

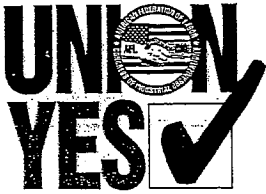
# Kansas AFL-CIO

2131 S.W. 36th St.

Topeka, KS 66611

785/267-0100

Fax 785/267-2775



President  
Steve Rooney

Executive Secretary  
Treasurer  
Andy Sanchez

Executive Vice  
President  
Bruce Tunnell

Executive Board

Jane Carter  
Kurt Chaffee  
Larry Horseman  
Jim Keele  
Larry Landwehr  
Mark Love  
Kevin McClain  
Roger Maack  
Mike Maloney  
Chad Manspeaker  
Lisa Ochs  
Emil Ramirez  
Clay Rodgers  
Deb Shepard  
Mark Shughart  
Richard Taylor  
Brian Threadgold  
Jason Vellmer

SENATE BILL 73  
TESTIMONY OF KANSAS AFL-CIO  
IN OPPOSITION  
FEBRUARY 4, 2013  
SENATE COMMERCE COMMITTEE

## APPENDIX

The testimony of the Ks. AFL-CIO was filed with the committee on Friday, Feb 1, 2013.

The Ks. AFL-CIO seeks to add this Appendix to supplement that testimony in OPPOSITION to SB 73.

Thank you.

Respectfully submitted.



**THE AMA GUIDES SIXTH EDITION TASK FORCE MEMBER REPORT**

On June 26 2008; June 27, 2008; July 30, 2008 and July 31, 2008 a panel of nine met to discuss the problems associated with incorporating the sixth edition of the AMA guides into the Iowa Workers Compensation legal system. One additional meeting is scheduled August 26, 2008.

The Task Force has no final decision making authority. The Task Force is charged with making findings and recommendations. The Task Force is composed of a non voting deputy commissioner moderator, two former deputy commissioners now working as ALJ's in non work comp assignments, two attorneys who practice primarily for the defense, two attorneys who practice primarily for the claimant and two accomplished physicians with extensive Iowa workers compensation experience.

Upon completion of the fourth day of study, after numerous presentations by 6<sup>th</sup> edition contributors and Iowa doctors, the Task Force voted to recommend rejection of the sixth edition. The Task Force also recommended rejection of Chapter 14 of the sixth edition after a lukewarm endorsement by a well recognized Iowa clinical psychologist. Chapter 14 had shown promise. The Task Force also concluded that the sixth edition modifies some impairment ratings both up and down. Some ratings stay the same. Insufficient data is available to make any sound conclusions concerning global impact on impairment ratings.

Upon completion of significant study and four days of discussion the following opinions are expressed if the sixth edition is adopted as a guide by the Iowa Workers Compensation Commissioner under rule 876 IAC 2.4(85,86) . The following opinions are solely attributable to the undersigned and should not assume consensus of any other task force member. However the conclusions are largely the result of significant debate among the members.

The AMA Guides to the Evaluation of Permanent Impairment are used primarily by state workers' compensation systems. About 80% of the guides use is in work comp. A wealth of credible opinions brings forth the conclusion that doctors should not rate impairment under the sixth edition without first receiving formal training. Impairment analysis under the sixth edition is complex and burdensome. This conclusion was voiced not only by Task Force doctors but by contributors to the sixth edition. A doctor should expect 24 to 30 hours of self study to establish proficiency. In the alternative 8 hours of seminar training may suffice.

The fifth edition of the guides is deficient in that it fails to properly address epicondylitis, fibromyalgia and mental impairments. The Task Force is unwilling to recommend piecemeal incorporation of the sixth edition, even temporarily, to address deficiencies of the fifth. The practicing Iowa lawyers understand that sixth edition ratings are admissible evidence even if not incorporated by rule 2.4. In litigated cases these conditions will most likely receive ratings and compensation where causation is established. However, since 80% of cases are not litigated a significant number of claimants will have compensable injuries that remain uncompensated because rule 2.4 makes the fifth edition prima facie evidence of compliance. The conclusion is that the majority of the three referenced ratable work injuries remain uncompensated.

It is recommended that the commissioner focus primarily on voluntary compliance when considering changes to the Iowa impairment rating system. The vast majority of Iowa work injuries resolve voluntarily. The Iowa work comp commissioner's 2007 statistics show about 22,000 work injury reports with a resulting 4,000 petitions filed and 600 hearings held. Thus, 80% of reported injuries are resolved without commissioner involvement. It is Iowa's voluntary compliance that allows Iowa's work comp system to function efficiently with only 29 employees. Voluntary compliance is driven by the predictability and consistency of permanent partial disability and industrial disability values. Sending even a small number of additional cases into litigation status will swiftly drain the commissioner's resources. Voluntary compliance is of paramount importance with litigation concerns a distant second. The Task Force is composed primarily of

litigation oriented individuals; consequently the focus often turns to litigation problems. The commissioner is discouraged from considering litigation as the primary consideration.

