

Congressional Testimony of

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before the

Committee on Education and Labor
Subcommittee on Workplace Protections
Developments in State Workers' Compensation Systems
UNITED STATES CONGRESS

November 17, 2010

Members of the Committee:

Thank you for the opportunity to come before you to address the impact resulting from the publication of the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition on the Iowa Division of Workers' Compensation and other workers' compensation jurisdictions more generally. I also plan to testify about the impacts restricted workers compensation programs have on federally funded programs such as Medicare and Social Security Disability.

It is a great honor personally for me to speak to the members of the Subcommittee today about the workers' compensation system in the state of Iowa and share with you the detailed findings of the Task Force I convened in May 2008 to study the Sixth Edition of the Guides.

In my capacity as the Iowa Workers' Compensation Commissioner I plan to explain the impact the publication of the Sixth Edition has had on my jurisdiction, which has historically relied upon the most recent edition of the Guides for assignment of permanent impairment ratings. I can also address issues faced by other jurisdictions which are mandated by law to use the most recent edition of the Guides. More importantly I plan to share my thoughts about how the problems identified by our Task Force regarding the Guides can ultimately affect federal programs over which you have oversight responsibility.

Each state has its own unique workers' compensation system. Iowa passed its Workers' Compensation Act in 1913 and it has evolved into a model system which is

annually recognized as one of, if not the best in the United States.¹ Iowa prides itself on being a national leader while keeping premiums low for Iowa employers and benefit rates high for injured workers. The workers of Iowa annually sustain 21,000 or more reportable workplace injuries. From those injuries the Division receives petitions for contested cases in approximately 4,200 cases and holds 600 administrative hearings. It is evident from the statistics that the vast majority of injury claims in Iowa resolve without intervention of our administrative agency. The high voluntary resolution statistics are driven by the self-effectuation of workers' compensation claims between employers and injured workers. It is envisioned within the Iowa Act that disability claims will be fairly and reasonably investigated and reasonable benefits owed pursuant to the Act will be paid.² This compliance with voluntary payment obligations is necessary as the Division of Workers' Compensation is limited to 26 full time employees following quite extensive across the board cuts in state funding.

Iowa's self-effectuating workers' compensation system relies upon disability payments that are reliable and consistent. For injuries that are considered "scheduled" injuries – limbs and portions of limbs – Iowa has a specific numerical value assigned as a number of weeks for loss/loss of use of the particular body part. For instance, in Iowa an arm is worth 250 weeks of disability benefits. If a worker loses 10 percent use of the arm the worker is entitled to payment of 25 weeks of permanent partial disability benefits. (250 weeks x 10 percent = 25 weeks) For injuries that are considered "whole body" injuries – spine, head, nervous system, etc. – the minimum permanent partial disability rating is most often the level of permanent impairment plus, perhaps, additional compensation for loss of earning capacity of the worker. Whole body injuries are compensated on a 500 week schedule. Therefore if a worker has a 10 percent whole person impairment the worker is entitled to payment of 50 weeks of permanent partial disability benefits. (500 weeks x 10 percent = 50 weeks)

Likely resulting from extensive study and political compromise, Iowa Code section 85.34 assigns a weekly value to the various body parts, the whole body, and for permanent total disability. As the weekly value of a disability is a constant, the assignment of impairment for the body part can drastically impact the extent of weekly benefits owed as a voluntary payment. For instance, for an arm the 250 week schedule is a constant. If an impairment guide modifies impairment from 8 percent to 4 percent for a certain condition the workers' disability entitlement can be reduced from 20 weeks of compensation to 10 weeks. An impairment level that increases following modification

¹ Iowa ranked as best performing state for Workers' Compensation by Work Loss Data Institute, July 22, 2009. Iowa remains a Tier 1 state for performance of its Workers' Compensation system per the Work Loss Data Institute, March 15, 2010.

² A claim for penalty benefits can be commenced against an employer who fails to timely pay indemnity benefits without reasonable or probable cause or excuse known to the employer at the time benefits were not paid. Iowa Code section 86.13(4).

of an impairment guide would likewise greatly affect the obligation of the employer to compensate a worker.

