

HB

60

Revision Date: _____
 Title: "An Act relating to impairment rating guides used in evaluation of certain workers' compensation claims."
 Sponsor: B. Davis
 Requestor: (H) HES

Department Affected: Administration
 BRU: Risk Management
 Component: Risk Management
 COMPONENT SERIAL NO. 0071

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
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CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
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FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: \$ -0-

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary.)

This bill requires the use of the most recently published edition (including supplements) of the American Medical Association Guides to the Evaluation of Permanent Impairment — when determining the existence and degree of permanent impairment compensable under the workers' compensation act. The newer editions now consider "pain" as an additional rating consideration.

Agency "Cost of Risk" premium allocations — inter-agency receipts collected by Risk Management — reflect average of 5 prior years of actual claims costs incurred. Any cost increases incurred applying newer rating guideline will be added into this claims experience - and considered in future workers' compensation premium allocations to each agency.

There is no direct fiscal impact to the Division of Risk Management.

Prepared by: Brad Thompson, Director
 Division: Risk Management

Phone: 465-5723
 Date: _____

Approved by Commissioner: Mark Boyer
 Agency: Department of Administration

Date: 1/11/96

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FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. HB 60

Revision Date: _____
 Title: Impairment rating guides for
 Workers' Comp
 Sponsor: Representative B. Davis
 Requestor: House HESS

Department Affected: Labor
 BRU: Workers' Compensation
 Component: Workers' Compensation
 COMPONENT SERIAL NO. 344

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL						
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CHANGE IN REVENUE FUND SOURCE #						
--	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY96) impact: \$ None

ANALYSIS: (Attach a separate page if necessary)

This bill proposes amending AS 23.30.190(b) to use the most recent published editions of the American Medical Association Guides, including supplementary materials, for the Evaluation of Permanent Impairment.

Prepared by: Paul Grossi, Director *Paul Grossi* Phone: 465-2790
 Division: Workers' Compensation *1-19-96* Date: 1/19/96
 Approved by Commissioner: Tom Cashen, Commissioner *Tom Cashen*
 Agency: Department of Labor Date: 1/19/96

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HOUSE COMMITTEE REPORT

(7)
 Date Referred: March 24, 1995 FURTHER REFERRALS: Finance

Date of Committee Action: 2/15/96

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered: HB 60

HOUSE BILL NO. 60 IMPAIRMENT RATING GUIDES FOR WORKERS COMP

"An Act relating to impairment rating guides used in evaluation of certain workers' compensation claims."

recommends it be replaced with the following committee substitute CS HB 60 (HES) the same title
 a new title

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) APPROVES PREVIOUS: (Dept/Date)
 fiscal note(s) _____ fiscal note(s) _____

zero fiscal note(s) Labor, Admin zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>Ann Ralston</i>	✓	✓		
<i>Car Beuch</i>			✓	
<i>Car Beuch</i>	✓	✓		
<i>Car Beuch</i>			✓	

CHAIR'S SIGNATURE *Car Beuch*

(7)

Date Referred: January 16, 1995

FURTHER REFERRALS:

HES
Finance

Date of Committee Action: 3-22-95

The LABOR AND COMMERCE Committee considered:

HB 60

HOUSE BILL NO. 60

IMPAIRMENT RATING GUIDES FOR WORKERS COMP

"An Act relating to impairment rating guides used in evaluation of certain workers' compensation claims."

recommends it be replaced with the following committee substitute _____ [] the same title
[] a new title

[] additional referral to _____ Committee

[] attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): _____ (Dept)

APPROVES PREVIOUS: _____ (Dept/Date)

[] fiscal note(s) _____ [] fiscal note(s) _____

[X] zero fiscal note(s) Labor ; Admin [] zero fiscal note(s) _____

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
<i>[Signature]</i>	Kott			✓	
<i>[Signature]</i>	Rokeberg	✓			
<i>[Signature]</i>	ELTON	✓			
<i>[Signature]</i>	Kubina	✓			
<i>[Signature]</i>	Porter	✓			
<i>[Signature]</i>	MASEK			✓	
<i>[Signature]</i>	Sanders			✓	
		(4)		(3)	

CHAIR'S SIGNATURE

[Signature]
✓

9-LS0293VC

Ford

1/25/96

CS FOR HOUSE BILL NO. 60()

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVE B.DAVIS

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to impairment rating guides used in evaluation of certain
2 workers' compensation claims."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 * Section 1. AS 23.30.190(b) is amended to read:

5 (b) All determinations of the existence and degree of permanent impairment
6 shall be made strictly and solely under the whole person determination as set out in
7 the most recently published edition of the American Medical Association Guides to
8 the Evaluation of Permanent Impairment, except that an impairment rating may not be
9 rounded to the next five percent. When a new edition of the American Medical
10 Association Guides is published, the board shall begin using the new edition not
11 later than ⁹⁰60 days after the date of publication. The board shall adopt a
12 supplementary recognized schedule for injuries that cannot be rated by use of the
13 American Medical Association Guides.

