


# CAAA BULLETIN

## Practice Tips

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Practice Tip # 59 · Rating Instructions (Part 2) · Points & Authorities

February 12, 2008

In Practice Tip #53 we addressed the importance of the rating instructions. It is well-established in workers compensation case law that the WCJ and/or Board determines the nature and extent of an injured worker's permanent disability and that this determination can be made without obtaining a formal rating or any input at all from the DEU. It has also been well-defined by case law that when a formal rating is requested by the WCJ, the disability evaluation rater must rate the disability based solely on the Judge's rating instructions, and he or she cannot deviate from, or ignore, any factor for determining disability set forth in those instructions.

It is the Judge who makes determinations regarding rating permanent disability, not the disability evaluation rater. A WCJ who has observed the applicant and heard his/her testimony has the special expertise to interpret the evidence and rate the applicant's disability without a formal rating, and such rating is within the sound discretion of a Judge.

In order to get a proper formal rating from the Judge or the Disability Evaluation Unit (DEU), many members are filing a points and authorities (P&A) detailing the recommended rating you wish the Judge to award, or alternatively the instructions that you wish the Judge to use in requesting a formal rating from the DEU. Remember that a WCJ is not required to refer a matter to the DEU for a recommended rating. A judge may accept points and authorities and proposed ratings from the parties, and decide either between the two interpretations or based on a range of the evidence.

Attached is a draft of a points and authorities that you can use to argue your case and point out to the Judge the appropriate authority in support of an award of a complete and correct impairment and disability rating. This draft is somewhat lengthy, and you should consider deleting portions that may be irrelevant to your specific case.

In order to keep abreast of policy decisions taken by the DEU, the PD Committee (formerly known as the AMA Committee) is requesting that members forward questionable rating instructions, DEU consultative and formal ratings to the committee for review and consideration. Such information may be used in discussions with the Administration and DEU about their application of the Guides in the future. Please send a copy of pertinent materials to the CAAA office via fax (916) 444-0661 or via email at [committees@caaa.org](mailto:committees@caaa.org) Attention: For PD Committee Review.

Lastly, please see the enclosed flyer offering for purchase the DVD of the Northern California Rating Seminar that took place in December of 2007. This seminar presents an excellent AMA impairment discussion, and is now available for purchase from the CAAA office.

***Note: This practice tip is intended to be advisory only, and does not define or establish any new standard or duty for practitioners.***



1 Applicant Attorney (SBN 98765)  
The Law Offices of CAAA  
2 123 Main Street  
Los Angeles, CA 12345

3 Attorney for Applicant

4 **WORKERS' COMPENSATION APPEALS BOARD**  
5 **STATE OF CALIFORNIA**  
6

7 I. Hurt,

CASE NO.. LMN 123 456

8 Applicant,

9 v.

**APPLICANT'S REQUEST FOR  
RATING OF MEDICAL REPORTS BY  
JUDGE, OR IN THE ALTERNATIVE,  
FOR SPECIFIC RATING  
INSTRUCTIONS**

10 XYZ Corp,

11 Defendants.  
12  
13

14 TO ALL DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

15 PLEASE TAKE NOTICE that the law firm of (fill in the blank) as Applicant's  
16 attorneys, hereby request the rating of the medical reports by the Honorable (name of  
17 judge), trial judge, or in the alternative, requests that the judge issue specific rating  
18 instructions to be provided to the Disability Evaluation Unit with specific findings of facts,  
19 as follows .

20 **REQUESTED FINDING OF FACTS:**

21 Applicant, (insert name here), born on (insert date of birth), while in the course  
22 of his customary duties as a (job title) for (employer), insured by (carrier), sustained an  
23 industrial injury to his/her (area of body injured) on (date of injury(ies)). Applicant was  
24 evaluated by (name of evaluating physician) who issued reports dated: (date of  
25 reports) which describes permanent impairment. That report [or those reports] is/are  
26 found to constitute substantial medical evidence. As a result of the injury, the applicant  
27 has a Whole Person Impairment of \_\_\_\_\_% to the (body part). [and a \_\_\_\_% WPI  
28 to the (body part), etc.]

**APPLICANT REQUESTS THAT WCJ (INSERT NAME) ISSUE AN AWARD  
BASED ON THE IMPAIRMENT FOUND BY DOCTOR(S): (insert doctor(s)  
names):**

Applicant requests that the Honorable **(name of judge)** issue an award of permanent disability based on the above facts, as follows:

Applicant has sustained a Whole Person Impairment of \_\_\_\_\_% to the **(body part)**. **[and a \_\_\_\_% WPI to the (body part), etc.]**, which would rate **(input rating string)**

**MEDICAL EVIDENCE SUPPORTING REQUEST**

The doctor has provided the reasoning behind his/her determination of the whole person impairment, as follows:

**(input supporting rationale given by doctor for the WPI)**

**POINTS AND AUTHORITIES IN SUPPORT OF REQUEST**

The California Supreme Court has held that for a report to be substantial medical evidence it must set forth the reasoning behind a physicians opinion, not merely his or her conclusions, *Granado vs. WCAB*, 69 Cal. 2<sup>nd</sup> 399, 407; *Zemke v. WCAB*, 68 Cal 2<sup>nd</sup>, 794. As shown above, the report clearly states the reasoning behind the opinion. As required by *Hegglin v WCAB*, 4 Cal 3<sup>rd</sup> 162, that reasoning is based on germane facts, an accurate and adequate history and examination, as can be seen by a review of the entire report. The report is not based on an incorrect legal theory or on surmise, speculation, conjecture or guess. *Place v. WCAB*, 3 Cal 3d 372.

