

Permanent Disability Rating Schedule Regulations	COMMENTS 45 DAY COMMENT PERIOD	NAME OF PERSON/ AFFILIATION	RESPONSE	ACTION
General Comment	Commenter sustained an industrial injury in 2001. Commenter objects to the 2005 PDRS on the basis that it will cause him unlimited financial hardship. Commenter alleges that his insurance company has denied multiple medical tests and procedures, and the denial of medical attention has been going on for over three years. Commenter requests that the Administrative Director “rescind the reform,” because it does not help the injured worker but it only helps the insurance carriers.	Ricky A. Woloszyn January 10, 2005 Written comment.	Comment goes beyond the scope of the regulations.	None.
§9805	Commenter believes the portion of the permanent disability rating schedule (PDRS) that has incorporated AME guidelines works very well. Commenter reports that every rating he has done (27) since the schedule has been in place are higher than ratings that he ever did in not only with the 1978 schedule, but also with the 1997 schedule. Commenter believes the new schedule may need to be tweaked - maybe certain areas need to be increased. The commenter believes the application of the schedule is simplistic and predictable. The commenter believes that everyone should reach the same conclusions if the medical reports are properly given.	Luis Perez-Cordero Private Permanent Disability Rater April 4, 2005 Oral comment	The permanent disability rating schedule has been revised pursuant to SB 899 in a manner intended to promote consistency, uniformity, and objectivity based on the AMA Guides to the Evaluation of Permanent Impairment, 5 th Edition (AMA Guides), and taking into consideration the occupation, age, and diminished future earning capacity of the injured worker. The Administrative Director will collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the	New section 9805.1. Data Collection, Evaluation, and Revision of Schedule , has been added to the regulations. Section 9805.1 provides: “The Administrative Director shall: (1) collect for 18 months permanent disability ratings under the 2005 Permanent Disability Rating Schedule (PDRS) effective for injuries occurring on or

			<p>diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c).</p>	<p>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; (2) 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; and (3) revise, if necessary, the diminished future earning capacity adjustment to reflect consideration of an employee's diminished future earning capacity for injuries based on the data collected. If the Administrative Director determines</p>
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§9805	Commenters submitted similar letters opposing the proposed regulations to establish a new methodology for rating permanent disabilities because commenters believe the regulations do not meet the requirements the Legislature set forth in establishing a new rating schedule. Commenters believe SB 899 requires the Administrative Director to incorporate empirical studies that measure an injured workers’ wage loss.	Joseph A. Aredas, International Representative-in-charge, International Alliance of Theatrical State Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada April 5, 2005	The PDRS pursuant to the proposed regulations is well within the language and intent of the statute which is to revise the process for determining the percentage of permanent disability based on Labor Code section 4660. See <i>CA Legislative Committee Analysis of SB 899</i> (April 15, 2004). Labor Code section 4660 (“the Statute”) sets forth the approach to be used by the Administrative Director to create the Schedule.	As indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data

	<p>Commenters do not believe the proposed regulations incorporate these studies as the law requires. Commenters feel this new permanent disability schedule is even less reflective of a workers' wage loss than the previous PD schedule. Commenters request the regulations incorporate wage loss data and follow the law.</p>	<p>Written comment</p> <p>Bill Camp, Executive Secretary, Sacramento Central Labor Council, AFL-CIO April 4, 2005 Written comment</p> <p>Alexander Mallonee, Secretary-Treasurer, Northbay Labor Council, AFL-CIO April 4, 2005 Written comment</p> <p>Shelley Kessler, Executive Secretary Treasurer, San Mateo, County Central Labor Council AFL-CIO April 4, 2005 Written comment</p> <p>Phaedra Ellis-Lamkins, Executive Officer, South Bay Labor Council, AFL-CIO April 4, 2005 Written comment</p> <p>Jerry Butkiewicz, Secretary-Treasurer, San Diego-Imperial Counties Labor Council, AFL-CIO April 4, 2005 Written comment</p>	<p>The Statute indicates that in determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to the employee's diminished future earning capacity ("DFEC"). The Statute further provides that for purposes of section 4660, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition) ("AMA Guides").</p> <p>Further, the Statute states that for purposes of section 4660, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. In this regard, the Statute directs the Administrative Director to formulate the adjusted rating schedule <i>based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.</i> Sections of a statute generally should be read to give effect, if possible, to every clause and word of a statute. See <i>United States v. Menasche</i>, 348 U.S. 528, 538-539 (1955). Contrary to the unions' and entities representing unions' argument, the Administrative Director complied with section</p>	<p>on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>
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		<p>President, Northern California District Council, International Longshore and Warehouse Union April 6, 2005 Written comment</p> <p>Willie L. Pelote, Political & Legislative Director, California, American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO April 4, 2005 Written comment</p> <p>James H. Beno, Directing Business Representative, Machinists Automotive Trades, District Lodge 190 of Northern California April 4, 2005 Written comment</p> <p>Lee Pearson, General Vice President, International Association of Machinists and Aerospace Workers April 4, 2005 Written comment</p>	<p>Evaluation, and Revision of Schedule, has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c).</p> <p>The Administrative Director has not acted beyond the powers delegated to her. The Schedule was formulated pursuant to section 4660. It indicates that the calculation of permanent disability is initially based on an evaluating physician's impairment rating, in accordance with the medical evaluation protocols and rating procedures set forth in the AMA Guides, which is incorporated by reference into the Schedule. Pursuant to the Statute, the impairment rating is then adjusted to account for the occupation and age at the time of injury, and the DFEC, to obtain a final rating. The Schedule sets forth a summary of the methodology for arriving at the DFEC formula. The explanation set forth in the Schedule under "Summary of Methodology" reflects the rationale for the DFEC formula.</p> <p>As to any contention that there is a lack of empirical evidence to support formulation of the DFEC, the schedule clearly indicates that it is</p>	
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			<p>special familiarity with satellite legal and regulatory issues. It is this expertise, expressed as an interpretation that is the source of the presumptive value of the agency's views. (<i>Id.</i> at 1028); <i>Exxon Mobil Corp. v. County of Santa Barbara</i> (2001) 92 Cal. App. 4th 1347, 1357.</p> <p>In <i>Kaiser Foundation Health Plan, Inc. v. Zingale</i> (2002) 99 Cal. App. 4th 1018, the Court of Appeal held that the California Department of Managed Health Care did not have the statutory authority to compel the Kaiser Foundation Health Plan to continue covering certain prescription drugs. The <i>Zingale</i> court indicated that in interpreting a statute where the language is clear, courts must follow its plain meaning. However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. Notwithstanding, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences. <i>Id.</i> at 1023. The <i>Zingale</i> court found that the Act in question simply did not authorize the Department to assert the power it sought to assert. <i>Id.</i> at 1024.</p> <p>In contrast, the plain meaning of section 4660 states that “in determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or</p>	
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§9805	<p>Commenter is concerned that the diminished future earning capacity formula incorporated into the permanent disability rating schedule is not based on the Permanent Disability Rating Schedule, Interim Report, 2003 prepared by RAND and upon data from additional empirical studies. Commenter believes the regulations will result in unauthorized reductions or in some cases increases in permanent disability benefits.</p>	<p>Angie Wei, Legislative Director, California Labor Federation, AFL-CIO April 4, 2005 Oral and written comment</p>	<p>See response to comments submitted by various unions above, commencing with Joseph A. Aredas, April 5, 2005.</p>	<p>As indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data</p>

