

State of California
DEPARTMENT OF INDUSTRIAL RELATIONS
Division of Workers' Compensation

FINAL STATEMENT OF REASONS

Subject Matter of Regulations: Workers' Compensation
Description of Disabilities, Primary Treating Physician Reporting Requirements, Schedule
for Rating Permanent Disabilities

TITLE 8, CALIFORNIA CODE OF REGULATIONS
SECTIONS 9725 et seq.

The Administrative Director of the Division of Workers' Compensation (hereinafter "Administrative Director"), exercising the authority vested in her by Labor Code sections 59, 133, 4603.5, and 5307.3, has adopted Article 5 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, section 9785.4, and Article 7 of Chapter 4.5, Subchapter 1, section 9805.1, and has amended Articles 2, 5 and 7 of Chapter 4.5, Subchapter 1, and Subchapter 1.6, of Title 8, California Code of Regulations, sections 9725, 9726, 9727, 9785, 9785.2, 9785.3, 9785.4, 9805, 10150, 10152, 10156, 10158, 10160, 10161, 10163, and 10165.5, and repealed sections 10151 and 10154, as follows:

Section 9725	Method of Measurement
Section 9726	Method of Measurement (Psychiatric)
Section 9727	Subjective Disability
Section 9785	Reporting Duties of the Primary Treating Physician
Section 9785.2	Form PR-2 "Primary Treating Physician's Progress Report"
Section 9785.3	Form PR-3 "Primary Treating Physician's Permanent and Stationary Report"
Section 9785.4	Form PR-4 "Primary Treating Physician's Permanent and Stationary Report"
Section 9805	Schedule for Rating Permanent Disabilities, Adoption, Amendment
Section 9805.1	Data Collection, Evaluation, and Revision of Schedule
Section 10150	Disability Evaluation Unit
Section 10151	Schedule for Rating Permanent Disabilities [Repealed]
Section 10152	Disability, When Considered Permanent
Section 10154	Permanent Disability Rating Determinations, Kinds [Repealed]
Section 10156	Formal Rating Determinations
Section 10158	Formal Rating Determinations as Evidence
Section 10160	Summary Rating Determinations, Comprehensive Medical Evaluation of Unrepresented Employee
Section 10161	Forms
Section 10163	Apportionment Referral (DEU Form 105)

UPDATE OF INITIAL STATEMENT OF REASONS AND INFORMATIVE DIGEST

As authorized by Government Code §11346.9(d), the Administrative Director incorporates the Initial Statement of Reasons prepared in this matter. There have been no changes to the statutes directly relating to this rulemaking.

The proposed regulation changes are summarized below.

THE FOLLOWING SECTIONS WERE AMENDED FOLLOWING THE PUBLIC HEARING AND CIRCULATED FOR A 15-DAY COMMENT PERIOD (April 12, 2005 through April 27, 2005.)

1. Modifications to Section 9785.2—Primary Treating Physician’s Progress Report (PR-2).

The introductory paragraph of the Primary Treating Physician’s Progress Report (PR-2) was amended for clerical error, at page 7 of the proposed regulations, to clarify that if the patient is “permanent and stationary” (i.e., has reached maximum medical improvement), the physician may use DWC Forms PR-3 “or PR-4.” The correction is necessary to alert the primary treating physician that there are two permanent and stationary report forms: PR-3 is to be used for ratings prepared pursuant to the 1997 permanent disability rating schedule, and PR-4 is to be used for ratings prepared pursuant to the 2005 permanent disability rating schedule.

2. Modifications to Section 9785.4—Primary Treating Physician’s Permanent and Stationary Report (PR-4).

The language contained in the first shaded box of the Primary Treating Physician’s Permanent and Stationary Report (PR-4), at page 17 of the proposed regulations, was amended for clerical error to clarify that the form is designed to be used by the primary treating physician to report the initial evaluation of permanent “impairment” to the claims administrator. The use of the term “impairment” is consistent with the AMA Guides.

The language contained following the section of the form entitled “pain assessment,” at page 19 of the proposed regulations, was amended to clarify that if the burden of the worker’s condition has been increased by pain-related impairment in excess of the pain component already incorporated in the whole person impairment rating under Chapters 3-17 of the AMA Guides, the additional whole person impairment rating may be specified in the range of “0%” to 3% whole person impairment. This amendment was made to clarify that the medical evaluator may consider the range between 0% up to 3% whole person impairment rating consistent with the AMA Guides as opposed to assessing an automatic 3% whole person impairment rating.