As a result, the decision of the AMA to alter the impairment paradigm and assign new impairment values based upon a diagnosis significantly impacts both Iowa employers and injured workers. This system-altering change occurred without open discussion or transparency. More troubling is that the change was made without consultation with the various state jurisdictions including the Iowa Division of Workers' Compensation or elected leaders of the many states. Consequently, numerous state jurisdictions were left to react to the Sixth Edition following publication. What Iowa uncovered following a comprehensive study by an appointed, independent Task Force was both troubling and frustrating. It is a great concern that as fewer benefits may be awarded to injured workers due to drastic impairment reductions, those workers will likely turn to state or federal programs for assistance.

The Iowa Task Force

Upon publication of the AMA Guides, Sixth Edition, Iowa's workers' compensation community was confronted with many concerns and questions. Were physicians to use the Fifth or Sixth Edition; were employers to pay benefits using ratings from the Fifth or Sixth Edition to show compliance with voluntary payment obligations; was the Sixth Edition peer-reviewed; was the Sixth Edition compliant with Iowa laws; and what training was necessary to either complete or review an impairment rating under the Sixth Edition? These significant issues and others led to the convening of a Task Force comprised of two medical professionals who frequently practice in the Iowa Workers' Compensation system, two "claimant" and two "defendant" attorneys who frequently practice in the Iowa system, two former Deputy Workers' Compensation Commissioners from Iowa, and one moderator to perform various administrative tasks and issue the final report.

The Task Force was assigned five primary agenda items:

- 1 - Provide an analysis of the new paradigm for rating impairment contained in the sixth edition as compared to the prior editions of the guides as well as other rating guides. Identify advantages and disadvantages of the new paradigm.
- 2- Document errors or areas of concern contained in the sixth edition of the AMA Guides.
- 3- Outline an analysis that can be used to determine whether there is a significant impact on impairment ratings when using the sixth edition of the Guides as compared to prior editions of the Guides – most specifically the fifth

edition. If possible, provide an analysis of the impact on ratings and corresponding benefit payments.

4- Provide a recommendation on whether the sixth edition of the Guides should be used, whether parts of the sixth editions should be used, or what other impairment guides should be used in evaluating permanent impairment. Provide a further recommendation as to whether Iowa should create its own “Iowa Guide” for assigning impairment in Workers’ Compensation claims – and if so recommended, outline what process and timeline would be necessary to create the new “Iowa Guide”.

5- Report back on other considerations that the task force finds compelling.

The Task Force met 5 times from June 26, 2008 to August 26, 2008. The Task Force accepted testimony from several medical practitioners involved in developing the Sixth Edition including Alan Colledge, M.D., Mark Melhorn, M.D., Mohammed Ranavaya, M.D., Douglas Martin, M.D., Christopher Brigham, M.D., John Brooke, Ph.D., and James Gallagher, M.D. The Task Force also studied comparative data, held extensive discussions, and proposed administrative rule amendments for the Iowa system. The findings of the Task Force concluded with a vote of 7-1 against Iowa allowing the use of the Sixth Edition. I ask that a complete copy of the Task Force Report be included into the Record of the hearing. It can also be found online at the following location:

<http://www.iowaworkforce.org/wc/amatastaskforce/2008amaguidesprocessreport.pdf>

A paradigm shift in the Sixth Edition – blurring boundaries between medical and legal determinations

The Task Force learned that at the heart of the Sixth Edition is a change in the paradigm of rating impairment. The Sixth Edition replaces the “1980 International Classification of Impairments, Disabilities and Handicaps” with the World Health Organization’s model of disablement “International Classification of Functioning, Disability and Health” (ICF). The ICF model in the Sixth Edition defines impairment as “a consensus derived percentage estimate of the loss of activity that reflects the severity of a given health condition and the degree of associated limitations in activities of daily living.” The Task Force expressed significant concern that the Sixth Edition blurs the line between the level of impairment (a medical determination) and the level of disability (a legal determination). Dr. Mark Melhorn admitted that some of the Sixth Edition analysis clearly crosses into the area of disability as opposed to merely assigning impairment. It is the province of the workers’ compensation jurisdictions to assign the extent of disability resulting from a medical finding of impairment.

