

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

NOTICE OF PROPOSED RULEMAKING

Workers' Compensation – Schedule for Rating Permanent Disabilities

NOTICE IS HEREBY GIVEN that the Acting Administrative Director of the Division of Workers' Compensation (hereinafter "Administrative Director"), exercising the authority vested in her by Labor Code sections 59, 133, 4660, and 5307.3, proposes to adopt regulations contained in Article 7 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, section 9805, relating to the Schedule for Rating Permanent Disabilities.

PROPOSED REGULATORY ACTION

The Division of Workers' Compensation, proposes to adopt Article 7 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, section 9805.

Amended section 9805 Schedule for Rating Permanent Disabilities, Adoption,
Amendment.

TIME AND PLACE OF PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, either orally or in writing, with respect to the subjects noted above. The hearing will be held at the following time and place:

Date: Monday, July 21, 2008
Time: 10:00 A.M. to 5:00 P.M., or until conclusion of business
Place: Ronald Reagan State Building – Auditorium
300 South Spring Street
Los Angeles, California 90013

Date: Tuesday, July 22, 2008
Time: 10:00 A.M. to 5:00 P.M., or until conclusion of business
Place: Elihu Harris State Office Building – Auditorium
1515 Clay Street
Oakland, California 94612

The state office buildings and their auditoriums are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other type of reasonable accommodation to facilitate effective communication for persons with disabilities, are available upon request. Please contact the State Wide Disability Accommodation Coordinator, Kathleen Estrada, at 1-866-681-1459 (toll free), or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation or 5:00 p.m., whichever is earlier. If public comment concludes before the noon recess, no afternoon session will be held.

The Administrative Director requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Department of Industrial Relations, Division of Workers' Compensation. The written comment period closes at **5:00 P.M., on July 22, 2008**. The Division of Workers' Compensation will consider only comments received at the Division by that time. Equal weight will be accorded to comments presented at the hearing and to other written comments received by 5 P.M. on that date by the Division.

Submit written comments concerning the proposed regulations prior to the close of the public comment period to:

Maureen Gray
Regulations Coordinator
Division of Workers' Compensation, Legal Unit
P.O. Box 420603
San Francisco, CA 94142

Written comments may be submitted by facsimile transmission (FAX), addressed to the above-named contact person at (510) 286-0687. Written comments may also be sent electronically (via e-mail) using the following e-mail address: dwcrules@dir.ca.gov.

Unless submitted prior to or at the public hearing, Ms. Gray must receive all written comments no later than **5:00 P.M., on July 22, 2008**.

AUTHORITY AND REFERENCE

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in her by Labor Code sections 59, 133, 4660, and 5307.3.

Reference is to Labor Code sections 4660, 4662, 4663, and 4664.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Labor Code section 4660(a) provides that 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.

Labor Code section 4660(b)(1) provides that, in determining the percentages of permanent disability under this section, that 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, 5th Edition (AMA Guides).

Labor Code section 4660(b)(2) provides that, in determining the percentages of permanent disability under 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 section further provides that 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.

Labor Code section 4660(c) provides that the Administrative Director shall amend the permanent disability rating schedule at least once every five years.

Labor Code section 4660(d) provides in part that the schedule shall promote consistency, uniformity, and objectivity, and that any revision made 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.

These proposed regulations implement, interpret, and make specific section 4660 of the Labor Code as follows:

Section 9805 - Schedule for Rating Permanent Disabilities, Adoption, Amendment

This section is amended to provide that the method for the determination of percentages of permanent disability is set forth in the Schedule for Rating Permanent Disabilities, which adopts and incorporates by reference the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment, 5th Edition. The section provides that the schedule shall be amended at least once every five years. Subdivision (a) is added to provide that for dates of injury on or after January 1, 2005, and for dates of injury prior to January 1, 2005 unless otherwise exempt pursuant to subdivision (d) of Labor Code section 4660, the method for the determination of percentages of permanent disability is set forth in the Schedule for Rating Permanent Disabilities, which has been adopted by the Administrative Director effective January 1, 2005. Subdivision (b) is added to provide that for dates of injury on or after January 1, 2009, the method for the determination of percentages of permanent disability is set forth in the Schedule for Rating Permanent Disabilities, which has been adopted by the Administrative Director effective January 1, 2009. The amended section provides that both schedules are incorporated by reference and can be downloaded from the Division of Workers' Compensation website at <http://www.dir.ca.gov/dwc/dwcrep.htm>. A description of how the January 1, 2009, Permanent Disability Rating Schedule differs from the current January 1, 2005 Permanent Disability Rating Schedule is set forth below:

SECTION 1—INTRODUCTION AND INSTRUCTIONS

I. Introduction

The section has been revised to provide that the schedule applies to compensable injuries received on or after January 1, 2009. The paragraph stating that the calculation of a permanent disability rating is based on an evaluating physician's impairment rating in accordance with the AMA Guides has been brought forward in the section. Further, the section has been revised to provide that the extent of permanent disability that results from an industrial injury can only be assessed once an employee's condition becomes permanent and stationary.

II. Rating Procedures

A. Use of the AMA Guides

The section has been reworded to clarify the use and abbreviations of the whole person impairment scale, the upper extremity scale, and the lower extremity scale.

B. Calculation of Rating

1. Impairment Number

This section remains the same as it is in the January 2005 PDRS.

2. Impairment Standard

This section is revised to reflect the proposed age adjustment factors: the impairment standard is assumed to represent the degree of impairment for a theoretical average worker, i.e., a worker between the ages of 22 to 51 and with average occupational demands on all parts of the body.

3. Adjustment for Diminished Future Earning Capacity

This section is revised to reflect updated Future Earning Capacity (FEC) adjustment values and FEC ranks. The adjustment for an injured worker's diminished future earning capacity is applied to the whole person impairment standard as determined by the evaluating physician.

The FEC adjustment is determined according to a numerical formula based on standard permanent disability ratings and empirical data that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The formula, a ratio of average standard rating to proportional wage loss for each injury category, was devised by the RAND Institute for Civil Justice in its "Evaluation of California's Permanent Disability Rating Schedule" (December 2003). The result is that the injury categories are placed into different ranges according to their ratio of average standard rating to proportional wage losses. Each range will generate an assigned FEC adjustment for each injury category.

Empirical data recently collected by the Division of Workers' Compensation was used to establish the ratio of average California standard ratings under the 2005 Permanent Disability Rating Schedule to proportional wage losses for each of 11 injury categories. The data is summarized in the following three-part report issued by the Division of Workers' Compensation: "Uncompensated Wage Loss for Injured Workers with Permanent Disabilities" (May 2007); "Wage Loss for Injured Workers with Permanent Disabilities" (June 2007); and "Return to Work Rates for Injured Workers with Permanent Disability" (January 2007). These ratios are listed in Table B below and on page 1-8 of the proposed PDRS. The range of the ratios for the 11 injury categories is .498 (ankle) to 2.462 (knee). This numeric range was divided into eight equal ranges, ranked from 1 to 8. See Table A below and on page 1-7 of the proposed PDRS. Each injury category falls within one of these eight ranges, based on its rating/wage loss ratio.

A series of FEC adjustment factors were established to correspond to the range of ratios. The smallest adjustment factor is 1.2 which will result in a 20% increase when applied to the AMA whole person impairment rating. The largest is 1.5 which will result in a 50% increase. The FEC adjustment factors are listed in Table A. AMA whole person impairment ratings for injury categories that correspond to a greater relative loss of earning capacity will receive a higher FEC adjustment.

The ratio of standard ratings to wage loss and the corresponding rank for each injury category is provided in Table B. To adjust a whole person impairment standard for earning capacity, the impairment standard is multiplied by the appropriate adjustment factor from Table A and round to the nearest whole number percentage. Section 2 of the proposed PDRS contains a table which provides the earning capacity adjustment for all impairment standards and FEC ranks.

Various injury categories in Table B of the proposed PDRS do not list a ratio of average standard ratings to proportional wage loss. These injury categories, which together account for less than 3% of all ratings, include eyes, toe(s), hearing, respiratory/lung, heart, hip, soft tissue, and post-traumatic head syndrome. Empirical data does not exist to establish a valid statistical

sample of standard ratings under the January 2005 PDRS for these injury categories. They remain in the same FEC rank as they were initially assigned under the January 2005 PDRS.