The language contained in the note following the section of the form on “functional capacity assessment,” at page 21 of the proposed regulations, was amended for clerical error to substitute the word “disability” with the word “impairment.” The use of the term “impairment” is consistent with the AMA Guides.

4. Modifications to Section 9805—Schedule for Rating Permanent Disabilities, Adoption, Amendment.

Section 9805, at page 24 of the proposed regulations, was amended to clarify that the permanent disability rating schedule is effective for dates of injury on or after January 1, 2005, and “for dates of injury prior to January 1, 2005,” in accordance with subdivision (d) of Labor Code section 4660. This amendment clarifies that the 2005 PDRS applies to injuries prior to January 1 2005, if the elements set forth in Labor Code section 4660(d) are met.

The Permanent Disability Rating Schedule, as incorporated by reference under section 9805, was modified as follows:

Section 1—Introduction and Instructions

The text of subdivision (a) Summary of the Methodology, contained at Roman numeral II. Rating Procedures, B. Calculation of Rating, No. 3 Adjustment of Diminished Future Earning Capacity (FEC), at page 1-6, of the Schedule was corrected for clerical error to delete the word “below” at paragraphs 2, 3, and 4. The amendment is necessary to make this section of the PDRS clear.

The paragraph on top of Table A, at page 1-7, was corrected for clerical error to substitute the correct Table. Thus, Table “A” was inserted instead of Table “B.”

The adjustment factors reflected in Table A have been amended to correct the adjustment factor percentages for clerical error as set forth below. The adjustment factor was corrected for mathematical error by rounding the numbers to the nearest whole number percentages. This avoids different results when calculating the future earning capacity adjusted rating manually or by using the Section 2 of the PDRS.

Table A

Range of Ratios			
Low	High	FEC Rank	Adjustment Factor
1.647	1.810	One	1.100000
1.476	1.646	Two	1.142857
1.305	1.475	Three	1.185714
1.134	1.304	Four	1.228571
0.963	1.133	Five	1.271429
0.792	0.962	Six	1.314286
0.621	0.791	Seven	1.357143
0.450	0.620	Eight	1.400000

Section 3—Occupations and Group Numbers

Section 3 was amended at page 3-13 to correct a typographical error to reflect the occupation group number for 230 as Knitting Machine Operator, hosiery.

Section 7—Examples

Section 7, setting forth rating examples illustrating all the basic components of disability rating, was amended for clerical error as follows: At pages 7-2 to 7-3, the word “percentages” was substituted by the word “ratings” for clarification purposes in examples A, B, and C. Footnotes 4 and 7, at pages 7-2, and 7-3, were amended to delete the language “starting at page xx,” as superfluous. Footnotes 5 and 9, at page 7-3, were amended to delete the language “,page xx,” as superfluous. Example C was amended at page 7-3 to delete the word foot, and substitute the phrase “leg two inches.” Thus the sentence now reads: “Amputation of left leg two inches below knee,” and the language in the example is clear.

5. Proposed Section 9805.1—Data Collection, Evaluation, and Revision of Schedule

Proposed section 9805.1, at page 24 of the proposed regulations, was added to specify that the Administrative Director will collect for 18 months permanent disability ratings under the 2005 Permanent Disability Rating Schedule (PDRS) effective for injuries occurring on or after 1/1/05 and effective for injuries occurring on or after 4/19/04 and before 1/1/05 where there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Labor Code section 4601 to the injured employee. The section further provides that the Administrative Director will evaluate the data to determine the aggregate effect of the diminished future earning capacity adjustment on the partial permanent disability ratings under the 2005 PDRS. The section further provides that the Administrative Director will also revise, if necessary, the diminished future earning capacity adjustment to reflect consideration of an employee's diminished future earning capacity for injuries occurring on or after 1/1/05 based on the data collected. If the Administrative Director determines that there is not a sufficient amount of data to perform a statistically valid evaluation, the Administrative Director shall continue to collect data until a valid statistical sample is obtained. If there is a statistically valid sample of data that the Administrative Director determines supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c).

This section clarifies that the Administrative Director will collect valid diminished future earning capacity data, examine the data, and revise the 2005 PDRS accordingly. The revision of the PDRS will take place before the mandatory five year statutory revision contained in Labor Code section 4660(c), if there is a statistically valid sample of data that the Administrative Director determines supports a revision to the diminished future earning capacity adjustment.