If adopted by Iowa the complicated nature of the sixth edition ppi paradigm will create a cascade effect within the industry. The following predictions are made should Iowa adopt the sixth edition as a guide to impairment under rule 2.4. Analysis is broken down by the end user in a cost, benefit and risk format. As previously stated the predictions below are solely the opinions of the undersigned. These are opinions and not factual findings.

## **1. Employer, Insurance Company, Self Insured**

### *COST:*

Incorporation of the AMA Guides sixth edition results in increased costs for the insurer, employer and self insured employer. First, there are costs associated with administration of the new guides. Insurance adjusters and claims personnel require training on the new guides due to the marked differences when compared to the prior editions. The sixth edition is so revolutionary that even doctors are advised to avoid its use without proper training. Due to normal and ongoing high turnover in claims personnel this administrative cost continues indefinitely.

The insurer and self insured need to adjust reserves in low back cases which receive higher ppi ratings under the sixth edition. This is especially true in non litigated cases where voluntary payments generally increase with the higher ppi ratings. This is offset somewhat by the lower ratings offered for less frequent cervical spine injuries in non litigated cases. Since low back injuries are more common an overall reserve increase is expected in non litigated industrial disability cases.

The overall industrial disability cost in litigated industrial disability cases does not change from past experience.

There is anecdotal evidence that the sixth edition lowers ppi values in scheduled member injuries. This information fails to take into account the frequency of particular injuries. The sixth edition is at significance variance with the fifth edition with respect to scheduled member ppi ratings. Some ratings go up and some go down. To conclude this as a windfall to the insurance company and self insured is foolishly premature. The prudent claims manager must closely monitor scheduled member injury reserves to avoid future financial difficulty. It is more than likely that scheduled member payouts based on ppi ratings under the sixth will be a wash to the insurer. Most doctors will not study the guides carefully and just carry on with ratings traditionally given in years past. Nevertheless, scheduled member reserves must be studied in great detail by the insurance company and self insured.

### *Benefits:*

The purported advantage of the sixth edition is interrater consistency. The sixth edition provides a single number for a given diagnosis rather than a reference range. This should improve ppi rating consistency between physicians with proper training. This probably won't happen for years. First, the Iowa legal system is adversarial and divisive by nature. Since employer selects the treating doctor the conservative rating is generally granted by the treating physician. The section 85.39 IME is generally claimant oriented. The sixth edition is subject to the same conservative/liberal bias as the fifth edition. It is unlikely this benefit will accrue for many years, if ever.

### *Risk:*

Under the sixth edition the insurance carrier and self insured experience markedly increase costs for medical testing and section 85.39 IME exams. The sixth proves a tedious and convoluted

method for determining impairment as compared to the fifth. Increased time preparing sixth edition ppi reports demands higher fees for section 85.39 IME exams. Some sections seem to demand testing before assessing impairment. If the treating doctors read the sixth edition carefully it may change habits of testing and treatment resulting in higher costs. Most doctors will not read the sixth that closely and continue on with what they believe is reasonable and necessary.

The sixth edition initially increases litigation costs. The new methodology invites a variety of legal issues. A fair number of cases of first impression will work their way through the system during the sixth edition's infant years. Doctor's lack of training and experience result in a significant increase in taking of medical depositions. The legal costs level off after about two to three years and gradually move closer to pre sixth edition levels.

In summary, the greatest risk presented is improper reserving of scheduled member cases and un-represented industrial disability cases. Absent a true statistical analysis of a large number of cases the insurance carrier and self insured are in the dark for years concerning true costs of scheduled member ppi and non litigated industrial disability cases.

## **2. Unrepresented Claimants:**

### *Cost:*

The unrepresented claimant comprises the vast majority of Iowa work comp claims. Incorporation of the sixth edition polarizes lawyers into those who specialize in work comp and those who don't. This phenomenon has been growing for years. The high learning curve in the sixth hastens the trend. This in turn hurts the unrepresented claimant in the more rural areas who only have access to lawyers engaging in general practice. The recent increase in travel costs chills access to proper representation for a small number of claimant's with serious injuries.

A second class of unrepresented workers suffers under the sixth edition: Those who fall into a category with injury that would have been rated higher by the fifth than the sixth. There is also a category that receives no rating under the sixth but is rated under the fifth. For the individual the cost is significant. The average injured worker will not understand that under the fifth they could receive a rating. As such it will not impugn the integrity of the system. Unions are quick to adapt to this inequity pushing such cases to litigation resulting in precedent setting case law. Those without union representation remain largely uncompensated.

Increased travel costs result because many rural doctors refuse to provide sixth edition ratings due to the steep learning curve.