M. Roy Schwarz, MD
Senior Vice President
Medical Education & Science

515 North State Street
Chicago, Illinois 60611

312 464-1111
312 464-1111 Fax

February 14, 1995

Mr. L. E. Brueggemann
Attorney at Law
2817 2nd Avenue North
Suite 346-347, Pratt Building
Billings, Montana 59101

Dear Mr. Brueggemann:

Doctor Todd asked that I respond to your letter of January 10, 1995, which inquired about the position of the American Medical Association (AMA) regarding use of the AMA book, *Guides to the Evaluation of Permanent Impairment (Guides)*.

The AMA's position is clearly stated on page 5 of the *Guides* 4th edition (enclosed), which was published in June, 1993. You quoted the official position in your January 10th letter. The position is: "The American Medical Association strongly discourages the use of any but the most recent edition of the *Guides*, because the information in it would not be based on the most recent and up-to-date material".

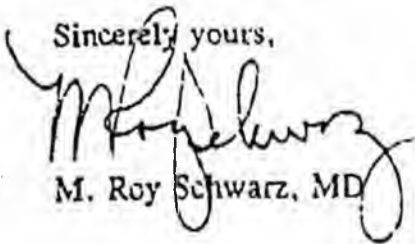
The position of the AMA quoted above reflects advice that the AMA's staff provided in May, 1992, to the staff of each state medical society.

It is AMA practice to sell or provide only the most recent *Guides* edition. Any state law mandating the use of a specific *Guides* edition gives rise to the serious hazard that the state's citizens eventually may not be able to obtain a copy of the book to which the law refers.

I commend the Acting Commissioner of the Department of Labor, State of Alaska, for her efforts to change the laws of Alaska, so that they will refer to using the most recent *Guides* edition in Alaska's workers' compensation cases.

I trust this letter will help.

Sincerely yours,


M. Roy Schwarz, MD

enc

BACKGROUND

ALASKA

Alaska Statutes § 23.30.190

Compensation for Permanent Partial Impairment

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association *Guides to the Evaluation of Permanent Impairment*, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association *Guides*.

Alaska Administrative Code tit. 8 § 45.122.

Rating Permanent Impairment.

(a) Permanent impairment ratings must be based upon the American Medical Association *Guides to the Evaluation of Permanent Impairment*, third edition (1988), and it is presumed that the AMA guides address the injury. If the board finds the presumption is overcome by clear and convincing evidence and if the permanent impairment cannot, in the board's opinion be determined under the AMA guides, then the impairment rating must be based on American Academy of Orthopedic Surgeons *Manual for Evaluating Permanent Physical Impairments*, first edition (1965). If a rating under the AAOS is not of the whole person, the rating must be converted to a whole person rating under the AMA guides.

(b) A rating of zero impairment under AMA guides is a permanent impairment determination and no determination may be made under the AAOS manual.

AMA SUPPLEMENT PAGES

medicine.

A detailed explanation sets forth, for the first time, the process by which the book was written. The editors explain how the chairpersons and committee members for the various chapters were selected, how the new edition underwent peer review, and how 11 medical societies, the Social Security Administration, the Department of Veterans Affairs, the Oklahoma State Workers' Compensation Agency, and the American Bar Association were permitted to review a draft of the fourth edition and suggest changes. This explanation helps to answer many of the questions previously raised by commentators concerning how the *Guides* were written and how the impairment percentages were determined.

The foreword to the fourth edition emphasizes that the book itself applies only to permanent impairments, which are defined as "adverse conditions that are stable and unlikely to change." This is a significant change from the third edition revised, which provided a more restrictive definition of permanent impairment, i.e., "Impairment should not be considered 'permanent' until the clinical findings determined over a period of time, usually 12 months, indicate that the condition is static and well stabilized."² Physicians no longer have to wait a set amount of time before rating permanent impairment.³

The modified definition of permanent impairment is the first example of the more flexible approach to rating permanent impairment taken by the editors of the fourth edition. Additional examples of the flexibility and the reliance on the experience and training of physicians are set forth throughout this book.