	<p>Commenter believes the regulations are illegal because of its failure to formulate an adjusted rating schedule based on other empirical studies.</p>			<p>on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>
§9805	<p>Commenter feels the PDR schedule is legally, intellectually and morally wrong. Commenter cites 4660(b)(2) – “the Administrative Director shall formulate the adjusted rating schedule based on empirical data and findings from the evaluation of California's permanent</p>	<p>Mark Gerlach CA Applicants Attorneys Association April 4, 2005 Oral comment</p>	<p>The PDRS has been revised pursuant to SB 899 in a manner intended to promote consistency, uniformity, and objectivity based on the AMA Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides), and taking into consideration the occupation, age, and diminished future earning capacity of the</p>	<p>As indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations.</p>

	<p>disability rating schedule, interim report of December 2003, prepared by the RAND Institute for Civil Justice and upon data from additional empirical studies.” Commenter feels since empirical data does not currently exist, a crosswalk study should have been done, and feels the regulations should not have been adopted without completion of a crosswalk study. Commenter feels the new PDRS will reduce benefits 50 to 70 percent.</p>		<p>injured worker. The regulations were necessitated by the Legislature’s requirement for regulations implementing SB 899 by January 1, 2005. (See, Labor Code section 4660(e).)</p> <p>The Statute specifies in section (b)(2) that the schedule shall be based on empirical data and findings from the <i>Evaluation of California’s Permanent Disability Rating Schedule, Interim Report</i> (December 2003), prepared by the RAND Institute, and <i>upon data from additional empirical studies</i>. (Emphasis added.) The PDRS is based on RAND’s December 2003 interim report. Research was conducted to determine whether empirical studies were conducted by other states which would contain empirical data that could be used to formulate the adjusted rating schedule (i.e., wage loss data based on permanent disability ratings using the AMA Guides). No such studies were found.</p> <p>Section 4660(c) directs the Administrative Director to amend the Schedule “at least once every five years.” Reference to additional empirical studies allows the Administrative Director to consider additional empirical studies in future amendments of the Schedule.</p> <p>New section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director</p>	<p>This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>
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			<p>determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c).</p> <p>See also, response to comments submitted by various unions above, commencing with Joseph A. Aredas, dated April 5, 2005...</p>	
§9805	<p>Commenter incorporates by reference the comments of Angie Wei and John Burton. Commenter feels the decision to promulgate the emergency regulations on time was a selective decision. Commenter believes the regulations do not reflect the Legislative intent. Commenter feels the future earnings capacity adjustment is without merit and without scientific data to support it.</p>	<p>Peggy Sugarman Executive Director VotersInjuredatWork.org April 4, 2005 Oral and written comment</p>	<p>The regulations were necessitated by the Legislature's requirement for regulations implementing SB 899 by January 1, 2005. (See, Labor Code section 4660(e).)</p> <p>See also response to comments submitted by various unions above, commencing with Joseph A. Aredas, April 5, 2005.</p>	<p>As indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the</p>

				Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.
§9805	Section two of the Disability Rating Schedule describes two methods to calculate the Future Earning Capacity (FEC) adjusted rating (manually or using the FEC adjustment table) The commenter is concerned that the FEC Adjustment Table in some instances will conflict with the manually calculated adjusted rating, in that the FEC Adjustment Table is not consistent in rounding to the nearest whole number. Commenter recommends correcting the FEC Adjustment Table to reflect the rules in Method 1 – consistently rounding to the nearest whole number percentage.	Marie W. Wardell , Claims and Legislative Research Specialist Claims/Rehabilitation State Compensation Insurance Fund April 4, 2005 Written comment	Agree.	Table A, contained in the 2005 PDRS which was incorporated by reference in section 9805, has been corrected by rounding the adjustment factor to the nearest whole number percentage.
§9805	Commenter is concerned about the “multiplier factor” which arbitrarily, in his judgment, reduces benefits by 50 percent. Commenter feels the diminished future earning capacity was to be based upon a RAND wage loss study, and	Former Sen. John Burton April 4, 2005 Oral and written comment	See response to comments submitted by various unions above, commencing with Joseph A. Aredas, April 5, 2005.	As indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the

	<p>believes the regulations more or less ignore the RAND study. Commenter was informed that RAND could translate the data from the old PD schedule and update it to be used in the development of a new PD schedule, but was not asked to do it. In addition, the commenter believes the regulations were not based on any other empirical studies. Commenter, therefore, feels the regulations are inconsistent with the law or the legislative intent.</p>			<p>proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>
§9805	<p>Commenter feels the ratings based on the schedule pursuant to the AMA guides are</p>	<p>Leon Reich, Esq. Applicant's attorney</p>	<p>The permanent disability rating schedule has been revised pursuant to SB 899 in a manner</p>	<p>As indicated above, new section 9805.1</p>

	<p>“markedly” lower than the prior schedule, especially for those injuries that occur more often (i.e. backs, upper and lower extremities). Commenter feels the schedule does not account for the “difference in the rating”.</p>	<p>April 4, 2005 Oral comment</p>	<p>intended to promote consistency, uniformity, and objectivity based on the AMA Guides, and taking into consideration the occupation, age, and diminished future earning capacity of the injured worker. Any impact on the ratings, whether it is an upward rating or downward rating, based on the AMA Guides, is a result of the statutory requirement that the PDRS be based on the AMA Guides. (See, Labor Code section 4660(b)(1).)</p>	<p>(Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-</p>
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				Cordero, dated April 4, 2005, above.
§10150	<p>Commenter is concerned that under §10150, it is unclear whether the doctor will be required to submit his report directly to the DEU department for automatic rating or rejection. If the proposed regulations, however, are not intended to make it mandatory for the doctor to submit his report directly to the DEU Department, then the commenter feels the general assumption by the insurance industry (including instructors) is incorrect and the insurance industry/TPA's/employers have the obligation to provide the examiner with the elemental tools and training to allow the examiner to perform his/her job duties in accordance with the new regulations. In particular, the commenter is concerned examiners will not be provided AMA Guidelines by the insurance industry.</p>	<p>Susie White, lawlolie@yahoo.com April 4, 2005 Written comment</p>	<p>Disagree. It appears that the commenter is concerned that the insurance companies are not going to properly train their claims examiners on the AMA Guides. This comment is beyond the scope of the regulations.</p>	None.
§9805	<p>Commenter believes any medical conditions not included in the PDRS should not be evaluated for permanent disability by any other means, because it will severely undermine the policies established in section 4660, the authority of the Administrative Director, and the legislative goal of consistency, uniformity, and objectivity.</p> <p>Commenter also feels the multiplier</p>	<p>Michael McClain General Counsel California Workers' Compensation Institute April 4, 2005 Written comment</p>	<p>Disagree. If an impairment based on an objective medical condition is not addressed by the AMA Guides, physicians should use clinical judgment, comparing measurable impairment resulting from the unlisted objective medical condition to measurable impairment resulting from similar objective medical conditions with similar impairment of function in performing activities of daily living. This consistent with the AMA Guides as set forth at page 11 of the AMA Guides, under the section 1.5 Incorporating Science with Clinical Judgment.</p> <p>Agree with the commenter's remarks regarding</p>	<p>None.</p> <p>None.</p>