### *Benefits:*

The unrepresented claimant benefits most in low back claims where the impairment ratings increase. Such claimant's realize higher net proceeds from voluntary payment of the ppi rating. Since low back injuries are the more frequent claim this is a significant benefit to the represented and unrepresented claimant.

Ppi ratings increase under the sixth in certain types of scheduled member injuries resulting in higher voluntary payments. The sixth provides a means to rate impairment of mental, epicondylitis and fibromyalgia work injuries.

In theory, the sixth edition should bring the ppi ratings closer together even when different doctors rate the same condition. This is an untested and unlikely outcome because the sixth edition's complexity encourages its improper interpretation.

### *Risk:*

The unrepresented claimants' greatest risk is falling into one of the injury categories that result in lower or zero ratings under the sixth as compared to the fifth.

The second risk involves the class of immigrant workers with English as a second language. The sixth edition DASH and QUICK DASH system modifier is not appropriate for those with poor English skills. Many immigrants cannot complete this aspect of a sixth edition rating. As such, they lose out on one aspect of the sixth edition which increases ppi.

### **3. Claimant Attorneys and Represented Claimant's:**

#### *Cost:*

Claimant attorneys experience a modest to moderate decline in revenues after incorporation of the sixth edition primarily due to voluntary ppi payments in low back cases and increased administrative lost time attributable to training.

The prudent claimant representative immediately takes intense training on use of the sixth edition. Self study is not sufficient to properly understand the convoluted paradigm. Furthermore, each time a supplement is presented the prudent claimant attorney takes a refresher course. Waiting to take a training course until after the supplements are published leaves the client at a significant disadvantage where sixth edition ppi ratings are at issue. The training is less important in cases of industrial disability and far more important to cases classified as scheduled member. Claimant lawyers devote more time to less valuable scheduled member cases resulting in revenue diminution. Familiarity with the sixth edition provides a strategic advantage in medical depositions. Initial deposition preparation time of 3 to 4 hours per chapter is generally required.

#### *Benefits:*

Claimant attorneys appreciate some scheduled member cases with higher ppi ratings as compared to the fifth edition. Claimant attorneys trained on the use of the sixth edition gain a strategic advantage in medical depositions as it is likely that treating doctors will be slow in understanding the new paradigm. Advanced training allows claimant's attorneys to educate their IME doctors to the pitfalls and advantages of the sixth edition.

Lawyers who specialize in work comp see increased client base as general practitioners shy away from cases with complicated medical issues involving the sixth edition. Knowledge of the new ppi scheduled member ratings allows the claimant attorney to screen out the injuries which are now lower under the sixth edition.

#### *Risk:*

Failure to take immediate and continuing training on the sixth edition use creates significant risk of poor awards and the rare legal malpractice claim. Since the sixth edition lowers and eliminates certain ppi ratings for specific injuries, the unwary lawyer may accept cases that receive inconsequential awards under the sixth. Awards and overall generation of revenues in work comp scheduled member injury cases is strongly related to a lawyer's knowledge of the sixth edition. This phenomenon will continue for several years until the Iowa doctors become familiar with the complicated new impairment system.

### **4. Defense Lawyers and Clients:**

#### *Cost:*

As noted for claimant lawyers, the savvy defense lawyer immediately takes training in the sixth edition with refresher courses each time a supplement is published. Intimate knowledge provides

a strategic advantage in medical depositions. The savvy defense lawyer warns the client of higher legal costs continuing for several years due to the number of cases of first impression generated by changes in the sixth edition. Defense lawyers initially dedicate 3 to 4 hours of extra time preparing for medical depositions per chapter of the sixth edition.

*Risk:*

Defense lawyers who fail to warn and counsel clients of increased legal costs and the need to train insurance claims personnel, experience erosion of client confidence. Failing to get on top of the issue immediately and stay ahead results in loss of client base.

*Benefit:*

The administrative cost of training is offset by increased billings due to increased litigation in scheduled member cases and cases with issues of first impression. Defense lawyers experience an overall increase in revenues for several years while the cases of first impression work their way through the system. This flurry of litigation, after a few years, levels off but never does move back to pre sixth edition levels as the sixth will always require additional preparation time.

**5. Medical Professionals:**

*Cost:*

Doctors using the sixth edition face even greater challenges to their time. Incorporation of the sixth edition forces a costly learning curve with a choice of 8 hours seminar time or 24 to 30 hours of self study. Ppi evaluations under the sixth edition take significantly more time as compared to the fifth edition.

Complexities of the edition are detailed to treating and evaluating doctors by the various special interest groups within days of the sixth edition incorporation to rule 2.4. Doctors are promptly informed by this grapevine that training is mandatory prior to issuance of ratings under the sixth edition. Claimant lawyers inform and help educate the IME doctors while defense lawyers train and inform the treating employer selected doctors. As a result, a consensus emerges within weeks. The informed work comp doctor refuses to evaluate under the sixth edition until after attending a formal training course. The prudent and time starved doctors delay any training course until the sixth is supplemented at least once and maybe until after several supplements are issued. Many doctors refuse to rate under the sixth edition resulting in reduced access to doctors willing to rate impairment and increased claimant travel costs borne by employers.