The editors of the fourth edition, again for the first time, state in the foreword that "impairment percentages derived by using *Guides* criteria represent estimates rather than precise determinations."⁴ This simple statement is a significant change from the prior edition of

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The fourth edition of American Medical Association *Guides to the Evaluation of Permanent Impairment (Guides)* is a remarkable improvement over the previous edition (third edition revised). The American Medical Association has listened to and incorporated the suggestions of occupational physicians, attorneys, judges, legislators, and others involved in workers' compensation and occupational medicine. The result is a much improved edition—one which, when used correctly, can objectively guide physicians, attorneys, judges, and others in arriving at estimates of permanent impairment.

This new edition of *Understanding the AMA Guides* discusses the key legal issues raised by the fourth edition and compares the third edition revised with the current fourth edition. Those persons interested in the historical development of the *Guides*, the validity and reliability of the third edition revised, sample proofs, and prior judicial interpretations of the *Guides*, should consult the first edition of *Understanding the AMA Guides* and its 1993 supplement.

The chapters and sections of this book correspond to those of the fourth edition of the *Guides*. It must be understood, however, that this book is not a substitute for the *Guides*, nor can it be used as one. This book has three purposes:

1. to highlight the areas of key legal interest in the fourth edition;
2. to identify and analyze the significant changes in the fourth edition from the third edition revised; and
3. to update the cases, statutes, and regulations found in the first edition of *Understanding the AMA Guides*.

We hope that counsel will find this book a valuable resource.

Expanded Use of *Guides*

It is important to note that courts have started to use the *Guides* in tort cases as well as in workers' compensation cases.

For example, in the case of *Michels v. U.S.*,¹ the U.S. District Court for the Southern District of Iowa dealt with a motorcyclist, Michels, who filed a federal tort claim Act (FTCA) action against the United States.

Permanent Impairment

The government's independent medical exam, done by Dr. Virgil Balint, utilized the *Guides* and was adopted by the court regarding physical impairment.

Dr. Balint also calculated an impairment rating for Michels. He concluded as follows:

I have used the *Guides for the Evaluation of Permanent Impairment*, Third Edition, in order to compute his impairment rating. Basically I have gotten an 18 percent impairment rating of the lower extremity from his ankle, a 15 percent impairment of the lower extremity from his knee injury and a 45 percent lower extremity impairment from his left hip. By combining these values, I have gotten a 62 percent lower extremity impairment. This 62 percent impairment represents a 25 percent impairment of the whole person.²

The court awarded the plaintiff damages in the amount of \$710,000.

In the case of *Ross v. Black & Decker, Inc.*,³ the U.S. Court of Appeals for the 7th Circuit dealt with a products liability action filed by the plaintiff Ross, whose left hand was severed while using a Black & Decker 10-inch power saw. In the products liability suit, an expert used by the plaintiff testified using the *Guides* as follows:

As expert witness for the plaintiff, Dr. Hatem Galal, a plastic surgeon who examined Ross' injured hand and conducted an occupational therapy evaluation of Ross' hand function for employment purposes, testified that Ross lost about 60 percent of the functioning of his left hand because of the saw accident and stated that a human hand accounts for about 90 percent of the function of an arm. An arm accounts for about 60 percent of the body's total function. Therefore, Dr. Galal estimated that Ross' hand injury deprived him of about 30 percent of total body functioning.

BILL NO: Senate Bill No. 365 am

DATE: April 25, 1994

TITLE: Governor's Omnibus Bill

CONTACT: Arbe Williams
465-2700

Senate Bill No. 365 as amended incorporates three changes to the Alaska Workers Compensation Act. The amendments are part of the solution to what the department views as a critical problem in meeting the time frame for processing Decisions & Orders that are mandated in statute.

Section 4 proposes to amend AS 23.30.041(e) to adopt the latest federal publication of "Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles" (SCODDOT). This publication reflects current training and physical requirements of jobs and is the basis for determining eligibility for reemployment benefits under standards established in the 1988 amendments to the Alaska Workers' Compensation Act. The latest publication recognizes changes in the physical capacity or demands of specific jobs, and includes job titles previously not identified. Adopting the revised publication will reduce the need for administrative hearings since injured workers will not need to challenge the use of an outdated version of SCODDOT and will ensure that those applicants who meet current requirements of jobs will qualify for benefits.