Chapter 2 of the Sixth Edition provides Iowa with a significant number of troublesome principles contained within the Guides which conflict with Iowa statutory and case law. Other jurisdictions will face similar conflicts.

Section 2.5 blurs the line between medical and legal standards for disability by defining “causality”. Whether an injury arises out of and in the course of employment is a legal determination to be made by an administrative law judge or a member of the judiciary, as opposed to a medical practitioner. The Sixth Edition states that to opine that a cause relates to an effect within a reasonable degree of medical probability, it is necessary that the event occurred, that the individual who experienced the event must have the possible condition, that is, the effect which may be related to the event, and that medical probability exists for the event to have caused or materially contributed to the condition. The Task Force noted that “if medical probability means a greater than 95% relationship, this definition of causality differs from the more likely than not legal probability standard in Iowa workers’ compensation law.” If the causation standard is to be amended in Iowa, that change should occur through the political process and not through an unelected, undisclosed panel within the AMA.

Section 2.5 further blurs the line between medical and legal standards by defining “aggravation”, “exacerbation”, “recurrence” and “flare up”. An aggravation is described as a permanent worsening of a pre-existing or underlying condition, which results from a circumstance or event. It is distinguished from an exacerbation, recurrence, or flare up. Those three terms are said to imply a temporary worsening of a pre-existing condition that then returns to a baseline. The Task Force notes that “Iowa workers’ compensation law makes no such distinction between exacerbation and aggravation; each may be considered to result in a permanent, potentially compensable, substantial change in a pre-existing condition.”

Finally, section 2.5 provides a methodology for allocating or “apportioning” impairment between or among multiple factors. The Sixth Edition allows for a final rating which is derived by subtracting from current impairment any pre-existing impairment. This “apportionment” of disability conflicts with the recently amended Iowa Code section 85.34(7) and places employers at risk of a penalty if they pay an impairment rating value which improperly reduces the impairment in violation of section 85.34(7). Likewise, for injured workers who are paid a reduced disability award based upon improper apportionment, the worker may never obtain the extent of disability owed pursuant to Iowa law or may be required to file a contested claim with the agency and incur legal expenses – both of which are to be avoided in the self-effectuating Iowa workers’ compensation system.

Dr. Christopher Brigham presented the Task Force with an article he relates is to be published. Dr. Brigham concludes his article as follows:

In interpreting reactions by different stakeholders it is important to distinguish between the criticism of the process and the perceived impact on the stakeholders. The more significant problems do not lie with The Guides, but rather, with how impairment ratings are used by Workers’ Compensation Systems or other systems. The AMA Guides will continue

to evolve and improve. The systems that make use of the Guides must also evolve.

With all due respect to Dr. Brigham, the Iowa Workers' Compensation system will evolve and improve when it is decided by the citizens of Iowa that it will evolve and improve. The system will not evolve at the whim or business opportunity of either one physician, one medical association, or a small consensus of the two.

Iowa has long held that the question of how disabled an injured worker has become following an injury is a legal question, not a medical question, to be decided by the workers' compensation commissioner as trier of fact with the causation standards set forth in the Iowa Code. In violation of Iowa law, the authors and editors published a Sixth Edition which unquestionably and explicitly "crosses the bridge into," "attempts to determine," and "is a surrogate for" legal disability. Sixth Edition, p. 5 (defining "impairment rating" to include the disability concept of the "degree of associated limitations in terms of ADL's"). Such encroachment of state law by an unelected body is a serious breach. Furthermore, states which are bound by their statutes to rely upon the most recent edition of the Guides will turn away injured workers who previously were entitled to benefits or may leave workers with benefit awards that fail to adequately compensate the worker to the extent as before adoption of the Sixth Edition. Injured workers denied coverage under a workers' compensation act will turn to other available venues for support – most likely applying for Social Security Disability benefits or federally sponsored medical care.