*Benefit:*

The sixth edition provides a solid number for ppi instead of a reference range. The sixth should eventually lessen the need for follow up letters, depositions and calls questioning the ppi rating. The ratings should be more consistent. However the opinion of one medical professional on the task force accurately predicts:

"The issue in the 6<sup>th</sup> edition is not interrater reliability; it is the data, the quality of the data, and the biases of the doctors who provided the numbers in the grids. If the underlying numbers are incorrect, or biased inappropriately in one direction or the other, then the outcome is still wrong, regardless of interrater reliability."

This benefit is years in the future, if ever. Resolution of the ppi number differences in scheduled member cases is important. If the sixth is adjusted to match the ppi ratings in the fifth, faster and more widespread acceptance is expected.

This issue of changing impairment numbers was noted by the fifth edition authors at page five. The fifth edition authors indicated that numbers should not change arbitrarily.

Doctors are justified in charging higher fees when evaluating ppi under the sixth edition.

The sixth edition provides a guide to evaluate mental conditions which is absent in the fifth edition. Other conditions evaluated by the sixth are not addressed in the fifth. This impact is small due to the low volume of Mental Mental and Physical Mental claims.

*Risk:*

Early implementation of the sixth edition results in a marked increase in doctor depositions. This trend lasts for several years at a minimum. The time starved work comp doctor must manage this aspect of the practice to avoid being overwhelmed with depositions. Some doctors refuse to use the sixth edition to rate impairment because of this consequence.

The sixth edition also provides some treatment and ethical dilemmas for the treating doctor. The sixth edition seems to require certain tests prior to granting ppi; whereas, clinical examinations are sufficient for evaluation in the fifth edition. The conflicting views on testing and treatment present ethical questions for the work comp doctor. Since most doctors fail to read the sixth closely these ethical issues are overlooked. Should the sixth cause a liability or ethical issue for just one doctor, such would undoubtedly result in wholesale rejection by the medical community.

## **6. Workers Compensation Commissioner Administrative Costs**

*Cost:*

Little in the way of training is required if the sixth edition is adopted as a guide. The significant increase in doctor depositions will train the deputy staff on the nuances of the sixth edition. The significant increase in deposition submission places a strain on deputy time.

The greater cost stems from appellate review. Adoption of the sixth edition generates a considerable flurry of litigation. Issues of first impression abound including but not limited to:

- a) Does the sixth edition ppi rating in industrial disability cases incorporate traditional industrial disability factors? Does the ppi rating invade the province of the Commissioner?
- b) Does the sixth edition ppi rating amount to a true rating of loss of use as defined by Miller making it the better rating for scheduled members as compared to other guides?
- c) Does the sixth edition discriminate against immigrants and those with lower education and intelligence in the DASH and QUICK DASH modifier?
- d) Does the sixth edition invade the province of the legislature by changing ppi values arbitrarily based on a consensus of doctors and not based on any scientific data?
- e) Does the sixth edition violate Iowa law by rating simultaneous nerve injuries at 100% for the first, 50% for the second and zero % for the third?

Increases in deputy work load due to medical depositions will be easy to manage. Increased deposition submission does not significantly impact day to day operations for the deputy. Adjustments to work load shifting deputy hours to appellate hours causes increased time from hearing to decision at the deputy level. This impact will last at a minimum of three years. It takes at least 6 to 9 months before the flurry of litigation begins.

In Summary, the Commissioner's office experiences a considerable increase in appellate caseload resulting in a marked time increase from submission to final decision. Shifting of deputy work to appellate work is inevitable to balance the work load.

*Benefit:*

Adoption of the sixth under rule 2.4 has no practical benefit other than preparation for the seventh edition publication. Implementation and acceptance may take a full five years. If the seventh is based on the same paradigm and evolutionary the transition to the seventh edition is simple.

*Risk:*

There is significant risk to the Workers Compensation Commissioner's office. The paradigm shift in the sixth edition causes protracted litigation burdening the Commissioner's resources to the point that significant case backlogs exist at both the deputy and appellate level. The degradation of the litigation system spills over causing poor voluntary compliance by insurance carriers and self insured's. Case loads increase quickly and significantly.

*Summary:*

The sixth edition paradigm is not the future for Iowa. It is not a better system for Iowa work comp than the fifth edition. Iowa should continue with the fifth edition with modifications to correct some minor problems. Iowa should entertain the creation of its own diagnosis based scheduled member impairment guide that is simple and easy to use.