	<p>devised to determine diminished future earning capacity (FEC) is straightforward and predicable. Commenter feels the modifier implements the RAND evaluation of diminished FEC and is well within the statutory authority of the Administrative Director. Commenter believes the simplicity of the FEC calculation will reduce disputes and stabilize the assessment of disability.</p> <p>The commenter recommends the Division use new data, and not rely on the RAND analysis for future revisions of the schedule and further development of the FEC because the RAND analysis is out of date (1993 data) and irrelevant.</p>		<p>the DFEC.</p> <p>Agree.</p>	<p>As indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity</p>
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	<p>Commenter believes that the add-on factor for atypical pain under the AMA Guides (Chapter 18) should not be applied to multiple body parts and conditions arising from the same injury because it results in rating the same impairment twice, resulting in duplicative and erroneously inflated ratings. Commenter feels the Legislature did not authorize the Division to create a “customized” impairment rating system based on the AMA Guides.</p>		<p>Agree in part. The regulations should clarify that a pain assessment only applies when the burden of the worker’s condition has been increased by pain-related impairment in excess of the pain component already incorporated in the WPI 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, not an automatic 3%.</p>	<p>adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c).</p> <p>The pain assessment portion of the Primary Treating Physician Permanent and Stationary Report (PR-4) and the language contained in Section 1 of the PDRS relating to rating impairment based on pain has been amended to clarify that 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 WPI 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.</p>
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§9805	<p>Commenter feels the proposed regulation will radically reduce permanent disability benefits for the vast majority of injured workers. Commenter feels there is nothing in the statute which indicates a reduction in permanent disability benefits was intended via amendments to Labor Code section 4660. Commenter feels the statute clearly specifies that ratings are to be adjusted to account for diminished future earnings capacity, and that such adjustment is to be based on the empirical data from the RAND study. Commenter states the RAND study found certain injuries were compensated at too high a rate and certain injuries were compensated at too low a rate. Accordingly, an appropriate adjustment to the permanent disability schedule based on the RAND study would have maintained benefit levels in the aggregate, while changing specified permanent disability ratings based on a more accurate reflection of wage loss. Commenter asserts the Legislative language clearly evidences an intent to maintain permanent disability ratings on the aggregate, but to make changes which will produce a more fair and consistent system. In other words, SB 899 achieved overall savings in permanent disability costs through means other than the rating system. Commenter feels the proposed regulations are in conflict with the recent indemnity benefit increases which the Legislature enacted in both AB 749 (Chap. 6, Stats. 2003) and SB 899.</p>	<p>Barry Broad, Esq. California Teamsters Public Affairs Council California Conference Board of the Amalgamated Transit Union California Conference of Machinists American Federation of Television and Radio Artists, AFL-CIO Region 8 States Council of the United Food & Commercial Workers UNITE HERE! AFL-CIO Engineers and Scientists of California, IFPTE Local 20 Professional and Technical Engineers, IFPTE Local 21 Jockeys' Guild April 4, 2005 Written comment</p>	<p>See response to comments submitted by various unions above, commencing with Joseph A. Aredas, April 5, 2005.</p>	<p>As indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with</p>
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	Specifically, SB 899 set forth an increase in the number of weeks to which an injured worker was entitled where his injury exceeded 70%. Commenter feels there will be instances where an injured worker would have received a 70% rating under the old schedule and no longer is entitled to that rating under the new schedule.			comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.
§§9725-10165.5	The commenter expresses strong support for the speedy adoption of the emergency regulations on a permanent basis. Commenter feels the California Workers' Compensation system has long suffered from "fantasy" based permanent disability ratings causing billions of dollars of excessive benefits to fully functional injured workers. Commenter feels neither promulgating regulations nor creating empirical studies can be done overnight. Commenter believes the statutory deadlines must be followed and this new schedule implemented. Commenter feels credible data should be gathered; the schedule should be continuously monitored; and the schedule should be revised as necessary - and well before the statutory deadline of April 2009.	Suzanne Guyan Director of Employee Benefits Costco Wholesale March 31, 2005 Written comment	Agree in part.	As indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative

				Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.
§§9725-10165.5	<p>Commenter believes the PDRS adopted by emergency regulation and now proposed for adoption on a permanent basis does not comply with the language and intent of the enacting legislation SB 899. Commenter feels these regulations should be withdrawn. Commenter incorporates by reference his letter dated November 29, 2004.</p> <p>Commenter states a 2004 California Applicant's Attorney Association commissioned study (Paul Leigh, Ph.D., UC Davis School of Medicine) found that the adoption of an AMA-based rating schedule will reduce permanent disability ratings by 2/3 for the most common types of work injuries.</p>	<p>J. David Schwartz CA Applicant's Attorney Association April 4, 2005 Oral and written comment</p>	<p>With respect to the commenter's allegations that the PDRS does not comply with the language and intent of SB 899, see response to comments submitted by various unions above, commencing with Joseph A. Aredas, April 5, 2005.</p> <p>Disagree. With respect to CAAA's submitted study in support of the argument that the Schedule substantially reduces the average permanent disability rating, it is noted that this study is flawed. The study is based on a comparison of impairment ratings with disability ratings. Under the 2005 law, workers will not be compensated on the basis of an impairment rating alone, but rather on an impairment rating that has been adjusted for diminished future earning capacity (DFEC), occupation and age. The earning capacity adjustment, in particular, ranges from a 10% to</p>	<p>None.</p> <p>None.</p>

