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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 than 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
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 than 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 1, 2004 to December 31, 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. Two Thousand and Four 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 19, 2004 and the new PDRS that 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 than 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 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 consider those comments 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 Mr. 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 19, 2004 to recognize the need for policy makers to continuously review the effects of recent reform measures. Additionally as necessary to provide changes to those reforms that serve the interest of achieving and maintaining an 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.