Respectfully submitted by,  
Marlon D. Mormann, Administrative Law Judge  
August 7, 2008.

**7. 8/12/2008 Response to Mormann Analysis by Peter J. Thill, Defense Attorney**

**Alternate Summary**

After a thoughtful review of the 5th Edition, 6th Edition with Errata, information and writings from other states workers' compensation systems, and various commentary by medical professionals actively involved in the creation and editing of the 6th Edition, I would not support adoption of the 6th Edition at this time or a separate Iowa Guide to the Evaluation of Permanent Impairment. I would be in favor of revisiting the possibility of adopting the 6th Edition after at least two years of data is available from other states or research groups comparing a large number of injuries rated under both the 5th and 6th Editions to determine the overall impact on ratings and whether interrater reliability is actually increased under the 6th Edition as suggested in the Guide in way that is fair to both Claimant and Employer/Insurance Carrier. Increased interrater reliability would in theory drive down litigation costs and increase predictability in scheduled member cases. Everyone in the system would benefit by increased interrater reliability in a way that is fair to all parties. The first most important step in ensuring increased interrater reliability is training in the use of any new Guides adopted by Iowa in the future. Without proper and consistent training of all medical professionals that will use a new addition of the Guides, interrater reliability would be only a possibility, not a probability. The complexities of 6th Edition warrant, in my view, a serious consideration of requiring state mandated training of all medical professionals that will use the Guides. The goals of state mandated training in the use of the Guides would be to increase interrater reliability, increase predictability in scheduled member cases, and thus decrease litigation costs (including decreased IMEs and depositions).

Peter J. Thill, Attorney at Law-

**8. AUGUST 26, 2008 FINAL TASK FORCE MEETING**



The task force met for a final meeting on August 26, 2008. The task force voted against recommending that Iowa create its own impairment guide notwithstanding a vote to create some type of guide to cover conditions not rated by the fifth edition. The task force voted to recommend several non-substantive changes to rule 2.4. A final presentation was given by Dr. Rondinelli, who generously volunteered his time on two occasions. The 52 page sixth edition errata published to the internet was discussed. One task force member printed the errata and taped its amendments into her copy of the sixth edition. The cut and tape task consumed 3.5 hours notwithstanding the member's intimate familiarity with the sixth edition guides. It would take much longer for a person not familiar with the guides. Concerns were expressed about the errata and the ongoing updates. The errata, considering its ongoing growth, increase the steep learning curve for the sixth edition. It appears the sixth edition was rushed to publication without proper review. It is obvious that the AMA used an inappropriate model for authoring the sixth edition when employing a committee of highly qualified doctors to form a consensus.

## **9. IOWA IMPAIRMENT GUIDE**

A suggested long term solution for Iowa is to publish a guide to impairment addressing those few issues corrected by the sixth edition. The Iowa guide should also provide impairment ratings for more prevalent scheduled member injuries.

Immediately publishing by rule impairment rating guides for carpal tunnel syndrome, epicondylitis and fibromyalgia encourages voluntary compliance.

Insufficient information is available to make suggestions on impairment ratings in work related mental cases. The undersigned is gravely aware that mental injury impairment has been ignored by Iowa work comp for decades. The sixth edition chapter 14, while holding some promise, remains deficient. The errata resolve some issues. Many task force members simply refuse to accept the sixth edition in any form due to the steep learning curve. The trepidation of task force members is not well founded. Its incorporation would only affect a small number of Iowa mental health practitioners in an equally small number of cases. Iowa should not become the sixth edition chapter 14 guinea pig. Chapter 14 deserves a second review after two years.

The commissioner is encouraged to explore the Utah impairment guide as a model for creating an easy to understand and user friendly Iowa impairment guide. The Utah guide author indicates that no restrictions exist on its use. The Utah guide is not endorsed for its content but suggested only as a guide model written by a single author. Creation of an Iowa guide which complies with Iowa law is not expensive nor is time consuming. An easy to use guide promotes voluntary compliance. The easier it is to understand the greater the interrater reliability that results.

The Iowa commissioner is discouraged from creating a new guide for body as a whole injuries.

## **10. SUGGESTED FORMAT FOR AN IOWA IMPAIRMENT GUIDE**

Iowa has much to learn from the AMA sixth edition mistakes. The AMA wrote a book by committee consensus. The AMA chose some of the best doctor's in the world as co-authors. This utopian management philosophy is highly impractical. Choosing the best doctors in the field and asking them to concede their expertise on any issue is not realistic. The result is a guide bloated with inconsistencies and burdensome procedure. The AMA violated some basic management tenets:

The best way to kill a good idea is to send it to committee.

No business achieves financial success when managed by consensus.

Autocracy is the most efficient form of governance.

