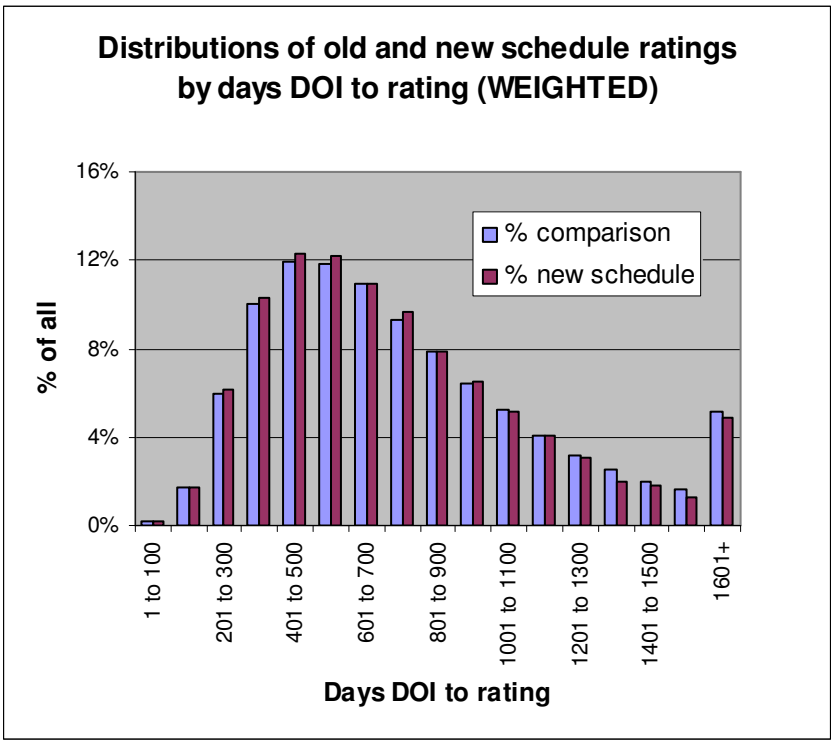

Comparison of Occupational Variants: Old vs. New PD schedule (Consult Ratings)
40%
30%
20%
10%
0%
Percent of all
C
D
E
F
G
H
I
J
Occupational Variant
New Sched
Old Schedule

Maturity adjustments

Even though the new schedule is operative for initial PD determinations on or after 1/1/2005 rather than the date of injury, the maturity of the claims rated under the new schedule is less than that of a cross section of cases from 2000-2004 rated under the prior schedule. The graph below gives the distribution of claims by 100 day increments between the date of injury and the date of rating.

There are differences in the maturity of cases. Consequently, the initial table in this memorandum is based on weighting the ratings under the new schedule to reflect the distribution of maturity under the prior schedule (see the second chart below). The result is to increase the average standard rating observed by a small, but not insignificant percentage. However, when comparing between the two schedules, the weighting had the affect of increasing the average rating under the 4/1/97 schedule by slightly more than the percent increase for the new schedule.




Distributions of old and new schedule ratings by days DOI to rating (WEIGHTED)
16%
12%
8%
4%
0%
% of all
% comparison
% new schedule
1 to 100
201 to 300
401 to 500
601 to 700
801 to 900
1001 to 1100
1201 to 1300
1401 to 1500
1601+
Days DOI to rating

ADDENDUM PART 4.

Illustrations of Adjustment Factors with Public Policy Options
Updated February 23, 2006

This is an update of Attachment H in the report approved on February 9, 2006. The average Whole Person Impairments have been re-weighted for maturity as described in the February 20, 2006 Neuhauser memo. As a result of the re-weighting, the calculated FEC factors are slightly lower than in the prior illustration. The following table is left blank where there is still insufficient data to calculate FEC factors. With the larger sample now available, FEC factors can be calculated for more types of injury so that over 95% of all injuries can now be covered by injury-specific FEC factors.

While the paper does not recommend a particular choice for the overall level of average ratings, the three options mentioned in the paper (0.55, 1.00, and 1.09) are illustrated.

Type of Injury (Impairment # in 2005 PDRS)	Average Earnings Loss %	Average WPI %	Unmodified Adjustment Factor	Public Policy Option (three options shown)	Final Adjustment Factor
Spine (15.xx.xx.xx)	18.45	9.99	1.85	1.09	2.01
				1.00	1.85
				0.55	1.02
Shoulder (16.02.xx.xx)	13.08	4.93	2.65	1.09	2.89
				1.00	2.65
				0.55	1.46
Elbow (16.03.xx.xx)	6.23	3.98	1.57	1.09	1.71
				1.00	1.57
				0.55	0.86
Wrist (16.04.xx.xx)	10.84	4.96	2.19	1.09	2.38
				1.00	2.19
				0.55	1.20
Hand/Fingers (16.05.xx.xx – 16.06.xx.xx)	4.89	3.83	1.28	1.09	1.39
				1.00	1.28
				0.55	0.70
Arm – grip/pinch strength (16.01.04.00)	8.73	9.17	0.95	1.09	1.04
				1.00	0.95
				0.55	0.52
Arm – other (16.01.01.01 – 16.01.03.00 and 16.01.05.00)	17.98	6.88	2.61	1.09	2.85
				1.00	2.61
				0.55	1.44
Hip (17.03.xx.xx)	21.10			1.09	
				1.00	
				0.55	
Knee (17.05.xx.xx)	9.31	4.95	1.88	1.09	2.05
				1.00	1.88
				0.55	1.03
Ankle and Foot (17.07.xx.xx – 17.08.xx.xx)	9.28	4.51	2.06	1.09	2.24
				1.00	2.06
				0.55	1.13
Toes (17.09.xx.xx)	9.09			1.09	
				1.00	
				0.55	

Type of Injury (Impairment # in 2005 PDRS)	Average Earnings Loss %	Average WPI %	Unmodified Adjustment Factor	Public Policy Option (three options shown)	Final Adjustment Factor
Gen. lower ext. (17.01.xx.xx – 17.02..01.00 and 17.04.10.00 and 17.06.10.00)	17.21				
Hearing (11.01.xx.xx)	17.69				
Gen. abdominal (06.xx.xx.xx)	19.24				
Heart (03.xx.xx.xx – 04.03.02.00)	30.82				
Vision (12.xx.xx.xx)	5.68				
Lung (04.04.00.00 – 05.xx.xx.xx)	25.44				
PT Head (13.01.00.00 and 13.03.00.00)	25.57				
Other	9.04				
Psyche (14.01.xx.xx)	49.01	16.80	1.45 (see text for derivation of psyche FEC)	1.09 1.00 0.55	1.45 (or lower)