

**ADOPTED REGULATION OF THE DIVISION OF INDUSTRIAL
RELATIONS OF THE DEPARTMENT OF BUSINESS
AND INDUSTRY**

LCB File No. R060-03

Effective October 1, 2003

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§ 1-4, NRS 616C.110.

Section 1. NAC 616C.002 is hereby amended to read as follows:

616C.002 1. For the purposes of NRS 616B.557, 616B.578, 616B.587, 616C.105, 616C.490 and 617.459, the Division hereby adopts by reference the *Guides to the Evaluation of Permanent Impairment*, ~~[4th Edition, 3rd Printing,]~~ *5th Edition*, published by the American Medical Association.

2. A copy of the publication may be obtained from the *Order Department*, American Medical Association, P.O. Box ~~[7046, Dover, Delaware 19903-7046,]~~ *930876, Atlanta, Georgia 31193-0876, by telephone at* 800.621.8335, *or on the Internet at <www.amapress.com>*, for the price of ~~[\$49.95]~~ *\$129* for persons who are members of the Association, or ~~[\$75.95]~~ *\$149* for persons who are not members of the Association.

3. The provisions of this section do not:

(a) Constitute a change of circumstances for the purposes of NRS 616C.390.

(b) Entitle an injured employee whose permanent partial disability was rated pursuant to NRS 616C.490 before ~~[May 1, 1997,]~~ *October 1, 2003*, to an increase in the compensation he receives for that disability.

Sec. 2. NAC 616C.021 is hereby amended to read as follows:

616C.021 1. The designation of a rating physician or chiropractor pursuant to NRS 616C.490 must be in writing. To qualify for designation, a physician or chiropractor must:

(a) Possess the qualifications required of a physician or chiropractor who is appointed to the panel of physicians and chiropractors established pursuant to NRS 616C.090 and NAC 616C.003;

(b) Demonstrate a special competence and interest in industrial health by:

(1) Performing ratings evaluations of permanent partial disabilities when selected pursuant to NRS 616C.490, except disabilities related to an injured employee's vision or functional limitations, including deficiencies in brain function, resulting from an industrial accident or occupational disease;

(2) Scheduling and performing a rating evaluation within 30 days after receipt of a request from an insurer, a third-party Administrator or an injured employee or his representative; and

(3) Serving without compensation for a period not to exceed 1 year on the panel to review ratings evaluations established pursuant to NAC 616C.023;

(c) Except as otherwise provided in ~~{subsection 2, successfully}~~ *this section*:

(1) Successfully complete a course on rating disabilities that is approved by the Administrator and pass an examination *covering this subject* that is administered by the American Board of Independent Medical Examiners ~~{}~~ or its successor organization ~~{}~~, *or by any other organization or company recognized by the Division*; and

(2) Successfully complete a course on the most recent edition of the Guide, as adopted by reference pursuant to NAC 616C.002, and pass an examination covering this subject that is

administered by the American Board of Independent Medical Examiners or its successor organization, or by any other organization or company recognized by the Division; and

(d) Demonstrate an understanding of the:

(1) Regulations of the Division related to the evaluation of permanent partial disabilities;

and

(2) ~~*American Medical Association's Guides to the Evaluation of Permanent Impairment,*~~

Guide, as adopted by reference ~~*by the Division*~~ pursuant to ~~*NRS 616C.110 and*~~ NAC 616C.002.

2. The Administrator may authorize ophthalmologists and psychiatrists who are authorized to practice in this state to attend the relevant portions of the ~~*course*~~ *courses* required by paragraph (c) of subsection 1 and, upon the recommendation of the instructor of ~~*the*~~ *such a* course, may approve an ophthalmologist or psychiatrist to evaluate injured employees with impaired vision or brain damage according to his area of specialization.