Table A

Range of Ratios			
Low	High	FEC Rank	Adjustment Factor
2.217	2.462	One	1.2
1.971	2.216	Two	1.24286
1.726	1.970	Three	1.28571
1.481	1.725	Four	1.32857
1.235	1.480	Five	1.37143
0.989	1.234	Six	1.41429
0.744	0.988	Seven	1.45714
0.498	0.743	Eight	1.5

Table B

Part of the Body	Ratio of Rating over Losses	FEC Adjustment Factor	FEC Rank
Knee	2.462	1.2	1
Loss of grasping power	1.735	1.28571	3
Psychiatric	1.670	1.32857	4
Elbow	1.623	1.32857	4
Hand/Fingers	0.944	1.45714	7
Shoulder	0.897	1.45714	7
Wrist	0.692	1.5	8
Spine	0.686	1.5	8
Other Arm	0.621	1.5	8
Other Leg	0.586	1.5	8
Ankle	0.498	1.5	8
Eyes		1.2	1
Other		1.24286	2
Toe(s)		1.37143	5
Hip		1.37143	5
Heart		1.37143	5
Soft Tissue		1.41429	6
General Abdominal		1.41429	6
PT Head syndrome		1.41429	6
Respiratory/Lung		1.45714	7
Hearing		1.5	8

The FEC Rank for the "Other" category is based on average ratings and proportional earning losses for the following impairments:

Impaired rib cage
Cosmetic disfigurement
General chest impairment
Facial disfigurement or impairment
Impaired mouth or jaw
Speech impairment
Impaired nervous system
Vertigo
Impaired sense of smell
Paralysis
Mental Deterioration
Epilepsy
Skull aperture

4. Occupational Grouping

This section is revised to clarify that the requirements of an injured worker's specific occupation at the time of injury is done by categorizing the workers job duties based on a predetermined set of occupational groups. Primary consideration is given to the employee's actual job duties when assigning an occupational group number.

5. Occupational Variant

This section remains the same as it is in the January 2005 PDRS.

6. Occupational Adjustment

This section remains the same as it is in the January 2005 PDRS.

7. Age Adjustment

This section is revised to indicate that the age adjustment table in Section 6 of the proposed PDRS has been changed based on empirical evidence showing that the percentage of proportional wage loss (the average difference in earnings of comparable uninjured co-workers compared to injured workers, as a percentage of the uninjured group's wages) is higher for the youngest category of workers (21 years of age and younger) and the oldest category of workers (52 years of age and older). For workers between the ages of 22 and 51, there is no statistical correlation between age and wage loss.

8. Final Permanent Disability Rating

This section remains the same as it is in the January 2005 PDRS, with a reference to Subdivisions C.1. and C.2. of the schedule, pages 11 and 12, concerning the combining of multiple impairments and disabilities.)

9. Rating Formula

This section of the Schedule is amended to reflect the revised FEC Adjustment Factor and revised Age Adjustment Factor. The formula is as follows:

15.01.01.00 – 6 – [8]9 – 470H – 12– 15 PD

Each component is described below:

15.01.01.00 – Impairment number for cervical spine, soft tissue lesion

6 – Whole person impairment standard

[8] – FEC Rank

9 – Rating after adjustment for earning capacity based on FEC Rank 8 (FEC Adjustment Factor 1.5)

470 – Occupational group number for Furniture assembler, heavy

H – Occupational variant

12 – Rating after occupational adjustment

15 – Permanent Disability rating after adjustment for age of 55

C. Additional Rating Procedures

This section remains the same as it is in the January 2005 PDRS.

SECTION 2—IMPAIRMENT NUMBER/EARNING CAPACITY ADJUSTMENT

Section 2 contains AMA impairment numbers (which identify the injured body part, organ system, and/or nature of injury) and their corresponding FEC Rank. The FEC adjustment table at the end of Section 2 applies the FEC Adjustment Factors (reflected in the applicable FEC Rank) to any impairment standard rating. The section is amended to reflect the revised FEC Ranks and FEC adjustment factors.

