



California Workers' Compensation Institute
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VIA E-MAIL

Carrie Nevans, Administrative Director
Maureen Gray, Regulations Coordinator
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142
ATTN: DWC Forums

Subject: Permanent Disability Rating Schedule – 45-day Comment Period
Administrative Director Regulation Section 9805

Dear Mesdames Nevans and Gray:

Labor Code section 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 (5th 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.

DWC Analysis

Section 4660 requires that the permanent disability rating schedule (PDRS) contain several specific elements, including consideration of the employee's age and diminished future earning capacity. Section 4660(b) specifically defines diminished future earning capacity to include the following elements. The FEC variant must be:

- a numeric formula based on empirical data and findings;
- an aggregate of the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees;
- based on the 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
- based upon data from additional empirical studies.

The Initial Statement of Reasons demonstrates, in detail, the empirical evidence relied upon by the AD for the proposed revision to the PDRS. In the Statement of Reasons, the AD has provided references to the several DWC analyses of permanent disability ratings over an 18-month period, a study by the Commission on Health and Safety and Workers' Compensation, and a monitoring report by the Workers' Compensation Insurance Rating Bureau to support the proposed revisions to the PDRS. The AD discusses the findings of the analyses and how they relate to the elements of the statutory definition of diminished future earning capacity.

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 as required by Labor Code section 4660. That methodology has been validated by the WCAB in a number of En Banc opinions. By continuing to rely on the RAND methodology, administrative director Nevans has complied with the dictates of the statute and continued a process specifically approved by the WCAB.

The RAND methodology dictates that the injury categories are given FEC ranges according to the ratio of the average standard rating to proportional wage losses. The Division has collected individual permanent disability ratings over an 18-month period to evaluate the continued viability of the RAND methodology and issued a three-part analysis (2007 DWC Analysis) that established the rationale for this proposed revision.

The statute dictates that the AD “shall formulate the adjusted rating schedule based on empirical data” and “shall amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years.” Section 4660 gives the AD authority over the express elements of the permanent disability rating formula contained in the statute, nothing more.

In litigation over the validity of the 2005 PDRS, the California Applicants’ Attorneys Association raised the issue of whether the 2005 schedule was based on the RAND Interim Study (cited in the statute), whether data from additional empirical studies should have been considered, and, more specifically, whether the AD should have conducted a “crosswalk” study or a comparison analysis to correlate the ratings assigned under the 1997 schedule to those assigned under the 2005 PDRS.

Regarding the crosswalk study, the Workers’ Compensation Appeals Board in Costa v. Hardy Diagnostic (2006) 71 CCC 1797 ruled that additional empirical evidence was not available and the Board accepted AD Hoch’s determination that any comparison between the old and new permanent disability rating systems was, essentially, useless because of the inconsistency among evaluating physicians and the disparity between the old and new rating philosophies. The Board’s reasoning in Costa has been amplified in the recent En Banc opinion in Boughner v. Comp USA, (2008) 73 CCC _____), in which the Board, based on similar evidence, determined that the applicant failed to demonstrate that the AD’s adoption of the 2005 PDRS was arbitrary and capricious, or inconsistent with section 4660(b)(2).

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 available.

Additional Empirical Studies

Empirical evidence is evidence that is derived from observation or experiment, verifiable or provable by means of observation or experiment. What “additional empirical studies” can be considered to establish the diminished future earning capacity? The only empirical studies that can be used to validate the FEC variant are those that specifically relate to the statutory definition. The FEC variant must be:

- a numeric formula based on empirical data;
- an aggregation of the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees; and
- based on the 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.

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 to revise the schedule, as necessary, based on that analysis. The AD has accomplished that task and the empirical evidence developed by the Division specifically addresses the definition of diminished future earning capacity contained in section 4660.

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. The AD should consider how many additional life pension awards 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 social policy 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 methodologies and 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 can be appropriately modified.

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

Sincerely,

Michael J. McClain
General Counsel and Vice President

MMc/pm

cc: Destie Overpeck, DWC Counsel
CWCI Medical Care Committee
CWCI Claims Committee
CWCI Legal Committee
CWCI Regular Members
CWCI Associate Members