**[HERE, IF THE DOCTOR HAS NOT DONE SO, DESCRIBE THE LEGAL BASIS FOR THE DOCTOR'S OPINION, DEPENDING ON THE METHOD THE DOCTOR USED. FOR EXAMPLE, YOU MAY WANT TO REFER TO CHAPTER ONE OR TWO OF THE GUIDES AS JUSTIFICATION FOR USING AN IMPAIRMENT BY ANALOGY**

(either “textbook” or to similar conditions or similar ADL impacts), OR YOU MAY WISH TO EMPHASISE THE REQUIREMENT THAT ADL’S ARE THE UNDERLYING BASIS FOR ALL IMPAIRMENTS AND THAT THE DOCTOR IS REQUIRED TO USE HIS/HER CLINICAL JUDGEMENT AND KNOWLEDGE. YOU MAY WISH TO REFER TO TREATISE REGARDING THE GUIDES, SUCH AS “MASTER THE AMA GUIDES 5<sup>TH</sup>.” YOU SHOULD EMPHASIZE THAT THE GUIDES REQUIRE A *WHOLE PERSON* IMPAIRMENT.]

In recognition of the generic nature of the tables, the *Guides* state:

**"The physician's judgment, based on experience, training, skill, thoroughness in clinical evaluation, and ability to apply the *Guides* criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment. Clinical judgment, combining both the "art" and "science" of medicine, constitutes the essence of medical practice." ( *Guides*, Page 11 - Emphasis added )**

### **THE LEGAL AUTHORITY OF THE RATER**

Whether or not a medical report is substantial medical evidence is an issue for the trier of fact, not the rater. In determining an applicant's level of disability, only a judge, not a rater, has this authority. In *Hines v. IAC* 215 Cal 177 (1932), the California Supreme Court indicated that "The determination of the percentage of this disability is, of course, left to the sound discretion of the Commission to be exercised in view of all the circumstances." Furthermore, in *Liberty Mutual Ins. Co. v. IAC* 13 CCC 267 (1948) the California Supreme Court opined that the rating schedule is only prima facie evidence and that the Judge determines the extent of disability through a review of all the evidence.

Furthermore, a Judge is not required to obtain a rating report from the DEU. There is no requirement that a rating expert must be consulted whenever a permanent disability is claimed. See *California Casualty Indemnity Exchange v. IAC (Peak)* 13 CCC 258

(W/D, 1948) and *City of Los Angeles v. IAC, et.al.* 30 CCC 230 (W/D, 1965). In *Scheftner v. Rio Lindo School District* 69 CCC 1281 (en banc, 2004) the court indicated that the trier of fact may determine the percentage of disability without the need for the expertise of the DEU.

As discussed in *Universal City Studios, Inc. v. WCAB (Lewis)* (1979), 44 CCC 1133, a simple request for the DEU rater to rate the report could be deemed "a submissive mechanical application of schedules and numbers determined by a rating specialist, without the use of judgment or discretion of the workers' compensation trial judge," thus providing an invalid rating." In *Industrial Indemnity Company v. IAC (Hicks)* 26 CCC 246 (1961), the Supreme Court of California reversed an award made by the referee (WCJ) because the rating expert failed to follow the Judge's instructions by substituting in a different job category. In *State Compensation Insurance Fund v. WCAB (Stapp)* 43 CCC 658 (1978), the Court of Appeal, Third Appellate District vacated the Board's decision based on the rating expert as the rating expert testified that his rating was not based solely on the facts, but was modified to conform to the board's perceived intent to increase the applicant's rating. In *Davis v. De Laval Turbin, et.al* 35 CCC 465 (en banc, 1970) the Board indicated that a rating specialist is not to draw legal conclusions but is to recommend a percentage of permanent disability based upon the facts provided to him/her by the trier of fact.

In *Hegglin v. WCAB et.al*, 36 CCC 93 (1971), the California Supreme Court stated that "if the Board does obtain a recommended rating, it must follow its own rules and set forth in its instructions to the rating bureau a full description of every factor of the applicant's disability." Moreover, "In its rating instructions to the rating bureau, the Board must set forth a full description of every factor of the injured's permanent disability." See *Walter C. Glass v. WCAB, et.al.* 45 CCC 41 (1980).

The Schedule clearly defines the role of the rater. On page 1-3, the Schedule provides that "A final permanent disability rating is obtained only after the impairment rating **obtained from an evaluating physician** is adjusted for diminished future earning

capacity, occupation and age at the time of injury " (emphasis added) Thus, the function of the rater under the 2005 PDRS, if asked to provide this function, is limited to the *adjustment* of the evaluating physician's WPI rating to reflect diminished future earning capacity, occupation and age at the time of injury. There is nothing in the Schedule that gives the disability evaluator authority to question, challenge or contest the physician's Whole Person Impairment rating.