	<p>Commenter contends the FEC adjustments are grossly inadequate and do not reflect the diminished future earning capacity of the injured worker. Commenter feels according to the data in the RAND interim report, indemnity benefits should be increased not reduced because indemnity benefits in California are inadequate. Commenter states the RAND study recommended that any realignment of permanent disability</p>		<p>a 40% increase. Thus, any difference in pre- and post-reform ratings will be mitigated by the DFEC adjustment. The other two adjustment factors (age and occupation at the time of the injury) have not been changed and may either be positive or negative and as a result would tend to cancel out one another on average.</p> <p>Another flaw noted in the study (see page 15 of the study) is that it is not based on a random sample. In fact, the medical reports used were selected by attorney-members of the organization sponsoring the study. Also, the use of only one disability evaluator to determine the (2004) disability rating is problematic because the majority of disability ratings under the 2004 Schedule tend to be based on subjective factors that require the judgment of the evaluator. Given the inherent variability of these types of ratings, the Division of Workers' Compensation cannot tell whether the ratings of CAAA's individual evaluator would have matched the average ratings of a group of state-appointed evaluators. These flaws are fatal and render the CAAA study unreliable and suspect.</p> <p>We disagree with the comments regarding the FEC adjustment. However, we note that as indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director</p>	<p>See action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>
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	<p>ratings must consider the impact of the changes on benefit adequacy. Commenter contends the new rating schedule ignores this RAND finding.</p> <p>Commenter further contends that despite a legislative mandate, there is no empirical basis for the FEC factors used. Commenter feels empirical data is needed from experts regarding the diminished earning capacity as it relates to the AMA impairment ratings. Commenter asserts the FEC adjustments bears no connection to AMA Guides, and that the revised schedule fails to reflect empirical data that shows a close correlation between ratings assigned under the old rating schedule and diminished future earning capacity of injured workers. Commenter illustrates this by referring to rating disability from pain.</p> <p>Commenter believes there is no empirical data that justifies the use of the combined values chart found in Section 8 of the revised rating schedule. Commenter states the combined values chart taken from the AMA Guides is used in this Guide to prevent the combination of 2 or more ratings from exceeding 100%. Commenter believes SB 899, however, limits the accumulation of all permanent disability awards issued with respect to any one region of the body to 100% over the employee's lifetime. Consequently, commenter contends, it is neither</p>		<p>determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>	
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	<p>necessary nor appropriate to use the combined values chart. Commenter asserts that the ratings must also consider the workers' diminished future earning capacity, therefore, many states use a combining procedure that results in a combined rating that exceeds the sum of the individual ratings.</p> <p>Commenter further believes the PDRS adopted by emergency regulation and now proposed for adoption on a permanent basis does not comply with the California Constitution.</p>		<p>With respect to the commenter's allegations that the PDRS does not comply with the California Constitution mandate to provide adequate compensation for workers' injured in the workplace, it is noted that the relevant section of the California Constitution provides:</p> <p>“The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault</p>	<p>None.</p>
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			<p>of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; ...” <i>Cal. Const.</i> art. XIV § 4.</p> <p>Contrary to commenter’s assertions, the permanent disability rating schedule does not violate the California Constitution. An interest in a particular level of workers’ compensation benefits does not constitute a vested right. In <i>Graczyk v. WCAB</i> (1986) 184 Cal.App.3d 997, the Court of Appeal upheld a retroactive change to the definition of “employee,” noting that the workers’ compensation system is wholly statutory, and that no vested rights were impaired. <i>Id.</i> at 1006. The court went on to note that a vested right may be impacted in certain circumstances where the state interest is very great. <i>Id.</i> at 1008. Here, the state has a great interest in making improvements to an acknowledged workers’ compensation crisis.</p> <p>Additionally, in <i>Yoshioka v. Superior Court</i> (1997) 58 Cal.App.4th 972, the Court of Appeal upheld an initiative proposition that retroactively prohibited an uninsured motorist from collecting non-economic damages. The court stated that “...numerous courts have held</p>	
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	<p>Commenter is concerned Forms PR-3 and PR-4 are vague and confusing (see pages 14 and 20 of the regulations) as to the use of the term “directly caused” by the work injury in one question, and the use of the term “caused” by other factors in the second question. Commenter recommends these forms be revised to use the “directly caused” wording in both questions.</p> <p>Commenter recommends PR-4 form be revised by deleting the note preceding the functional capacity assessment which</p>		<p>that the right to recover specific types of damages is not a vested right because such rights are created by state and common law independent from the Constitution.” <i>Id.</i> at 982. Therefore, a state and its people may alter such rights. Such alteration is only forbidden when at the very least the party is deprived of every reasonable method of securing just compensation. This does not encompass instances where the plaintiff would not recover as much as he would have had the former rule continued. <i>Fechenscher v. Gamble</i> (1938) 12 Cal. 2d 482, 499.</p> <p>Although commenter contends that permanent disability ratings received by workers under the revised rating schedule will be lower than ratings received under the revised schedule, and therefore this would violate the constitutional mandate, the permanent disability rating schedule is not in violation of the California Constitution.</p> <p>Disagree. The second question in the form asks whether the permanent disability is caused, in whole or in part, by other factors besides the present industrial injury. The use of the word “directly” in the second question will cause confusion.</p> <p>Disagree. The reason the note preceding the functional capacity assessment is there is because there is a change from the previous</p>	<p>None.</p> <p>None.</p>
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	<p>specifies that it is not to be considered in the permanent disability rating but is to be used only for the purpose of determining the workers' ability to return to work. Commenter believes the form should require a complete assessment of functional capacity, looking at the effect of the impairment on all activities of daily living. Commenter further feels that unless this assessment is used as part of the evaluation and rating process, it could violate Labor Code §132a, which prohibits discharging or discriminating against injured workers who file a workers' compensation claim and receive a rating, award or settlement. §9785(b)(3) and (b)(4)</p> <p>Commenter does not believe the reference to §4061 is appropriate, as that section deals with evaluations conducted for the purpose of determining permanent disability. Otherwise, commenter recommends insertion of an introductory clause in both paragraphs to make it clear they apply to both disputes over medical determinations and disputes over permanent disability determinations. Commenter also recommends these paragraphs be amended to reference the expedited hearing process established by Labor Code §5502(b).</p>		<p>method in rating impairment. In the old rating method, this information would have been considered as a rating factor. With the new schedule, this information is not considered. The note clearly indicates that the information is being collected for purposes of determining the injured workers' ability to return to his or her usual and customary employment, and will not be considered in the permanent impairment rating. We do not believe that this will result in a Labor Code section 132a violation.</p> <p>Disagree. Labor Code section 4061, subdivisions (c) and (d) set forth the applicable procedures for disputing medical determinations regarding "permanent disability rating" based on the treating physician's evaluation. The definition of a "medical determination" in Section 9785(a)(4) means "a decision made by the primary treating physician regarding any and all medical issues necessary to determine employee's eligibility for compensation. Such issues include but are not limited to ... the point in time at which the employee has reached a permanent and stationary status..." Further, "permanent and stationary status" is defined in the emergency regulations as "the point when the employee has reached medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment." After the injured worker is</p>	<p>None.</p>
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			determined to be permanent and stationary, a primary treating physician's permanent and stationary report follows (PR-3 or PR-4). Thus, reference to the procedures set forth in Labor Code section 4061 setting forth procedures for disputing medical determinations regarding permanent disability determinations in Section 9785, subdivisions (b)(3) and (b)(4), is appropriate.	
§§9725-10165.5	<p>Commenter believes using the AMA Guides to evaluate impairment and as the core of a permanent disability rating puts California in the mainstream nationally. Commenter feels use of the Guides should lead to the goals enunciated in SB 899.</p> <p>Commenter believes the Administrative Director applied the RAND based empirical evidence in a reasonable manner. Commenter also states that the rating of psychological injuries seems practical and consistent with the statute.</p> <p>Commenter believes use of the AMA Guide will provide more consistent descriptions of the impairment, and with that, an explanation of the basis for their rating.</p> <p>Commenter believes by its definition of "diminished future earning capacity", the legislature gives substantial latitude to the setting of the regulation for the disability rating determination.</p> <p>Commenter believes the adjustment</p>	<p>Peter S. Barth Professor of Economics Emeritus University of Connecticut April 4, 2005 Oral and written comment</p>	Agree.	None.

