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VIA E-MAIL

Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142
ATTN: DWC Forums

Subject: Forum Comments -- Permanent Disability Rating Schedule
Administrative Director Regulation Section 9805

Labor Code section 4660

Labor Code section 4660 requires that the permanent disability rating schedule (PDRS) include several specific elements, including consideration of the employee's age and diminished future earning capacity. Section 4660(b) defines diminished future earning capacity as follows:

> (b) 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.

Regulation section 9805.1 required the Division of Workers' Compensation to compile data for 18 months and to evaluate the aggregate effect of the diminished future earning capacity adjustment on permanent partial disability ratings under the 2005 PDRS and revise the schedule, as necessary, based on that analysis.

DWC Analysis

The 2005 permanent disability rating schedule, developed by the DWC and administrative director Andrea Hoch was based on the methodology and the findings of the 2003 RAND Report mandated by the statute. That methodology has been validated by the WCAB in a number of En Banc opinions and the various attacks on the FEC variant have been rejected by a number of District Courts of Appeal. By continuing to rely on the RAND methodology, Administrative Director Nevans has complied with the dictates of the statute and continued a process approved by the WCAB and validated by the Courts of Appeal.

The AD has continued to use the methodology devised by RAND for the December 2003 assessment of injured workers' long-term loss of income that the Legislature specifically included in Labor Code section 4660. The result of this methodology is that the injury categories are given FEC ranges according to their ratio of average standard rating to proportional wage losses. The

Division then collected data over an 18-month period to evaluate the continued viability of that methodology and issued a three-part analysis (2007 DWC Analysis) that established the rationale for the proposed revision to the schedule.

It is the statutory responsibility of the AD to establish a permanent disability assessment process that is fair, accurate, and based on empirical evidence. As the 2007 DWC Analysis indicates, the AD has enhanced the methodology and updated the rating formula using the most current, relevant, and comprehensive data.

Diminished Future Earning Capacity

While the higher end of the updated FEC range (1.5 modifier producing an FEC ranking of 8) may provide greater equity at the lower and mid ranges of PD, the AD must also consider that this change will have a ripple effect at the highest end of the rating spectrum. How many additional life pensions and total permanent disability ratings will be created simply by this technical revision to the FEC? By attaching the higher FEC range to certain injuries, the Division must also ensure that the resulting ratings are, across the board, justified.

Injury Type

The reordering of injury types is, again, based on data compiled by the DWC Analysis and indicates that relative earnings loss has changed.

Age

The revision to the age variant, while based on the DWC data assessment, is a significant change to the permanent disability evaluation process. Traditionally, the belief in California has been that the permanent residuals from work-related injuries have a more extreme financial consequence for older workers, and the age variant has been geared to compensate for that.

The proposed revisions to the age variant are based on findings from the 2003 RAND Report indicating that the percentage of proportional wage loss is actually higher for the youngest category of workers (21 and younger) and the oldest workers (52 and older). To the extent that these findings are based on empirical evidence, the conventional wisdom underlying the age variant should be revised.

Thank you for your consideration. Please contact me for further clarification or if I can be of any other assistance.

Sincerely,

Michael McClain
General Counsel and Vice President

MMc/pm

cc: Claims Committee
Legal Committee
Associate Members