Section 5 proposes to amend AS 23.30.095(k) to clarify the authority of the Alaska Workers' Compensation Board to delegate its authority to division staff to arrange necessary independent medical evaluations (IME's). Division staff have for many years regularly arranged IME's; however, recently the Assistant Attorney General assigned to the Board questioned the regulation giving staff authority to arrange such evaluations. Clarifying the Board's authority to delegate this administrative function will reduce the need to convene the Board to approve such arrangements. This will allow the Board to concentrate their effort on the adjudication of claims, rather than on administrative procedures. In addition, timely medical evaluations will contribute to the timely finalization of worker's compensation claims.

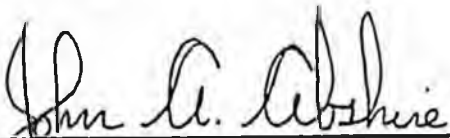
Section 6 proposes to amend AS 23.30.190(b) to allow the use of the edition of the American Medical Association Guides to the Evaluation of Permanent Impairment in effect at the time of the impairment rating. This publication is the basis for determining eligibility for permanent partial impairment compensation and reemployment benefits adopted in the 1988 amendments to the Alaska Workers' Compensation Act. Allowing the use of the current edition of the publication in effect at the time of the impairment rating will reduce the need for Board hearings and ensure that those applicants who meet current requirements will qualify for benefits. The older version of the AMA guides do not include some injury types and do not reflect current thinking on degrees of injury given new medical technology and prognosis for recovery.

POSITION PAPER/Department of Labor

April 25, 1994

The adoption of the latest publications and the clarification of the Board's authority is supported by the Alaska Workers' Compensation Board, the medical community, private rehabilitation specialists, employers and injured workers. The Department of Labor supports Senate Bill No. 365 as amended and would urge passage this legislative session.

APPROVED:



Charles W. Mahlen, Commissioner

POSITION PAPER/Department of Labor

HB60
Library

NO. D-4270

IN THE
SUPREME COURT OF TEXAS

TEXAS WORKERS' COMPENSATION COMMISSION, et al,

Petitioners

vs.

HECTOR GARCIA, JR., et al,

Respondents

BRIEF OF AMICI CURIAE

TO THE SUPREME COURT OF TEXAS:

The American Medical Association, Bruce S. Hinckley, M.D., D. A. Broudreau, D.O., and Martin Haig, M.D., as Amici Curiae, submit this brief for the consideration of the Court in connection with the application for writ of error filed in this cause.

STATEMENT OF
INTEREST OF AMICI CURIAE IN THIS LITIGATION

The American Medical Association (AMA) was founded in 1847 to promote the science and art of medicine and the betterment of the public health. It is a voluntary membership organization whose nearly 300,000 physician and medical student members practice in all specialties of medicine. The AMA is the world's largest medical publisher and

disseminates its scientific journals worldwide and publishes numerous books and other materials for the public as a means to promote health education. Among its publications is the *Guides to the Evaluation of Permanent Impairment* (3rd Edition) ("*Guides*"). The AMA seeks to further the proper use and application of the *Guides*. Similarly, the AMA has a vital interest in identifying and discouraging any improper or unauthorized use of the *Guides*, that is, any use or application of the *Guides'* evaluative standards and guidelines for a purpose or in a manner other than that for which they were intended. It is the opinion of the AMA that the Texas Workers Compensation Act ("the Act") improperly utilizes the *Guides*. Accordingly, the AMA has an interest in the outcome of this appeal, which involves the use of the *Guides* under the Act.

Drs. Hinckley, Boudreau, and Haig are physicians whose practices include the evaluation and treatment of injured workers. Each has utilized the *Guides* to conduct physical impairment evaluations. Because they disapprove of the manner in which the Act utilizes impairment evaluations, these physicians are interested in the outcome of this appeal.