Other Sixth Edition Concerns:

Consensus

In order to determine the basis for the paradigm shift and to determine who was included in the "consensus" for such changes, the Task Force submitted 5 questions to the AMA. The AMA and the medical practitioners questioned by the Iowa Task Force (each of whom specifically stated he did not speak for the AMA) either failed or refused to explain a legitimate rationale for the paradigm shift to the ICF. Such lack of transparency raises concerns about the motives and justifications behind the shift. Furthermore, there was a wholesale refusal to provide the names and qualifications of those involved in the decision to shift the paradigm and adopt the ICF model. Dr. Melhorn stated that the decision to change the assessment methodology was made prior to his involvement with the upper extremity committee and he did not believe that all chapter editors agreed with the paradigm change. Also, the AMA further refused to identify who ultimately assigned the values to the numerous impairment ratings found in the Sixth Edition, or why the values were changed from those found in the Fifth Edition. Information shared with Task Force members suggests that much of the construction of the book and assignment of impairment values was not the result of a consensus at all as much as it was the work of one person, Dr. Christopher Brigham. It must be noted that Dr. Brigham has a successful enterprise based upon reviewing, correcting, or

commenting on other physician's ratings. Dr. Brigham further offers several courses to teach physicians and others how to use the Guides.³

The questions and responses from the Task Force to the AMA are set forth herein:

1. How were the members of the various medical consensus groups chosen? What practitioners were included in the groups?

The American Medical Association (AMA) sought to include the broadest participation of content and impairment experts in developing the Guides to the Evaluation of Permanent Impairment, Sixth Edition (Guides Sixth). Accordingly, we solicited nominations from the entire Federation of Medicine which includes all of the state, county, and specialty medical societies represented in the AMA's House of Delegates that work together to advance the agenda of physicians and their patients. We also solicited wider participation via a call for nominations placed on the AMA Website.

The nominees were assigned to one or more chapter work groups and worked within their group to develop, update, or review content for each chapter. Each chapter draft was reviewed by a wide-ranging group of stakeholders including physicians, attorneys, worker's compensation and insurance system representatives and judges. The Advisory Committee members were also established via a call for nominations to the Federation of medicine. A complete list of Editorial Panel, Advisory Committee, Contributing and review group members is included in the Guides Sixth.

2. What were the criteria for selection of the legal advisers to the Sixth Edition?

Legal advisers possessing medical knowledge were identified within the framework of the selection process identified above. The AMA collaborated with legal advisers on prior editions of the Guides and other publications with a medico legal component. Additionally, the AMA is working with the American Bar Association to determine how best to coordinate legal society input for future editions.

3. Were any workers' compensation administrators actively involved or consulted in the Sixth Edition development process?

Yes, Medical Director input was provided during the conceptual and review phases including final chapter review.

4. How were chapter contributors chosen? Which contributors wrote the various chapters?

See #1 above. Contributors were nominated by the Federation and other stakeholders. A complete list of contributors is included in the Sixth Edition.

5. What role did senior contributing editor, Christopher R. Brigham, M.D., have in the overall development process for the Sixth Edition?

Dr. Christopher R. Brigham's role was as one of the ten members of the Editorial Panel.

³ Dr. Brigham's company can be found on the internet at www.impairment.com and there one can find his education courses, rating review charges, and many of his primarily employer-insurance carrier oriented topics. It was noted by the Iowa Task Force that Dr. Brigham's company provides a service to evaluate impairment ratings, and charges \$95 for correct ratings and \$195 for incorrect ratings – likely making it in his own best interest to find incorrect impairment ratings. With the significant difficulty in training physicians following the paradigm shift it was noted that there will be a significant increase in impairment rating errors which would also be to Dr. Brigham's own financial best interest. Since the findings of the Iowa Task Force were published, Dr. Brigham has amended his fee schedule.

When the AMA asserts that it relies upon a group/consensus process to assign values of impairment, it becomes important to know who comprised the group as it is obvious that outcomes may vary significantly depending upon those who are included or excluded from the consensus process. Without knowing the composition of the groups who determined the ratings in the book it is impossible to determine the biases which may exist or which may suggest an unfair group composition. Moreover, the lack of transparency furthers the belief that “consensus” may have succumbed to the decisions or opinions of one particular person. The Iowa Task Force continued to ask, “Why the Editors and the AMA are being so vague as to who was involved in developing the particular chapters?” In the Fifth Edition, the AMA freely shared the members involved in the development and editing of each chapter. It also appears that “consensus” may have been reached in the Sixth Edition because those who were initially consulted and had differing opinions were no longer part of the “consensus” by the time “consensus” was reached. Such a belief is bolstered by the suggestions that Dr. Brigham ultimately was a consensus of one for many chapters of the Sixth Edition.