	<p>factors built into the new schedule are consistent with the degrees to which certain impairments had been relatively overpaid or underpaid in California.</p> <p>Commenter believes the Global Assessment of Functioning allows consideration for psychological, social and occupational functioning allowing the rater to use a uniform and consistent methodology to convert to a whole person impairment rating.</p> <p>Commenter is of the opinion that California Applicant's Attorney Association commissioned study (Paul Leigh, Ph.D., UC Davis School of Medicine) is fatally flawed so as to undermine its conclusions.</p> <p>Commenter's analysis of Texas and California indicates to him that limiting permanent partial disability (PPD) benefits to persons who sustain impairments that are recognized by the AMA Guides is not necessarily going to cut the rate of permanent partial disability ratings in this state beginning in 2005.</p>			
§§9725-10165.5	<p>Commenter is concerned because his client has objective injuries and the difference in benefits from the old system to the new schedule is about \$2,200 to about \$42,000.</p>	<p>Gilbert Stein, Esq. On behalf of Gabriel Skeeahan April 4, 2005 Oral comment</p>	<p>Disagree. The permanent disability rating schedule has been revised pursuant to SB 899 in a manner intended to promote consistency, uniformity, and objectivity based on the AMA Guides, and taking into consideration the occupation, age, and diminished future earning capacity of the injured worker. Any impact on the ratings, whether it is an upward rating or downward rating, based on the AMA Guides, is</p>	<p>None.</p>

	<p>Commenter feels there is empirical data to show what is fair and adequate benefits.</p>		<p>a result of the statutory requirement that the PDRS be based on the AMA Guides. (See, Labor Code section 4660(b)(1).)</p> <p>With respect to the commenter’s allegations that “empirical data [exists] to show what [is] fair and adequate,” see response to comments submitted by various unions above, commencing with Joseph A. Aredas, April 5, 2005. Further, note that as indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>	<p>See action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>
§§9725-10165.5	<p>Cedaron is a software vendor for the AMA guidelines and the California PD. Commenter states as they were writing the software this time for the California PD, they found a couple of inaccuracies.</p>	<p>Karen Bond April 4, 2005 Oral comment</p>	<p>Disagree. Commenter does not point to specific inadequacies in the PDRS.</p>	<p>None.</p>
§§9725-10165.5	<p>Commenter feels these regulations will cut compensation to legitimately injured workers by 50% - 70\$--even 100% in</p>	<p>Mark Hayes, President VotersInjuredatWork.org</p>	<p>See response to comments submitted by David Schwartz, CAAA, April 4, 2005, above. See also response to comments submitted by various</p>	<p>See action taken in connection with comment submitted by</p>

	<p>some cases. Commenter states these benefits were already too low according to the RAND studies. Commenter believes the regulations are in violation of the constitutional guarantee of adequate compensation and urges withdrawal of this schedule.</p>	<p>April 4, 2005 Oral and written comment</p>	<p>unions, commencing with Joseph A. Aredas, April 5, 2005, above.</p> <p>Further, note that as indicated above, new section 9805.1 (Data Collection, Evaluation, and Revision of Schedule), has been added to the proposed regulations. This proposed section will allow the Administrative Director to collect data on the PDRS for 18 months or until a valid statistical sample is obtained, and evaluate such data to determine whether revision to the 2005 PDRS is necessary. If the Administrative Director determines that a statistically valid sample of data supports a revision to the diminished future earning capacity adjustment, the Administrative Director will revise the 2005 PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c). For further details, see action taken in connection with comment submitted by commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>	<p>commenter Luis Perez-Cordero, dated April 4, 2005, above.</p>
<p>§§9725-10165.5</p>	<p>Commenter supports the final adoption of the proposed disability rating schedule regulations. Commenter feels California's workers' compensation system has long suffered from inconsistent, easily manipulated, litigious, disability system.</p> <p>Commenter believes the regulations meet the mandate of SB 899. Commenter supports the manner in which the schedule addresses the usage of the AMA Guides. Commenter believes the ordering of the factors are appropriate, in</p>	<p>Charles Bacchi Legislative Advocate California Chamber of Commerce April 4, 2005 Oral and written comment</p>	<p>Agree.</p>	<p>None.</p>

	<p>that the worker needs to be injured and that injury must result in an impairment, as determined by the guides before there can be a FEC adjustment.</p> <p>Commenter supports the proposal that the Division closely assesses the outcomes of the new schedule and update the schedule as needed as long as it is driven by solid data and that the foundation of the disability schedule continues to be the AMA Guides.</p>			
General Comments	<p>Commenter disagrees with the old PDRS rating system. Commenter is tired of defense doctors contradicting his doctor, and the long-drawn out claims process. Too many games.</p> <p>Commenter wants PDRS to reflect a more personal level because across-the-board cuts do not translate to reality. Commenter believes workers are not getting what they need to meet the minimum mission of the Commission, to try to minimize the impact of injuries on workers.</p> <p>Commenter is concerned about the system leaving him out in the cold due to his injury. i.e. losing job and being told to seek vocational rehabilitation training, and not being able to see his doctor because he has to see someone from a list.</p> <p>Commenter feels the old rates were not enough to compensate her for her financial losses, and objects to the new</p>	<p>Mr. Balestrieri April 4, 2005 Oral comment</p> <p>Marie Fanelli April 4, 2005 Oral comment</p> <p>Armando Lopez San Francisco Chronicle Pressman (worker) April 4, 2005 Oral comment</p> <p>Nancy Mennel April 4, 2005 Oral comment</p>	<p>Disagree. Comment goes beyond the scope of the regulations.</p> <p>Comment goes beyond the scope of the regulations.</p> <p>Comment goes beyond the scope of the regulations.</p> <p>Comment goes beyond the scope of the regulations.</p>	<p>None.</p> <p>None.</p> <p>None.</p> <p>None.</p>