SECTION 3—OCCUPATIONS AND GROUP NUMBERS

This section remains the same as it is in the January 2005 PDRS.

SECTION 4—OCCUPATIONAL VARIANTS

This section remains the same as it is in the January 2005 PDRS.

SECTION 5—OCCUPATIONAL ADJUSTMENT

This section remains the same as it is in the January 2005 PDRS.

SECTION 6—AGE ADJUSTMENT

Empirical data collected by the Division of Workers' Compensation - a sample of workers injured in 2001 and 2002 - indicates that the youngest workers (20 years of age and younger) and the oldest workers (55 years of age and older) experienced the greatest proportional wage loss as a result of an occupational injury. (Proportional wage loss is defined as the average difference in earnings of comparable uninjured co-workers compared to injured workers, as a percentage of the uninjured group's wages.) For workers whose age fall in the middle range (between the ages of 20 and 55), proportional wage loss does not have a statistical

correlation to age (i.e., an injury to a 25 year old has the same effect as an injury to a 45 year old). The proposed revisions will adjust the age adjustment factors to correspond to empirical data that delineates the relationship between proportional wage loss and age.

SECTION 7— EXAMPLES

This section sets forth new examples of permanent disability ratings illustrating all the basic components of disability rating, including converting AMA scales, adjusting for diminished future earning capacity, occupation, and age. This section is amended to reflect the revised FEC rank and adjustment factors, and the revised age adjustment factors.

SECTION 8— COMBINED VALUES CHART

This section remains the same as it is in the January 2005 PDRS.

DISCLOSURES REGARDING THE PROPOSED REGULATORY ACTION

The Administrative Director has made the following initial determinations:

- Significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states: None.
- Adoption of this regulation will not: (1) create or eliminate jobs within the State of California; (2) create new businesses or eliminate existing businesses within the State of California; or (3) affect the expansion of businesses currently doing business in California.
- Effect on Housing Costs: None.
- Cost impacts on representative private person or business: The Administrative Director has determined that the proposed regulations will not have a significant adverse economic impact on representative private persons or directly affected businesses. While the proposed revisions will increase the average dollars awarded in permanent disability awards by 16%, an increase of between \$200,000,000 and \$400,000,000 statewide in permanent disability benefits, the increase will be absorbed by other savings resulting from the workers' compensation reforms enacted in recent legislation, most notably SB 899.
- All employers that are governed by the California workers' compensation laws, including the State itself and every local agency, are required to pay permanent partial disability indemnity to injured workers whose injury results in permanent partial disability. Because of the legal requirement to pay permanent partial disability indemnity to injured workers, as many as 400,000 California businesses may be impacted, which represents all business with at least one employee. Approximately 500 insurance carriers and 3,000 self-insured employers, which include private corporations and government agencies, may also be impacted.
- Generally, the proposed regulations will result in cost increases affecting all businesses and other entities that employ individuals in the state of California. It is estimated that changes to the Future Earning Capacity Adjustments from the 2005 PDRS will increase the average permanent disability rating by 13%; the average dollars awarded will be increased by 16%. The percentage increases approximate between an additional \$200,000,000 and \$400,000,000 paid in permanent disability benefits.

FISCAL IMPACTS

- Costs or savings to state agencies or costs/savings in federal funding to the State: See above. State government operates under the same workers' compensation system as all other employers in California. As noted above, there will be an increase in permanent partial disability costs due to revisions in the schedule.
- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district. The potential costs imposed on all public agency employers by these proposed regulations, although not a benefit level increase, are not a new State mandate because the regulations apply to all employers, both public and private, and not uniquely to local governments. The Administrative Director has determined that the proposed regulations will not impose any new mandated programs on any local agency or school district. The California Supreme Court has determined that an increase in workers' compensation benefit levels does not constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. See *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46. The potential costs imposed on all public agency employers and payors by these proposed regulations, although not a benefit level increase, are similarly not a new State mandate because the regulations apply to all employers and payors, both public and private, and not uniquely to local governments.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. (See "Local Mandate" section above.)
- Other nondiscretionary costs/savings imposed upon local agencies: None. The proposed regulations do not apply to any local agency or school district. (See "Local Mandate" section above.)