Members of the Iowa Task Force were also concerned about the biases of the consensus itself. This concern emanates from comments and correspondence received from Dr. Douglas Martin, a physician from Sioux City, Iowa, who was one of the reviewers for the Fifth Edition of the Guides and is also on the Editorial Board of the Sixth Edition. In correspondence and in a meeting with the Task Force, Dr. Martin expressed concerns about “hidden agendas and biased allegiances which many physicians (involved in the development of the Sixth Edition) cannot say.” As noted by the Task Force members, this is an extremely troubling statement from a member of the Editorial Advisory Board and calls into question the consensus that derived the impairments to be assigned in this book.

Errors and Editorial Concerns

The limited, initial involvement of workers’ compensation systems in the production of the Sixth Edition was quickly reduced by attrition. Two Medical Directors for state workers’ compensation systems, Dr. Alan Colledge and Dr. Hal Stockbridge, withdrew from the editorial process of the Sixth Edition. Dr. Stockbridge apparently withdrew for reasons unrelated to the editorial process. However, Dr. Colledge testified before the Iowa Task Force that he withdrew because of disagreements over the content and the methodology being developed for the Sixth Edition. Dr. Colledge has practical experience in workers’ compensation systems from clinical practice and impairment ratings to medico-legal settings, to government experience as Utah’s workers’ compensation medical director. While state Medical Directors were initially involved, the Iowa Task Force was not informed of any state commissioner or agency head being invited onto the editorial staff.

Of perhaps greater concern than the editorial makeup of the Sixth Edition is the significant number of errors included in the initial publication as well as in the subsequent errata. The AMA and the editors have produced a product that people rely upon for serious business purposes that has so many identified errors that it required a

52 page errata to publish them all, as well as an entirely new printing for additional changes. It is noted that the second printing is not identified as a corrected version. Therefore, it is perhaps impossible for a state workers' compensation agency, which must review an impairment rating, to know if it was done with the corrected version of the Sixth Edition, or the original flawed publication. Dr. Rondinelli has stated that corrections and clarifications to the Sixth Edition are likely to be ongoing in nature. Therefore, a workers' compensation agency cannot accurately rely upon the Sixth Edition as the publication is under continual amendment. Furthermore, a recent business solicitation from Dr. Brigham reports that 80 percent of impairment ratings are incorrect and his team of "certified" raters will review ratings and provide corrections.

Although the Iowa Task Force detailed the numerous errors, those errors are too detailed and require significant explanation and will not be further detailed herein but can be found within the Task Force Report at the link previously provided.

Cultural Bias

The Iowa Task Force was the first body to question the scientific basis of and the potential for cultural bias in the questionnaires and tests included within the Sixth Edition. It was confirmed that the Dash and Quick Dash questionnaires, which were created for the Sixth Edition, are not culturally sensitive and they have not been tested to determine the reading proficiency level which a native English speaker must possess in order to be able to read, understand, and answer questions appropriately. By failing to properly test the Dash and Quick Dash forms it is highly possible that the questionnaires may result in invalid (artificially high or low) scores for any of the numerous and diverse non-Anglo cultures which exist in the Iowa workforce. Lack of reading level proficiency testing means these questionnaires may result in invalid scores for those of lower educational levels.

This lack of sensitivity and proficiency testing results in a significant possibility of a disparate impact in the ultimate impairment rating assigned to persons of different cultures or educational levels. The Dash and Quick Dash scores are not only used as part of the "net adjustment formula" which can modify the normal impairment ratings, Sixth Edition, p. 11; if the scores are inconsistent with other modifiers by 2 or more grades then the grade modification process is thrown out entirely, Sixth Edition, pp. 406-407; and if they are simply too high (above 60) then the worker may be classified as a symptom magnifier or in need of a psychiatric diagnosis, Sixth Edition, pp. 447-448.