	<p>rates, and hopes the testimony presented will be taken into consideration.</p> <p>Commenter feels the 500-pound gorilla in the room is not the workers or the employers. It is the insurance companies who are the middlemen. Commenter believes the insurance companies have managed to make this into the golden goose of making profit as being the middle man between the worker's injuries and the employer. Commenter feels the onus needs to put on the insurance companies that are making profit and doing it in a very inefficient way, instead of cutting benefits of injured workers.</p> <p>Commenter feels the pendulum in California has swung all the way over to the employer's side, and asks that the guidelines be made fair to everyone.</p> <p>Commenter believes the permanent disability payment, is not enough. Commenter believes that under the new "restrictions" people who are really injured are suffering.</p> <p>Commenter believes the legislators should come up with a program where the worker has some rights to be evaluated before they are cut off. Commenter proposes there should be an independent medical panel of real doctors that evaluate each individual.</p> <p>Commenter wants what she is entitled to,</p>	<p>Alfredo Mariono Jimenez April 4, 2005 Oral comment</p> <p>Pat Wilson April 4, 2005 Oral comment</p> <p>Nadia Prescott April 4, 2005 Oral comment</p> <p>Mark Clark April 4, 2005 Oral comment</p> <p>Mylieta Jones</p>	<p>Comment goes beyond the scope of the regulations.</p>	<p>None.</p> <p>None.</p> <p>None.</p> <p>None.</p> <p>None.</p>
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	and feels the handling of her injury is unfair and unjust.	Safeway worker April 4, 2005 Oral comment	regulations.	
	Commenter expressed opposition to the regulations.	William Daman Caltrans worker April 4, 2005 Oral comment	Comment goes beyond the scope of the regulations.	None.
	Commenter expressed the opinion that the new laws are unfair.	Beverly Schenk Safeway worker April 4, 2005 Oral comment	Comment goes beyond the scope of the regulations.	None.
	Commenter feels the corporations are taking advantage of the work force, and the government is taking advantage of the people.	David Meany April 4, 2005 Oral comment	Comment goes beyond the scope of the regulations.	None.
	Commenter described her injuries.	Marilani Wright April 4, 2005 Oral comment	Comment goes beyond the scope of the regulations.	None.
	Commenter opposes the regulations.	Michael Campbell April 4, 2005 Oral comment	Comment goes beyond the scope of the regulations.	None.
	Commenter discussed the concept of pain and encouraged thoughtful decisions.	Beto Tellario April 4, 2005 Oral comment	Comment goes beyond the scope of the regulations.	None.
	Commenter feels with the new schedule her benefits will be greatly reduced.	Kathleen Denny April 4, 2005 Oral comment	Comment goes beyond the scope of the regulations.	None.
	Commenter is concerned that the regulations will not accurately reflect what a person's earning capacity might	Sydney Chase April 4, 2005 Oral comment	Comment goes beyond the scope of the regulations.	None.

General Comments	<p>actually be.</p> <p>Commenter describes her injuries, the impact of the injuries on her family members and financial status, and her negative experience with her doctor and workers' compensation attorney.</p>	<p>Marites Recosane April 4, 2005 Oral comment</p>	<p>Comment goes beyond the scope of the regulations.</p>	<p>None.</p>
General Comment	<p>Commenter describes his injuries, his inability to get medical treatment, and his negative experience with his first workers' compensation attorney. Commenter further states that a drop of "70.03%" permanent disability award is not fair or just.</p>	<p>Michael Kaiser Undated Written comment</p>	<p>Comment goes beyond the scope of the regulations.</p>	<p>None.</p>
§9805	<p>Commenter states that limiting a rating for pain under the revised schedule to a maximum of 3% clearly conflicts with empirical data. Commenter strongly urges that DWC consider the California Medical Association's letter of December 8, 2004 regarding the rating of pain. That letter included an explanation of the underlying theory behind Chapter 13 of the AMA Guides, 5th Edition, by Dr. Phillip Lippe, one of the co-authors of that chapter. According to the CMA, "when pain is a neurobiological illness itself – not a symptom of another condition – it should not be capped at the 3% rating but rather may be given a rating up to 40%." Commenter states that the key point is that when pain causes disability, this will impact the injured workers' future earning capacity,</p>	<p>J. David Schwartz CA Applicant's Attorney Association April 4, 2005 Oral and written comment</p>	<p>Disagree. Labor Code section 4660 ("the Statute") sets forth the approach to be used by the Administrative Director to create the Permanent Disability Rating Schedule. The Statute indicates, in relevant part, that in determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement ... of the employee. The Statute further provides that for purposes of section 4660, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition) ("AMA Guides").</p> <p>The AMA Guides provides for assessment of the pain component already incorporated in the</p>	<p>None.</p>

<p>§9805</p>	<p>and as such the 3% violates the mandate of Labor Code §4660 that ratings consider this factor.</p> <p>Commenter further states Section 8 of the revised rating schedule includes a combined values chart that is adopted from the AMA guides. Commenter states that there is no empirical data that justifies the use of this chart and it should be removed from the revised schedule. A combined values chart is used in the AMA Guides in order to prevent the combination of two or more ratings from exceeding 100%. Commenter further states that, however, in SB 899 the Legislature adopted new Labor Code § 4664(b)(2) that limits the accumulation of all permanent disability awards issued with respect to any one region of the body to 100% over the employee's lifetime. Commenter concludes that it is neither necessary nor appropriate to use the combined values chart to accomplish this purpose.</p>		<p>WPI rating under Chapters 3-17 of the AMA Guides. Pursuant to Chapter 18 of the AMA Guides, a WPI rating based on the body or organ rating system of the AMA Guides (Chapters 3-17) may be increased by 0% to 3% when the burden of the worker's condition has been increased by pain-related impairment in excess of the pain component already incorporated in the WPI rating.</p> <p>Disagree. As indicated above, Labor Code section 4660 sets forth the approach to be used by the Administrative Director to create the Permanent Disability Rating Schedule. The Statute indicates, in relevant part, that in determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement. The Statute further provides that for purposes of section 4660, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition) ("AMA Guides"). The AMA combined values charts is part of the AMA Guides and we are obligated by statute to "incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published" by the AMA Guides. The purpose of the combined values chart is to estimate the overall impairment when combining two or more separate impairments arising from the same injury. Labor Code section 4664(c) (not Labor Code section 4664(b)(2) as indicated by</p>	<p>None.</p>
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			commenter) addresses the combination or accumulation of awards for particular regions of the body over the worker's life time, not the combination of impairments arising from a single injury, which is what the combined values chart addresses.	
§9805	<p>Commenter states that as currently drafted, the proposed rating schedule does not comply with the California Constitution because contrary to Labor Code and legislative intent, the proposed rating schedule slashes benefits and provides workers with constitutionally inadequate benefits. Commenter argues that the proposed rating schedule slashes benefits for workers who suffer a permanent disability without legislative authorization, leaving workers with inadequate benefits in violation of article XIV, section 4 of the California Constitution.</p>	<p>Margaret R. Prinzing Remcho, Johansen & Purcell Letter of November 29, 2004, submitted on behalf of the California Applicant's Attorneys Association, attached to written comment of J. David Schwartz, CA Applicant's Attorney Association April 4, 2005</p>	<p>Disagree. The relevant section of the California Constitution, applicable to this matter, states as follows:</p> <p>The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; ... <i>Cal. Const.</i> art. XIV § 4.</p>	None.