There is nothing in SB 899 or any of the other recent reforms, nor is there any authority conferred by case law, for a rater to modify or change the WPI rating as assigned by the evaluating physician. For example, the 2005 PDRS clearly assigns the responsibility for developing the WPI rating to the evaluating physician. On page 1-2, the Schedule says that "The calculation of a permanent disability rating is initially based on a [sic] evaluating physician's impairment rating" under the AMA Guides.

In fact, Labor Code Section 4061 sets forth the **only** method by which to obtain evaluation of an injured worker's whole person impairment: "With the exception of an evaluation or evaluations prepared by the treating physician or physicians, **no evaluation of permanent impairment and limitations resulting from injury shall be obtained**, except in accordance with Section 4061.1 or 4062.2." ( Panel QME process)

Thus, only a physician can legally evaluate whole person impairment, and the function of the rater under the 2005 PDRS, if asked to provide this function, is limited to the **adjustment of the evaluating physician's WPI rating** to reflect diminished future earning capacity, occupation and age at the time of injury.

**THE COURT IS REQUIRED TO ISSUE A RATING OR TO ISSUE SPECIFIC RATING INSTRUCTIONS**

*Labor Code* §4660 (a) sets forth the factors which must be considered in determining the percentage of permanent disability. They are (1) the nature of the physical injury or disfigurement, (2) the occupation of the injured worker, (3) his or her age at the time of injury, and (4) consideration of an employee's diminished earning capacity. Those factors are all established in the requested finding of fact, except for the consideration of the diminished earning capacity, which is found in the rating string, as the DFEC factor for the applicant's injury. **(Consider whether you want to object to this factor)**

*Labor Code* § 4660 (b)(1) requires that the "nature of the injury or disfigurement" "shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairment" published in the "5<sup>th</sup> Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. The report of **(insert name of doctor)**, dated, **(insert date of P&S report)** has incorporated such descriptions and percentages and has provided a convincing and reasonable basis for the specific application of those descriptions and percentages to this individual applicant.

### **PRAYER**

1. Wherefore Applicant request that the Judge issue an award based on the findings of **(doctor's name)**, as follows:

Applicant has sustained a Whole Person Impairment of \_\_\_\_\_% to the **(body part)**. **[and a \_\_\_\_% WPI to the (body part), etc.]**, which rates, **(input rating string)**

2. In the alternative, if the Honorable **(judge's name)** wishes to have DEU rate the report, Applicant requests that the Judge make the following finding of facts and order the DEU rater perform the rating based on the facts as found:

Applicant, **(insert name here)**, born on **(insert date of birth)**, while in the course of his customary duties as a **(job title and occupational category)** for **(employer)**, insured by **(carrier)**, sustained an industrial injury to his/her **(area of body injured)** on **(date of injury(ies))**. Applicant was evaluated by **(name of evaluating physician)** who



issued report(s) dated: **(date of reports)** which describes permanent impairment. That report **[or those reports]** is/are found to be persuasive and to constitute substantial medical evidence. As a result of the injury, the applicant has a Whole Person Impairment of \_\_\_\_\_% to the **(body part)**. **[and a \_\_\_\_% WPI to the (body part), etc.]**

3. Applicant requests that the aforesaid specific instructions be provided to the DEU rater so a valid rating of applicant's impairment may be performed.

Respectfully submitted,

LAW OFFICES OF CAAA

DATED

By: \_\_\_\_\_  
Applicant Attorney,  
Attorney for Applicant

California Applicants' Attorneys Association  
**2007 Annual Rating Seminar**  
**Whole Person Reporting & Rating**  
 December 1 & 2, 2007

All about impairment . . . . .

- Hear a detailed analysis of injuries and potential compensable injuries to the internal systems and how to rate them
- Learn to analyze an internal medicine evaluation report and identify key impairment rating issues.
- Learn about the numerous ways physicians may use the nervous system chapter to rate impairment for various medical conditions.
- Learn various approaches to rating impairment including analogy and the direct activities of daily living (ADL) approach
- Hear a candid view from the bench including some fascinating insights on the DEU, compliant reports and a Judge's opinions in rating impairment.

Northern		Southern	
Panelists:		Panelists:	
<i>Todd McFarren, Esq.</i>	<i>Bradley Chalk, Esq.</i>	<i>Robert Havens, Esq.</i>	<i>Scott Rubel, Esq.</i>
<i>Honorable Colleen Casey</i>	<i>Steven Feinberg, M.D.</i>	<i>Honorable Scott Seiden</i>	<i>Lawrence Stern, Esq.</i>
<i>Revels Clayton, M.D.</i>	<i>Darcy Luna, Esq.</i>	<i>Nachman Brautbar, M.D.</i>	<i>David Sones, M.D.</i>
		<i>Raymond Craemer, M.D.</i>	

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