EFFECT ON SMALL BUSINESS

The Administrative Director has determined that the proposed regulations will result in cost increases of varying degrees to small businesses. All employers that are governed by the California workers' compensation laws, including small businesses, are required to provide workers' compensation benefits, and specifically required to pay permanent partial disability indemnity to injured workers whose injury results in permanent partial disability. As noted above, the proposed regulations will increase the average permanent disability rating by 13%; the average dollars awarded will be increased by 16%.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Administrative Director must determine that no reasonable alternative considered or that has otherwise been identified and brought to the Administrative Director's attention would be more effective in carrying out the purpose for which the actions are proposed, or would be as effective and less burdensome to affected private persons than the proposed actions.

The Administrative Director invites interested persons to present reasonable alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

PUBLIC DISCUSSIONS OF PROPOSED REGULATIONS

Pursuant to Government Code section 11346.45, the text of the draft proposed regulations was made available for pre-regulatory public comment by and advisory group of interested stakeholders and the general public through a posting on the Division's Internet message board (the DWC Forums).

AVAILABILITY OF INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS, RULEMAKING FILE AND DOCUMENTS SUPPORTING THE RULEMAKING FILE/INTERNET ACCESS

An Initial Statement of Reasons and the text of the proposed regulations in plain English have been prepared and are available from the contact person named in this notice. The entire rulemaking file will be made available for inspection and copying at the address indicated below.

As of the date of this Notice, the rulemaking file consists of the Notice, the Initial Statement of Reasons, proposed text of the regulations, pre-rulemaking comments and the Economic Impact Statement (Form STD 399). Also included are studies and documents relied upon in drafting the proposed regulations.

In addition, the Notice, Initial Statement of Reasons, and proposed text of the regulations being proposed may be accessed and downloaded from the Division's website at www.dir.ca.gov. To access them, click on the "Proposed Regulations – Rulemaking" link and scroll down the list of rulemaking proceedings to find the Audit Regulations link.

Any interested person may inspect a copy or direct questions about the proposed regulations and any supplemental information contained in the rulemaking file. The rulemaking file will be available for inspection at the Department of Industrial Relations, Division of Workers' Compensation, 1515 Clay Street, 17th Floor, Oakland, California 94612, between 9:00 A.M. and 4:30 P.M., Monday through Friday. Copies of the proposed regulations, Initial Statement of Reasons and any information contained in the rulemaking file may be requested in writing to the contact person.

CONTACT PERSON FOR GENERAL QUESTIONS

Non-substantive inquiries concerning this action, such as requests to be added to the mailing list for rulemaking notices, requests for copies of the text of the proposed regulations, the Initial Statement of Reasons, and any supplemental information contained in the rulemaking file may be requested in writing at the same address. The contact person is:

Maureen Gray
Regulations Coordinator
Department of Industrial Relations
Division of Workers' Compensation
P.O. Box 420603
San Francisco, CA 94142
E-mail: mgray@dir.ca.gov

The telephone number of the contact person is (510) 286-7100.

CONTACT PERSON FOR SUBSTANTIVE QUESTIONS

In the event the contact person above is unavailable, or for questions regarding the substance of the proposed regulations, inquiries should be directed to:

George P. Parisotto or Minerva Krohn
Division of Workers' Compensation
P.O. Box 420603
San Francisco, CA 94142
E-mail: gparisotto@dir.ca.gov

The telephone number of this contact person is (510) 286-7100.

AVAILABILITY OF CHANGES FOLLOWING PUBLIC HEARING

If the Administrative Director makes changes to the proposed regulations as a result of the public hearing and public comment received, the modified text with changes clearly shown will be made available for public comment for at least 15 days prior to the date on which the regulations are adopted.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, the final Statement of Reasons will be available and copies may be requested from the contact person named in this notice or may be accessed on the Division's website at www.dir.ca.gov.

AUTOMATIC MAILING

A copy of this Notice, the Initial Statement of Reasons, and the text of the regulations, will automatically be sent to those interested persons on the Administrative Director's mailing list.

If adopted, the regulations with any final amendments will appear in Title 8 of the California Code of Regulations, section 9805. The text of the final regulations also may be available through the website of the Office of Administrative Law at www.oal.ca.gov.