The commissioner is encouraged to create a diagnosis based system of impairment rating for one to three conditions. Carpal tunnel syndrome is a good diagnosis to start with because of its prevalence. Historical ppi numbers from the fifth edition and case law are incorporated into the Iowa guide to maintain the status quo for impairment value. Fibromyalgia and epicondylitis impairment numbers are compiled from the AMA and other state's guides. Doctors now rate injury impairment based on experience as opposed to training and education. The percentage numbers used below are illustrative only.

A suggested Iowa impairment guide format follows:

### **CARPAL TUNNEL SYNDROME IMPAIRMENT GUIDE**

**0% No impairment**

**1% Good outcome**

**3% Average outcome**

**5% Poor outcome**

Treating and examining doctors need no more instruction than the above to evaluate CTS impairment. Doctors simply answer a ppi question with no impairment, good outcome, average outcome or poor outcome. Doctors *no longer* use percentage numbers. The claims rep correlates the description of causally connected impairment outcome with the rule's CTS ppi number and pay accordingly. Doctors go back to practicing medicine rather than math. Minimal, Moderate and Maximal may also substitute for Good, Average and Poor language depending on the author's preference. The concept is to use one word that will categorize the treatment outcome which in turn corresponds to the final impairment value.

This guide model is so simple that an experienced claims examiner can make payment based on reviewing medical notes rather than waiting for an impairment rating. A simplified system dramatically increases voluntary compliance and reduces litigation for scheduled member injuries. The guide costs nothing to publish as it is posted to the commissioner's web page for easy access.

The commissioner is discouraged from creating an impairment guide for every diagnosis. The focus is best placed on injuries of high frequency. Consideration for inclusion are the top five or ten scheduled member injuries. Creating a simple guide for CTS alone will have a dramatic positive impact on voluntary compliance. A CTS guide provides necessary feedback for future diagnosis based, experience rated guides.

The greatest danger faced by the commissioner when creating an Iowa guide stems from litigation and political influence. Considerable pressure to over define each diagnosis and rating category is expected. Special interests may lobby to create ranges in each category such as 1% to 2% for good and 5% to 7% for poor. This would again force doctors into the mathematics realm, a concept that has not worked well under the AMA guides. The longer the definition, the less user friendly. The more discretion in impairment ranges the less predictable the outcome. Any Iowa work comp guide must be so user friendly that the majority of doctors pick up the concept after five minutes of self study. The Iowa guide is best authored by one person much like what occurred in Utah where implementation has experienced success. Editorial review is through the rule making process.

11. In conclusion, it is best to remain with the fifth edition unless the Iowa guide is significantly more user friendly. One person should author the Iowa guide to avoid inconsistencies and burdensome definitions caused by consensus decision making.

Marlon D. Mormann, Administrative Law Judge  
September 2, 2008

**12. 9/2/2008 Response and Concurrence by Peter J. Thill, Defense Attorney**

I generally concur with the report and resubmit the alternate summary noted in paragraph 7 above.

## AMA GUIDES: RESOURCE MATERIALS

*Reports, cases, talking points & other evidence demonstrating the inequities of connecting impairment ratings to Permanent Partial Disability (PPD) and reliance on the AMA Guidelines (6<sup>th</sup> Edition) as the sole determination of PPD.*

### **American Medical Association**

- AMA.....3
- JAMA.....3

### **World Health Organization**

- Definition Impairment vs. Disability.....3

### **Experts Critical of the AMA's Impairment Guidelines – 6<sup>th</sup> Edition**

- John F. Burton.....4
- Christopher R. Brigham, MD.....4
- Dr. Alan Colledge.....5
- Dr. Nachman Brautbar.....5

### **States**

- New York .....5
- Iowa.....5
- Kentucky.....7

## AMERICAN MEDICAL ASSOCIATION

### **American Medical Association Guides to the Evaluation of Permanent Impairment**

- The *AMA Guides* “ [are] not to be used for direct financial awards nor as the sole measure of disability. The Guides provide[ ] a standard medical assessment for impairment determination and may be used as a component in disability assessment.”

See: American Medical Association, *Guides to the Evaluation of Permanent Impairment* 12 (5th ed., AMA 2001) (emphases added).

### **The Journal of the American Medical Association (JAMA) states:**

- "The (AMA) Guides, currently undergoing revision, has been the focus of considerable controversy. Criticisms have focused on 2 areas: internal deficiencies, including the lack of a comprehensive, valid, reliable, unbiased, and evidence-based system for rating impairments; and the way in which workers' compensation systems use the ratings, resulting in inappropriate compensation. We focus on the internal deficiencies and recommend that *the Guides remains a tool for evaluation of permanent impairment, not disability.*"

Available at: <http://jama.ama-assn.org/cgi/content/abstract/283/4/519>

## WORLD HEALTH ORGANIZATION

### **World Health Organization Definition Impairment vs. Disability**

- The WHO makes an important distinction between "**impairment**" and "**disability**". "**Impairment**" is a body/physical/medical description ONLY and cannot be directly related to social or vocational functioning (or "**disability**") **as is the WCBs' illegal practice.** (From the original WHO International Classification of Impairments, Disabilities and Handicaps (ICIDH) to the more recent International Classification of Functioning, Disability and Health (ICF).