			<p>Contrary to the commenter’s assertions, the permanent disability rating schedule does not violate the California Constitution.</p> <p>An interest in a particular level of workers’ compensation benefits does not constitute a vested right. In <i>Graczyk v. WCAB</i> (1986) 184 Cal.App.3d 997, the Court of Appeal upheld a retroactive change to the definition of “employee,” noting that the workers’ compensation system is wholly statutory, and that no vested rights were impaired. <i>Id.</i> at 1006. The court went on to note that a vested right may be impacted in certain circumstances where the state interest is very great. <i>Id.</i> at 1008. Here, the state has a great interest in making improvements to an acknowledged workers’ compensation crisis.</p> <p>Additionally, in <i>Yoshioka v. Superior Court</i> (1997) 58 Cal.App.4th 972, the Court of Appeal upheld an initiative proposition that retroactively prohibited an uninsured motorist from collecting non-economic damages. The court stated that “...numerous courts have held that the right to recover specific types of damages is not a vested right because such rights are created by state and common law independent from the Constitution.” <i>Id.</i> at 982. Therefore, a state and its people may alter such rights. Such alteration is only forbidden when at the very least the party is deprived of every reasonable method of securing just compensation. This does not encompass instances where the plaintiff would not recover as much as he would have had the former rule</p>	
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<p>§9805</p>	<p>Commenter states that the proposed rating schedule does not comply with SB 899 as it is not based upon empirical data and findings from the Evaluation of California’s Permanent Disability Rating Schedule, Interim Report, prepared by the RAND Institute for Civil Justice or data from other empirical (FEC) studies, as required by Labor Code section 4660(b)(2). Commenter further states that the Future Earning Capacity adjustments in the proposed schedule bear no relationship to the data upon which they are allegedly based and the process used to assign the FEC adjustments is not related to any empirical data. Commenter states that the proposed schedule assigns an FEC adjustment of 1.10 to injury categories that have a ratio between 1.647 and 1.81, but there is nothing in the RAND data or in any other empirical data that justifies this selected adjustment. Commenter also states that the proposed rating schedule constitutes an abuse of the agency's discretion</p>		<p>continued. <i>Fechenscher v. Gamble</i> (1938) 12 Cal. 2d 482, 499.</p> <p>Therefore, although commenter contends that permanent disability ratings received by workers under the revised rating schedule should be lower than ratings received under the current schedule, and therefore, would violate the constitutional mandate, the permanent disability rating schedule is not in violation of the California Constitution.</p> <p>Disagree. Commenter maintains that the Permanent Disability Rating Schedule contravenes the language and intent of Senate Bill 899 (Chapter 34, stats. of 2004, effective April 19, 2004) (“SB 899”). The schedule, however, is well within the language and intent of the statute which is, to revise the process for determining the percentage of permanent disability based on Labor Code section 4660. See <i>CA Legislative Committee Analysis of SB 899</i> (April 15, 2004).</p> <p>Labor Code section 4660 (“the Statute”) sets forth the approach to be used by the Administrative Director to create the schedule. The Statute indicates that in determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to the employee’s diminished future earning capacity (“DFEC”). The Statute further provides that for purposes of section 4660, the “nature of the physical injury or disfigurement” shall</p>	<p>None.</p>
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	<p>because it improperly excludes a significant number of workers who have measurable diminished future earning capacity as a result of pain and other subjective factors of disability. Commenter states that the Legislature required the DWC to "incorporate" the impairment descriptions and rating percentages in the AMA Guides while taking "account" of the nature of the physical injury or disfigurement. But the Legislature did not mandate exclusive reliance on the AMA Guides for its impairment descriptions and rating percentages.</p>		<p>incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition) ("AMA Guides").</p> <p>Further, the Statute states that for purposes of section 4660, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. In this regard, the Statute directs the Administrative Director to formulate the adjusted rating schedule <i>based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.</i> Sections of a statute generally should be read to give effect, if possible, to every clause and word of a statute. See <i>United States v. Menasche</i>, 348 U.S. 528, 538-539 (1955). Contrary to the CAAA's argument, the Administrative Director complied with section 4660.</p> <p>The Court, in <i>Citizens to Preserve Overton Park, Inc. v. Volpe</i>, 401 U.S. 402 (1971), observed that the determination on whether an agency acted within the scope of its authority "begins with a delineation of the scope of the secretary's authority and discretion." Here, the statutory mandate concerning determining percentages of permanent disability and</p>	
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			<p>formulating the permanent disability rating schedule is contained in Labor Code section 4660.</p> <p>The Statute specifies in section (b)(2) that the schedule shall be based on empirical data and findings from the <i>Evaluation of California's Permanent Disability Rating Schedule, Interim Report</i> (December 2003), prepared by the RAND Institute, and <i>upon data from additional empirical studies</i>. (Emphasis added.) Research was conducted to determine whether empirical studies were conducted by other states which would contain empirical data that could be used to formulate the adjusted rating schedule (i.e., wage loss data based on permanent disability ratings using the AMA Guides). No such studies were found. Further, due to the stringent Legislature's requirement for regulations implementing SB 899 to take effect by January 1, 2005, the Division of Workers' Compensation was not able to conduct its own empirical study to assist in formulating the adjusted rating schedule. Nevertheless, this latter section in subdivision (b)(2), allowing the Administrative Director to draw upon data from additional empirical studies in addition to data contained in the December 2003 RAND report, does not establish any limitation or prohibition as to what factors could be considered by the Administrative Director in formulating the schedule. As specified, the directive is that any such additional data must be from empirical studies.</p> <p>Section 4660(c) directs the Administrative Director to amend the Schedule "at least once</p>	
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			<p>every five years.” Reference to additional empirical studies allows the Administrative Director to consider additional empirical studies in future amendments of the Schedule.</p> <p>The Administrative Procedure Act, 5 U.S.C.S. § 706(2)(A), sets forth the parameters that must be considered in determining whether the agency’s analysis throughout the rule-making process and its final decision making culminated in a rule which withstands challenge. This provision establishes that a court may set aside an administrative action only if that action is arbitrary, capricious, or otherwise contrary to law. Describing the standard of review as a “narrow one” in <i>Overton Park</i>, 401 U.S. at 416, the Court indicated that to make a finding that the agency’s choice was not arbitrary and capricious, the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Trial courts were admonished that although they must conduct a careful and in-depth review, they are not empowered to substitute their judgment for that of the agency. <i>Id.</i>; see also <i>Pulaski v. Occupational Safety & Health Stds. Bd.</i> (1999) 75 Cal. App. 4th 1331.</p> <p>These constraints were followed by the court in <i>Associated Fisheries of Maine, Inc. v. Daley</i>, 127 F.3d 104, 109 (1st Cir.1997), where the court said that policy choices are for the agency, not the court to make, and that even if a reviewing court disagrees with the agency’s conclusions, it cannot substitute its judgment for that of the agency. Additionally, in <i>Rhode</i></p>	