6. Modifications to Section 10151—Schedule for Rating Permanent Disabilities.

The text of section 10151 was deleted as redundant in the emergency regulations. The title of this section was not deleted in the emergency regulations and is now being deleted by strike-through as a clerical error.

7. Modifications to Section 10160—Summary Rating Determinations, Comprehensive Medical Evaluation of Unrepresented Employees.

Section 10160 was amended to rename DEU Form 100. The form was originally entitled “Employee’s Permanent Disability Questionnaire.” The title of the form was renamed “Employee’s Disability Questionnaire,” and the text of section 10160, at pages 26-27 of the proposed regulations, is amended at sections 10160(a)(2), 10160(b), 10160(d)(2) and 10160(e) to refer to the form as: “Employee’s Disability Questionnaire, (DEU Form 100).” The name of the form is corrected because an employee may have permanent total disability or permanent partial disability.

Section 10160 was further amended at subdivision (d)(1) to reflect the amended name of form 101. Thus the text of section 10160(d)(1), at page 27 of the proposed regulations, is amended for consistency purposes to state: “1. Request for Summary Rating Determination of Qualified Medical Evaluator’s Report, (DEU Form 101) as a cover sheet to the evaluation report.”

8. Modifications to Section 10161—Forms.

This section was not modified in the emergency regulations due to clerical error. Section 10160 of the emergency regulations references DEU Form 100, 101 and it is necessary to modify these forms to be consistent with the emergency regulations. The regulatory text of section 10161 is modified to reflect the amended names of DEU Forms 100 and 101 and the amended effective date of April 2005.

DEU Form 100 was originally entitled “Employee’s Permanent Disability Questionnaire.” The title of the form, at page 28 of the proposed regulations, was renamed “Employee’s Disability Questionnaire.” The name of the form is corrected because an employee may have permanent total disability or permanent partial disability.

DEU Form 100 (Employee’s Disability Questionnaire) was further amended at the introductory paragraph to substitute the word “disability” with the word “impairment.” This language is consistent with the AMA Guides language.

The number of the form (DEU Form 100) and revision date were move to the top left portion of the form under the “State of California, Division of Workers’ Compensation, Disability Evaluation Unit,” for convenience purposes. The line identifying the form and revision date at the bottom left of the form was deleted by strike through.

The text of the form, at page 28 of the proposed regulations, was amended to state: This form will aid the doctor in determining your permanent “impairment.” This language is consistent with the AMA Guides language.

The text of the form was further modified to clarify a portion of the response to the question “How was your evaluating doctor selected, to read as follows: From a list of doctors provided by the State of California, “Division of Workers’ Compensation,” and to delete by strike through the sentence: “From a list of doctors provided by the State of California, Information and Assistance Unit.” This language is obsolete because the Information and Assistance Unit no longer provides a list of doctors.

The text of the form was also amended for clarification purposes to substitute the word “injury” for the word “disability” in one of the questions, which now states: “How does this injury affect you in your work.”

Further the text of the form was amended to delete by strike through the word “permanent” in the second to last question, which now states: “Have you ever had a disability as a result of another injury or illness? If so, when?” This is consistent with the concept that an employee may have permanent total disability or permanent partial disability.

DEU Form 101 (Request for Summary Rating Determination of Qualified or Agreed Medical Examiner’s Report) was amended, at page 29 of the proposed regulations, as follows:

The title of the form was amended to state as follows: Request for Summary Rating Determination of Qualified Medical Evaluator’s Report,” as this is the proper terminology pursuant to the Labor Code.

The number of the form (DEU Form 101) and revision date were move to the top left portion of the form under the “State of California, Division of Workers’ Compensation, Disability Evaluation Unit,” for convenience purposes. The line identifying the form and revision date at the bottom left of the form was deleted by strike through.

The text of the form, at page 29 of the proposed regulations, was amended to state: The language contained at the top of the form to stating “[t]o be used for dates of injury on or after 1/1/91,” is deleted by strike through as obsolete language.

The text of the form at the paragraph entitled “Instructions to the Claims Administrator” was amended for clarification purposes to insert a No. 1 instruction to the claims administrator which states: “Use this form if employee is unrepresented and has not filed an application for adjudication.” This amendment clarifies that this form is used for unrepresented employees.

Instruction No. 1 at the same paragraph was renumbered to instruction No. 2, and the word “disability” was substituted with the word “impairment.” This language is consistent with the AMA Guides language.