Available at: <http://www.asphi.it/english/DisabilitaOggi/DefinizioniOMS.htm>

## EXPERTS

**John F. Burton** - Nation's preeminent scholar on workers compensation systems commenting on AMA guide 6<sup>th</sup> edition

- “My concern about the AMA guide (6th)...is that it’s simply *not evidence-based*. It’s ignoring the evidence that’s available to do it right....”

Available at:

<http://www.lexisnexis.com/Community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2009/07/20/The-Application-of-the-6th-Edition-of-the-AMA-Guides-to-Rating-Impairment-Under-the-Longshore-Act.aspx>

- During questioning, Prof. Burton told the [New York State] Workers’ Compensation Board that the basis for the *AMA Guides* was “*hokum*” and challenged assertions that the Guides were evidence based. During his speech to the Board, Prof. Burton implored New York State policy makers to “do it right” and *craft medical guidelines that adequately address “loss of earning capacity” rather than just “impairment”*.

Available at: <http://www.nyworkerscompensationalliance.org/archives/workers-compensation-ama-guidelines-prof-john-f-burton-tells-ny-workers-compensation-board-ama-guides-are-hokum-and-not-evidence-based.htm>

**Christopher R. Brigham, MD** - senior contributing editor of the sixth edition

- Dr. Christopher Brigham operates a substantial private business that both performs impairment evaluations and reviews ratings from other evaluators.
- Brigham and Phil Walker, Esq. are both public figures who have numerous websites promoting their services explaining the AMA Guides to workers’ compensation stakeholders throughout the country. Their joint website ([www.BrighamWalker.com](http://www.BrighamWalker.com)) takes you to Walker’s [www.askphilwalker.com](http://www.askphilwalker.com) where you can view streaming video of Phil touting his seminars to explain the AMA Guides. Similarly, the Brigham Walker website also takes you to Dr. Brigham’s website ([www.impairment.com](http://www.impairment.com)) where you can also find out about his AMA Guide seminars and “fill up your cart” in his online store. These are but a few of the numerous websites in which they are involved selling their services to the workers’ compensation community and state governments across the country. Clearly, *both these gentlemen are involved in massive Internet marketing of their AMA Guidelines related businesses*.

Available at: <http://www.nyworkerscompensationalliance.org/archives/cat-workers-compensation-ama-guidelines.html>

### Dr. Alan Colledge

- Utah physician who was an advisor to the AMA Guides, has asked that his name be removed from the advisors listed in the publication. Dr. Colledge wrote to the American Medical Association stating "*the Guides would discredit the AMA*".

Available at: <http://www.nyworkerscompensationalliance.org/archives/workers-compensation-ama-guidelines-more-states-follow-ny-and-abandon-ama-guides-to-evaluation-of-permanent-impairment.html>

### Dr. Nachman Brautbar

- The Forensic Toxicologist who was the first treating physician to study chromium toxicity as part of the Hinkley groundwater contamination case presented in the movie, "Erin Brockovich"
- "*Impairment ratings were designed to reflect functional limitations and not disability*. 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 . . ."

Available at: <http://www.environmentaldiseases.com/article-workers-compensation-impairment-rating-guide.html>

## STATES

### New York

- Published by the Workers' Compensation Alliance, the *blog has been cited by proponents of the guides as being one of the key reasons the guides were scratched in New York*. The blog includes a wealth of information.
- Dr. Christopher R. Brigham who was hired to bring the guides to New York states, "It is most unfortunate that the New York Workers' Compensation Alliance has continued to provide erroneous information on their blog relating to the AMA Guides and those individuals involved in the study."

Available at: <http://www.nyworkerscompensationalliance.org/archives/workers-compensation-ama-guidelines-prof-john-f-burton-tells-ny-workers-compensation-board-ama-guides-are-hokum-and-not-evidence-based.htm>

## Iowa

- Iowa's Workers' Compensation Commissioner convened a task force to examine the benefits of adopting the sixth edition in May of 2008. That task force included members with different interests in the workers' compensation industry and took testimony from various witnesses before deciding that it was not ready to recommend the adoption of the sixth edition. It had numerous concerns. It was concerned with the composition of the groups that composed the various chapters of the *Guides*. *It asked the AMA to specify the contributing editors to the various chapters. The AMA did not do so.*
- The Iowa group found that there was a problem in delineating a rating of impairment and the concept of disability in the language it found in the sixth edition. The task force also thought that *the sixth edition did not reflect any recognition of ethnicity in rating for impairment*. One more concern was the *complexity of methodology* that was required by the sixth edition. See <http://www.lexisnexis.com/Community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2009/07/20/The-Application-of-the-6th-Edition-of-the-AMA-Guides-to-Rating-Impairment-Under-the-Longshore-Act.aspx>