ORIGIN AND SCOPE OF THE GUIDES

Development of the Guides

In 1955, a group of physicians recorded their concerns at an AMA meeting about the plethora of methods of evaluating impairments. The AMA Council on Industrial Health was authorized by the AMA Board of Trustees to establish guidelines for the medical evaluation of impairments. The goal was to develop a standard system to measure the performance deficiencies of human organ systems. Three years later, the impairment committee, with the

aid of consultants, published the first set of guidelines, "A Guide to the Evaluation of Permanent Impairment of the Extremities and Back."¹

The next set of guidelines, prepared in 1958, pertained to the visual system. Then followed guidelines for the cardiovascular system and the ear, nose, throat, and related structures. Between 1957 and 1971, the AMA committee produced a set of guidelines dealing with each of the major organ systems; each set eventually was published in the Journal of the American Medical Association. In 1971, the 13 sets were published by the AMA as the first edition of the book, *Guides to the Evaluation of Permanent Impairment*.

The Second Edition of the *Guides*, sponsored and endorsed by the AMA's Council on Scientific Affairs, appeared in 1984. The Third Edition was published in November 1988; the second printing, dated February 1989, is the edition referenced and adopted by the Act. It is currently out of print and is no longer available. Alan L. Engelberg, M.D., M.P.H., who at the time was the director of the Department of Preventative Medicine at AMA, edited the Third Edition. George M. Smith, M.D., M.P.H., authored Chapters 1 and 2 of the Third Edition, which explain the fundamental and scientific concepts which govern the formulation and use of the *Guides*, and the proper methods of reporting the evaluation and rating of impairment, respectively. Both Dr. Engelberg and Dr. Smith testified at the trial of this case. The Fourth Edition of the *Guides*, representing the most current medical knowledge and understanding, was published in 1993.

¹ Committee on Medical Rating of Physical Impairment. A guide to the evaluation of permanent impairment of the extremities and back. Journal of the American Medical Association, 1958; Special Edition, February 15, 1958.

Purpose and Proper Use

As explained in Chapter 1, the purpose of the *Guides* is to provide a framework for the evaluation and reporting of permanent medical impairment by physicians. The *Guides* apply fundamental medical and scientific concepts to provide physicians with systematic analysis and detailed medical protocols for use in the evaluation of a broad range of medial impairments. (*Guides* at 1). Through use of the *Guides*, physicians have the capability to provide thorough evaluations according to a single set of standards. (*Guides* at 7; S.F. 273 at 20). The *Guides* provide the physician with the further option to translate his or her evaluation of an impairment into an "impairment rating" and to combine multiple impairments into an overall rating through use of tables and charts. (*Guides* at 4, 9). The *Guides* are widely used in the evaluation of physical impairment.

Although they cover a broad range of physical impairments, the *Guides* are not comprehensive and do not address every impairment. Thus, for example, there is no rating system for mental trauma or chronic pain. (S.F. 241 at 20 to 242 at 25). The *Guides to the Evaluation of Permanent Impairment* were not designed as a static document—they have and will continue to evolve from edition to edition. (S.F. 228 at 9-15; 378 at 14-24).

It is critically important to the proper use of both the *Guides* and the physician reports to understand what, in fact, is being evaluated and rated. The *Guides* provide a system for evaluating or assessing *impairment* defined as the "loss of, loss of use of, or derangement of any body part, system, or function." (*Guides* at 236). Drs. Engelberg and Smith properly noted that the evaluation of impairment itself *is not* based upon specialized occupational tasks or demands, but rather upon the activities of daily living. (S.F. 232 at 21

421 at 13). Indeed, the assignment of a rating number is optional with the physician. The limitations on the use of the rating were highlighted in the *Guides*:

A simple number, the impairment rating, although it may have been derived from a well structured complex set of thorough observations, does not convey any information about the person or the impact of the impairment on the person's capacity to meet personal, social, or occupational demands. In fact, information is lost in arriving at the number. Consequently, the strength of the medical support for a disability determination is dependent on the completeness and reliability of the medical documentation submitted. (*Guides* at 8).

THE ROLE OF THE *GUIDES* IN THE TEXAS WORKERS' COMPENSATION SYSTEM

The *Guides* play a central role in the determination of both "impairment income benefits" and "supplemental income benefits" under the Act. The Act expressly provides that:

All determinations of impairment under this Act, whether before the commission or in court, must be made in accordance with [the *Guides*] § 4.24.