Instruction No. 2 was renumbered instruction No. 3. The sentence following the number was reworded and superfluous language was deleted. The word “permanent” was deleted by strike through for consistency purposes.

Instruction No. 3 was renumbered instruction No. “4.”

Under the box entitled: “Instructions to the Physician,” instruction No. 1 was amended to delete the word “permanent” for consistency purposes. Further, instruction No. 3 was amended for clarification purposes to clearly require that a copy physician’s report and form 100 must be provided to the claims administrator and the employee.

The text of the form was further amended, at page 29 of the proposed regulations, to provide a field requesting the date of the first medical report indicating the existence of permanent disability, and a field requesting the last date for which temporary disability indemnity was paid. This aids the Disability Evaluation Unit to determine which schedule is applicable.

DEU Form 101 was also amended to delete the following the fields of “Representative’s name (if any):” and “Representative’s address:” as unnecessary fields.

9. Modifications to Section 10165.5—Notice of Options Following Permanent Disability Rating (DEU Form 110)

Section 10165.5 was amended to amend the name of the form to delete the word “permanent” for consistency purposes. The name of form 110 is now reflected at the title and in the text of the form in section 10165.5, at page 32 of the proposed regulations, as follows: “Notice of Options following Disability Rating, (DEU Form 110).” Further the word “permanent” was deleted from the first two sentences of the form, thus the form now reads, at page 32 of the proposed regulations, as follows: “This is a disability rating determination (Rating) prepared by the State of California Disability Evaluation Unit within the Division of Workers’ Compensation. It describes your percentage of disability.”

THE FOLLOWING NON-SUBSTANTIVE / CORRECTIONS WITHOUT REGULATORY EFFECT WERE MADE TO THE TEXT OF THE REGULATIONS AFTER THE CLOSE OF THE FINAL COMMENT PERIOD

1. Modifications to proposed section 9805.1—Data Collection, Evaluation, and Revision of Schedule

The phrase following the number (2) was corrected for clerical error. The sentence states that the Administrative Director will “evaluate the data to determine the aggregate effect of the diminished future earning capacity adjustment on the partial permanent disability ratings under the 2005 PDRS.” The sentence is corrected to indicated that the Administrative Director will “evaluate the data to determine the aggregate effect of the diminished future earning capacity adjustment on the *permanent partial disability* ratings under the 2005 PDRS.”

UPDATE OF MATERIAL RELIED UPON / DOCUMENTS ADDED TO RULEMAKING FILE

In addition to the documents identified in the Initial Statement of Reasons the following documents were relied upon by the Division and were made available to the public as required by Government Code section 11347.1.

Title of Document Added to Rulemaking File	Dates of Availability for Public Comment
Pre-Notice Public Comments	November 17, 2004 through November 29, 2004 November 24, 2004 through December 3, 2004 November 30, 2004 through December 7, 2004
Written Comments on Initially Proposed Regulations (45 Day Comment Period)	February 11, 2005 through April 4, 2005
Written Comments on Modified Text of Proposed Regulations (15 Day Comment Period)	April 12, 2005 through April 27, 2005

LOCAL MANDATES DETERMINATION

- Local Mandate: None. The proposed regulations will not impose any new mandated programs or increased service levels on any local agency or school district. The proposed amendments do not apply to any local agency or school district.
- Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with section 17500) of Division 4 of the Government Code: None. The proposed amendments do not apply to any local agency or school district.
- Other nondiscretionary costs/savings imposed upon local agencies: None. The proposed amendments do not apply to any local agency or school district.

CONSIDERATION OF ALTERNATIVES

The Division considered all comments submitted during the public comment periods, and made modifications based on those comments to the regulations as initially proposed. The Administrative Director has now determined that no alternatives proposed by the regulated public or otherwise considered by the Division of Workers' Compensation would be more effective in carrying out the purpose for which these regulations were proposed, nor would they be as effective as and less burdensome to affected private persons and businesses than the regulations that were adopted.

SUMMARY OF COMMENTS RECEIVED AND RESPONSES THERETO CONCERNING THE REGULATIONS ADOPTED

The comments of each organization or individual are addressed in the following charts.

The public comment period was as follows:

Initial 45-day comment period on proposed regulations:

February 11, 2005 through April 4, 2005.

15-day comment period on modifications to proposed text:

April 12, 2005 through April 27, 2005.