Available at: <http://www.iowaworkforce.org/wc/amatastaskforce/kuhnleinreport.pdf>

- **Iowa Rejects 6th Edition of AMA Impairment Guides for Work Injuries**

Since its publication, the Sixth Edition of the AMA Guides to the Evaluation of Permanent Impairment has met with stiff criticism. **It has been described as a step back in fairly assessing work injuries by many legal and medical experts.** Several States have formally rejected use of the Sixth Edition, and Iowa has joined that group of jurisdictions. Specifically, Iowa has relied on the Fifth Edition of the Guides, and will stay with that edition for the foreseeable future.

The Iowa Workers' Compensation Commissioner formally amended the agency's rules in the Iowa Administrative Code, to read: "876—2.4(85,86) *Guides to evaluation of permanent impairment. The Guides to the Evaluation of Permanent Impairment, Fifth Edition, published by the American Medical Association are adopted as a guide for determining permanent partial disabilities under Iowa Code section 85.34(2) "a" to "s."* The extent of loss or percentage of permanent impairment may be determined by use of this guide the Fifth Edition of the guides and payment of weekly compensation for permanent partial scheduled injuries made accordingly."

The Commissioner cited calls for greater clarity in the use of the Sixth Edition, and noted, " *Until such studies can be completed by medical and legal experts who commonly are involved in the Iowa Workers' Compensation system, the use of sixth edition ratings are expressly discouraged.*"



Available at:

<http://www.lexisnexis.com/Community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2010/02/17/Iowa-Rejects-6th-Edition-of-AMA-Impairment-Guides-for-Work-Injuries.aspx>

- Member Report for the Iowa Task Force Regarding the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition

Attached, also available at:

[http://www.lexisnexis.com/Community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2010/02/17/Member-Report-for-the-Iowa-Task-Force-Regarding-the-AMA-Guides-to-the-Evaluation-of-Permanent-Impairment\\_2C00\\_-Sixth-Edition.aspx](http://www.lexisnexis.com/Community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2010/02/17/Member-Report-for-the-Iowa-Task-Force-Regarding-the-AMA-Guides-to-the-Evaluation-of-Permanent-Impairment_2C00_-Sixth-Edition.aspx)

## Kentucky

- **Kentucky Changes Law for AMA Guidelines Usage**  
*By: Maresa Taylor Fawns, Executive Director Kentucky Justice Association*

For the past two years, Kentucky's Legislature delayed implementation of the Sixth Edition of the *AMA Guidelines* for determining worker's compensation impairment ratings. During the 2010 session, lawmakers took up the issue and voted to establish that the Fifth Edition, not the Sixth, would be the state's permanent benchmark.

House Bill 38 declares that the Fifth Edition be used until such time as the Legislature decides to change the law. Also included in the bill was a caveat that the Second Edition of the *Guides* continues to be used for psychological cases. Kentucky's Supreme Court held in *Knott County Nursing Home v. Wallen*, 74 S.W.3d 706 (Ky. 2002) that the Second Edition is the "latest edition" of the *Guides* for psychological injuries, therefore, the legislation included language to reflect that decision.

In addition to requiring that the Fifth Edition be used, HB 38 requires that the Commissioner of the Department for Workers Claims study each new edition and make a recommendation to the Legislature as to which edition should be used. The original House version of the bill included a provision that if the Legislature failed to act on that recommendation, the recommendation would stand, which could vary significantly based upon the Governor and/or Commissioner's position at that time.

However, the Senate version of the bill that ultimately passed requires that any such recommendation be affirmed by the Legislature in order to become the law.

Interestingly, the business community testified against mandating the use of one edition over another. Their argument was that this particular policy shouldn't be set in statute. However, the Republican led Senate argued that implementing policy is exactly what the Legislature does and that they alone should make that decision. The Democrat controlled House concurred as did Governor Steve Beshear who signed the bill into law.

Across the country, states are taking up this issue with increasing controversy. Many of the *Guides* own authors believe that the Fifth Edition should be used because it serves to explain many of the questions from previous editions. While moving to the latest edition would likely lead to more questions, concerns and unfortunately, litigation.

Jeff Roberts, a Kentucky attorney who represents workers said, **“Implementing the Sixth Edition in Kentucky would have dramatically reduced indemnity benefits for the truly injured workers in Kentucky.”** Kentucky's Legislature should be applauded for taking this stand supporting our state's workers.

Available at: [http://www.uslaw.com/law\\_blogs/Kentucky+Law+Blog?blog=730](http://www.uslaw.com/law_blogs/Kentucky+Law+Blog?blog=730)