The percentage impairment ratings assigned in accordance with the *Guides* dictate the duration, and therefore the overall amount, of impairment income benefits an injured worker receives. Under the Act, a worker who is impaired after achieving maximum medical improvement will receive impairment income benefits for a period equalling three weeks for each percentage point of impairment, subject to certain limitations. § 4.26(c). The greater the impairment rating, the greater the benefits; the smaller the rating, the smaller the benefits. The impairment evaluation report itself is not considered in the calculation of benefits.

to 233 at 4; 244 at 4-9; 381 at 3; 414 at 8-17). Further, an impairment evaluation does *not* establish, measure, or rate "disability." As explained in the *Guides*:

The accurate and proper use of medical information to assess impairment in connection with disability determinations depends on the recognition that, whereas impairment is a medical matter, disability arises out of the interaction between impairment and external demands. "Impairment" means an alteration of an individual's health status that is *assessed by medical means*; "disability," which is *assessed by nonmedical means*, means an alteration of an individual's capacity to meet personal, social, or occupational demands, or to meet statutory or regulatory requirements. Simply stated, "impairment" is what is wrong with the health of an individual; "disability" is the gap between what the individual can do and what the individual needs or wants to do.

An individual who is "impaired" is not necessarily "disabled." Impairment gives rise to disability only when the medical condition limits the individual's capacity to meet demands that pertain to nonmedical fields and activities. On the other hand, if the individual is able to meet a particular set of demands, the individual is *not* "disabled" with respect to those demands, even though a medical evaluation may reveal impairment. (*Guides* at 1-2, emphasis in original).

As noted above, the *Guides* permit physicians and others to assign an impairment rating, stated in terms of a percentage of impairment, based upon the evaluation. The assignment of an impairment rating (as opposed to the evaluation) is not a medical determination. (*Guides* at 7). As explained at trial, the impairment ratings do not have independent scientific validity -- they were not based upon epidemiological studies of large population groups and there was no reference framework within which to assign numbers. (S.F. 236 at 16 to 237 at 2; 418 at 2 to 420 at 21; 378 at 25 to 379 at 8). While the ratings provide a basis for comparison of levels of impairment, they are subordinant to the evaluation itself and should not be given a disproportionate significance. (S.F. 419 at 24 to

There is no direct relationship or correlation between physical impairment, which the *Guides* were designed to measure, and either disability, economic loss, or occupational impairment. A worker may suffer a physical impairment which will have little or no effect on that worker's ability to perform his or her job.² In that instance the worker has no disability or occupational impairment and his or her physical impairment has little or no economic consequences. Conversely, as explained by Dr. Engelberg, there are many injuries with potentially *low* overall impairment ratings which, depending on the injured worker's occupational demands, can result in a *high* level of disability.³ (S.F. 243 at 21-23). Dr. Engelberg gave numerous examples at trial of potentially low impairment high disability injuries. (S.F. 243 at 21 to 251 at 6). Thus, under the Act it is possible for two workers with very different degrees of disability (and corresponding economic loss) to receive similar overall impairment ratings and, therefore, similar benefits. If the impairment benefits scheme is intended to compensate an injured worker for an occupational impairment or for the economic loss occasioned by the worker's medical condition, then the Act's exclusive reliance on the impairment evaluation to determine the amount of benefits is neither rational nor fair. The evaluative system created by the *Guides* was not designed to be the sole determinant of the amount of compensation for a workplace injury. (S.F. 289 at 25 to 290 at 3). The *Guides* expressly warn against this type of use. (*Guides* at 6; 452 at 11-17).

² The *Guides* illustrate this point by considering the negligible effect of an injured finger on a banker's job performance. (*Guides* at 2, n. 1).

³ An impaired finger may be highly disabling to a concert pianist.

Supplemental income benefits under the Act are long term benefits for injured workers whose impairment income benefits have been exhausted. Only workers whose impairment rating is 15% or greater are entitled to these benefits. Thus, the impairment rating determines an injured worker's eligibility for supplemental income benefits. Again, the substance of the impairment evaluation report itself is not considered, only the impairment rating number.

THE ACT IMPROPERLY UTILIZES THE *GUIDES* TO DICTATE
THE AMOUNT OF IMPAIRMENT BENEFITS AND THE
AVAILABILITY OF SUPPLEMENTAL INCOME BENEFITS
UNDER THE ACT