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			<p><i>Island Higher Educ. Assistance Authority v. Secretary, U. S. Dept. of Education</i>, 929 F.2d 844, 855 (1st Cir.1991), the court referred to the arbitrary and capricious standard of review as a “generous one” and observed that absent mistake of law, reversal will lie only if the Secretary’s action lacked a rational basis. Thus, in order to succeed on an arbitrary and capricious claim, a party must demonstrate that the agency lacked a rational basis for its decision and such a showing may be made where the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise. <i>See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.</i>, 463 U.S. 29, 43 (1983); <i>see also Wallace Berrie & Co. v. State Bd. of Equalization</i> (1985) 40 Cal. 3d 60, 66. (A court may only sustain a facial challenge to a regulation when it is arbitrary, capricious or without rational basis.)</p> <p>The Administrative Director has not acted beyond the powers delegated to her. The Schedule was formulated pursuant to section 4660. It indicates that the calculation of permanent disability is initially based on an evaluating physician’s impairment rating, in accordance with the medical evaluation protocols and rating procedures set forth in the AMA Guides, which is incorporated by reference into the Schedule. Pursuant to the Statute, the impairment rating is then adjusted to account for the occupation and age at the time</p>	
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			<p>of injury, and the DFEC, to obtain a final rating. The Schedule sets forth a summary of the methodology for arriving at the DFEC formula. The explanation set forth in the Schedule under “Summary of Methodology” reflects the rationale for the DFEC formula. As to any contention that there is a lack of empirical evidence to support formulation of the DFEC, the schedule clearly indicates that it is based on RAND data as required by the Statute. (<i>Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899</i>, December 2004, RAND Institute for Civil Justice, Seabury, Reville, Neuhauser, http://www.rand.org/publications/WR/WR214/)</p> <p>As the court indicated in <i>Associated Fisheries</i>, 127 F.3d at 111, “whether or not we, if writing on a pristine page, would have reached the same set of conclusions is not the issue . . . what matters is that the administrative judgment, right or wrong, derives from the record, possesses a rational basis, and evinces no mistake of law.” Commenter has not demonstrated that the Administrative Director lacked a rational basis for adopting the Schedule, and has failed to show that the Administrative Director relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise. Although Commenter may assert that other factors may have been reasonable to consider in formulating the Schedule, this does not translate into a</p>	
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			<p>finding that the Administrative Director's decisions lack a rational basis or that she used improper factors that the Legislature did not intend the agency to consider.</p> <p>Under the principles of administrative law, courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute. <i>Train v. Natural Resources Defense Council, Inc.</i>, 421 U.S. 60, 87 (1975). When faced with a problem of statutory construction, the U.S. Supreme Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by those charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. <i>Udall v. Tallman</i>, 380 U.S. 1 (1965). When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order. <i>Id.</i> at 16-18.</p> <p>When a case involves an interpretation of an administrative regulation, a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. <i>Bowles v. Seminole Rock & Sand Co.</i>, 325 U.S. 410 (1945). The interpretations</p>	
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			<p>and opinions of an agency administrator, while not controlling upon the courts, constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. (<i>Id.</i> at 1028); <i>Yamaha Corp. of America v. State Bd. of Equalization</i> (1998) 19 Cal. 4th 1, 14. Because the agency will often be interpreting a statute within its administrative jurisdiction, it may possess special familiarity with satellite legal and regulatory issues. It is this expertise, expressed as an interpretation, that is the source of the presumptive value of the agency's views. (<i>Id.</i> at 1028); <i>Exxon Mobil Corp. v. County of Santa Barbara</i> (2001) 92 Cal. App. 4th 1347, 1357.</p> <p>In <i>Kaiser Foundation Health Plan, Inc. v. Zingale</i> (2002) 99 Cal. App. 4th 1018, the Court of Appeal held that the California Department of Managed Health Care did not have the statutory authority to compel the Kaiser Foundation Health Plan to continue covering certain prescription drugs. The <i>Zingale</i> court indicated that in interpreting a statute where the language is clear, courts must follow its plain meaning. However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. Notwithstanding, the court must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to</p>	
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			<p>absurd consequences. <i>Id.</i> at 1023. The <i>Zingale</i> court found that the Act in question simply did not authorize the Department to assert the power it sought to assert. <i>Id.</i> at 1024.</p> <p>In contrast, the plain meaning of section 4660 states that “in determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of the injury, consideration being given to an employee’s diminished future earning capacity” . . . “The Administrative Director shall formulate the adjusted rating schedule based on empirical data and findings from the <i>Evaluation of California’s Permanent Disability Rating Schedule, Interim Report</i> (December 2003), prepared by the RAND Institute . . . and upon data from additional empirical studies.” Where the <i>Zingale</i> court held that the Department did not have the statutory authority to assert the power it sought to assert regarding prescription drug coverage, the Administrative Director, here, was given statutory authority and properly asserted the authority provided in section 4660 in order to formulate the Schedule. Therefore, in contrast to the CAAA’s assertions, the Administrative Director has followed the legislative mandate by revising the process for determining the percentage of permanent disability based on Labor Code section 4660. See <i>CA Legislative Committee Analysis of SB 899</i> (April 15, 2004).</p> <p>See, also response to comments submitted by David Schwartz, CAAA, dated April 4, 2005,</p>	
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<p>§9805</p> <p>§9805</p>	<p>Commenter states that the proposed schedule combines multiple impairments and disabilities without considering empirical data.</p> <p>Commenter objects to the definition of permanent and stationary, stating that the proposed definition represents a significant change to the law without any indication in SB 899 that the Legislature intended to make this change.</p>		<p>relating to the issue of pain, above.</p> <p>Disagree. See response to comments submitted by David Schwartz, CAAA, dated April 4, 2005, relating to the issue of combined values chart/combined impairments, above.</p> <p>Disagree. This definition is based on the AMA Guides, which has been adopted pursuant to the statute.</p>	<p>None.</p> <p>None.</p>
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