The only commentary from the AMA or those interviewed by the Iowa Task Force came from Dr. Rondinelli who suggested that given the lack of cultural sensitivity in these tools, the questionnaires simply not be utilized with members of a minority population. However, the result of Dr. Rondinelli's suggestion would be to endorse disparate methodologies for rating permanent impairment for persons of different cultures, ethnicities, and educational ability. Simply rejecting use of these modifier questionnaires would eliminate a potential mechanism for such a person to have her or

his impairment rating legitimately modified. Such blatant disparate treatment is not only unfair, it is possibly legally discriminatory.

Iowa has long been at the forefront of equal protection for all its citizens. The Iowa Division of Workers' Compensation cannot endorse the use of a rating system that has a high likelihood of discriminating against classes of persons. Other jurisdictions should refuse to do so as well.

Costs to the Iowa Division of Workers' Compensation and Others

There are numerous costs to state jurisdictions and others resulting from alterations of impairment guidelines. In addition to state workers' compensation agencies it is necessary to focus on the costs to unrepresented workers, medical professionals, and also the federal government.

The primary cost to state workers' compensation jurisdictions will be borne in increased levels of litigation. Workers who are dissatisfied with the level of voluntary disability payments will seek to petition for additional benefits. There is a likelihood that those litigation claims may include complex issues such as whether the Guides' standards for causation and apportionment are applicable or overturn case law precedent and whether the permanent partial impairment ratings comport with the factors of permanent disability inherent in the state's own workers' compensation act. As litigation increases it results in longer timelines from the date a petition is filed until a final agency decision is produced. The longer it takes for litigation to occur the greater the likelihood that injured workers will be forced to seek alternate means of support including support from the federal government.

As was previously mentioned, the Iowa system requires good faith claims handling to fulfill the self-effectuating payment model. Most workers will simply agree to the voluntary payment made by the employer or insurance company without seeking attorney representation. If it is likely that voluntary payment levels are reduced there will be a significant increase in applications for other benefit programs. Furthermore, workers in rural areas of a state may be required to travel greater distances for an impairment rating as the number of doctors trained in the use of the Sixth Edition is greatly limited. For significantly disabled workers the increased travel may result in significant hurdles to obtain benefits that should be voluntarily paid by the employer or insurance carrier. Such hurdles may result in driving greater numbers of workers to apply for social security disability benefits or to seek other government programs.

Medical professionals who are called upon to provide expert opinions as to matters in workers' compensation claims face significant costs in use of the Sixth Edition. Due to the complete paradigm shift and the complexity of the new paradigm, it was estimated that a medical professional would need to attend a minimum 8 hour training course or spend 28-30 hours of self-study. The costs of such training are increased as the training often occurs out of state and requires an absence from day to day duties with patients. Many doctors will opt out of the workers' compensation system

if they are required to seek certification or prove they have obtained extensive training. For rural doctors it is not cost efficient to seek training as they see so few workers' compensation patients that they cannot recoup their investments. Hence workers in rural areas will have less access to proper ratings under the Sixth Edition. Any increase in costs associated with training and increased medical examination fees will be passed along to employers and insurance carriers.

As has been shown consistently throughout the testimony provided, when injured workers face hurdles caused by amendments to state workers' compensation programs they will seek assistance from the federal government. The cost shifting that can occur can be extensive. A common example of cost shifting which is already a significant federal concern is the shifting of medical costs from workers' compensation insurers to Medicare. Without strict scrutiny of settlements by the federal government there is the dramatic risk of having Medicare make medical payments that are the clear liability of the responsible insurer. An insurer may choose to pay a premium settlement to a worker with the understanding that they waive any further obligation to make medical payments, thus leaving the worker to seek Medicare coverage for future care. Likewise, if monetary value of injury payments is reduced either through legislative changes or through indirect means such as the new AMA Guides it is apparent that there will be a corresponding increase in the number of workers who will submit applications for Social Security disability benefits.

Conclusion

Thank you for your interest in the probable impact on the state of Iowa, other workers' compensation jurisdictions, and the federal government resulting from the publication of the AMA Guides, Sixth Edition. The information provided will hopefully spur further interest in this topic that can have a significant impact on participants in workers' compensation systems throughout the United States. I have greatly appreciated the opportunity to share my thoughts with you and I welcome further questions on an individual basis as your investigation moves forward.

Respectfully submitted,

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