The authors of the *Guides* anticipated that impairment evaluations and ratings would be considered in connection with benefit determinations under worker compensation laws. It was contemplated, however, that the medical information would be *combined* with other factors to determine the extent to which the *industrial* use of the worker's body was impaired. (*Guides* at 6). Users of the *Guides* are expressly advised that a one-to-one translation of impairment to disability is a use which was not intended and, accordingly, is discouraged. (*Guides* at 6). The Act directly translates impairment ratings to impairment income benefits without consideration of the occupational demands on the worker or other factors such as the worker's age, education, training, experience, or skills. (S.F. 234 at 4-15). To the extent that the impairment income benefit is designed to compensate the injured worker for the economic consequences of impairment, the manner in which the Act uses the impairment rating to calculate that benefit is improper. The *Guides* warn against this type of use for good reason.

to 220 at 4; 221 at 13). Furthermore, the *Guides* do not dictate any single impairment level which separates those workers who suffer long term economic loss and those who do not. Since workers with an impairment rating below 15 percent may, because of their occupation, suffer greater economic consequences than workers with an impairment rating above the threshold, the selection of the 15 percent level in the Act is arbitrary and unfair. (S.F. 307 at 24 to 308 at 7; 559 at 23 to 360 at 3).

The Act abuses the physician's role in the process by taking his or her medical evaluation and using it in a manner which was never intended. (S.F. 313 at 14-16; 329 at 22-24; 333 at 2-4). The *Guides* are clear: "The physician does not determine industrial loss of use or economic loss for the purpose of paying a disability benefit." (*Guides* at 2). Yet under the Act, the physician's evaluation determines the amount of impairment income benefits and the availability of supplemental income benefits. This use of the physician's evaluation is unfair to both the physician and the patient.

CONCLUSION

The *Guides* are a valuable medical tool which have served the medical community well for many years. But like any other tool, they are subject to misuse and abuse. The *Guides* describe and explain at length the concepts which underlie their proper use and warn against the improper application of impairment evaluations and ratings. Unfortunately, without consulting the AMA, the Legislature ignored those warnings and created a worker compensation system which utilizes the *Guides* in an inappropriate manner. In so doing, it has placed the *Guides* at risk of being used to generate unfair, arbitrary, and unreasonable compensation decisions, with the physician unwittingly placed in the role of decisionmaker.

The unfairness of this approach is compounded by the Act's focus on impairment ratings. As discussed above, impairment *ratings* are subordinant to the impairment *evaluation*. While a rating may provide a useful benchmark and basis for comparison, it was by no means intended as a precise indicator of impairment. Even when two physicians agree on the extent of impairment, a three percentage point difference in the ratings would not be unexpected. (S.F. 316 at 21 to 317 at 12). Indeed, the *Guides* permit - but certainly do not require - a physician to "round" the rating number to the nearest five percent. (S.F. 278 at 18-24; 336 at 14-19). Under the Act, two workers with similar impairments may be treated differently due to the lack of precision in the rating scheme and the physician's discretion to round the rating up or down or to properly decline to do so. By focusing exclusively on the rating, the Act misuses the *Guides* and aggravates the problems created by the one-to-one translation of impairment evaluations into compensation amounts.

The impairment rating also plays an important role in the award of supplemental income benefits under the Act. These benefits compensate an injured worker for a portion of his or her wage loss, suffered as a result of the impairment. §4.28(b). However, these benefits are available only to workers who receive an impairment rating of 15 percent or greater. §4.28(b). These Amici submit that, insofar as the *Guides* are concerned, the use of *any* rating value as a threshold for workers' compensation benefits is inappropriate. (445 at 2-19). Using the ratings in this way assigns to them a function they were never intended to have. (S.F. 445 at 9-15). Since there is no direct correlation between an impairment rating and economic loss, it is neither reasonable nor fair to determine worker eligibility for supplemental income benefits solely on the basis of an impairment rating. (S.F. 219 at 21

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief of Amici Curiae has been mailed by certified mail, return receipt requested, or hand-delivered on the 25th day of December, 1993 to the following:

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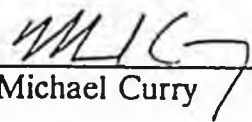
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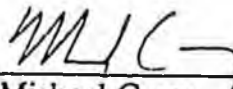
(S.F. 313 at 14-16; 425 at 11 to 453 at 5). Your Amici feel compelled to call this situation to the attention of the Court.

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NO. D-4270

IN THE
SUPREME COURT OF TEXAS

FEB 02 1996

TEXAS WORKERS' COMPENSATION COMMISSION, et al,

Petitioners

vs.

HECTOR GARCIA, JR., et al,

Respondents

FROM THE
FOURTH COURT OF APPEALS DISTRICT

BRIEF OF AMICI CURIAE

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