3. *In lieu of the individual courses and examinations required by paragraph (c) of subsection 1, a physician may qualify for designation if he has:*

(a) Successfully completed a course that covers both rating disabilities and the most recent edition of the Guide, as adopted by reference pursuant to NAC 616C.002; or

(b) Passed an examination covering both subjects that is administered by the American Board of Independent Medical Examiners or its successor organization, or by any other organization or company recognized by the Division,

as appropriate.

4. A rating evaluation of a permanent partial disability may be performed by a chiropractor only if the injured employee's injury and treatment is related to his neuromusculoskeletal system.

~~[4.]~~ 5. A rating physician or chiropractor may not rate the disability of an injured employee if the physician or chiropractor has:

- (a) Previously examined or treated the injured employee for the injury related to his claim for workers' compensation; or
- (b) Reviewed the health care records of the injured employee and has made recommendations regarding the likelihood of the injured employee's ratable impairment.

~~[5.]~~ 6. A rating evaluation of a permanent partial disability performed by a rating physician or chiropractor is subject to review by the Administrator pursuant to the provisions of NAC 616C.023.

Sec. 3. NAC 616C.476 is hereby amended to read as follows:

616C.476 1. A rating physician or chiropractor who performs an evaluation of a permanent partial disability shall evaluate the industrial injury or occupational disease of the injured employee as it exists at the time of the rating evaluation. The rating physician or chiropractor shall take into account any improvement or worsening of the industrial injury or occupational disease that has resulted from treatment of the industrial injury or occupational disease. *The rating physician or chiropractor shall not consider any factor other than the degree of physical impairment of the whole man in calculating the entitlement to compensation.*

2. ~~[A rating physician or chiropractor]~~ **In** performing an evaluation of a permanent partial disability, ~~[that is related to the spine of an injured employee shall use the "Injury Model," as described on page 3/94 of the guide, to rate the disability if the condition of the injured employee is listed in Table 70, Spine Impairment Categories for Cervicothoracic, Thoracolumbar, and Lumbosacral Regions, on page 3/108 of the guide. If none of the categories set forth in the table~~

~~are applicable to the condition of the injured employee, the rating physician or chiropractor may use the “Range of Motion Model,” as described on page 3/94 of the guide, to assist in categorizing the disability.~~

~~—3.— A rating physician or chiropractor evaluating an upper extremity neurological impairment shall use Table 15, Maximum Upper Extremity Impairments Due to Unilateral Sensory or Motor Deficits or Combined Deficits of the Major Peripheral Nerves, on page 3/54 of the guide, rather than Table 16, Upper Extremity Impairment Due to Entrapment Neuropathy, on page 3/57 of the guide.]~~ *a rating physician or chiropractor shall not use:*

- (a) Chapter 14, “Mental and Behavioral Disorders,” of the Guide; or*
- (b) Chapter 18, “Pain,” of the Guide.*

Sec. 4. This regulation becomes effective on October 1, 2003.

**NOTICE OF ADOPTION OF PROPOSED REGULATION
LCB File No. R060-03**

The Division of Industrial Relations of the Department of Business and Industry adopted regulations assigned LCB File No. R060-03 which pertain to chapter 616C of the Nevada Administrative Code on August 1, 2003.

Notice date: 5/28/2003
Hearing date: 6/30/2003

Date of adoption by agency: 8/1/2003
Filing date: 9/9/2003

INFORMATIONAL STATEMENT

1. A description of how comments were solicited from the public and affected businesses, a summary of responses from the public and affected businesses and an explanation of how other interested persons may obtain a copy of the summary.

The parts of Assembly Bill 168 (AB 168) pertaining to American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides, 5th Edition") were a subject of discussion during the 2003 legislative session. Workers' Compensation Insurers, Third-Party Administrators, Trial Lawyers, Organized Labor and representatives of the Division of Industrial Relations ("Division") participated in the discussions.

As approved by the Governor, AB 168 requires the Division to adopt the AMA Guides, 5th Edition, no later than August 1, 2003. Accordingly, the Division scheduled a workshop and public hearing on regulations adopting the AMA Guides, 5th Edition, on June 30, 2003. In conjunction with providing notice to the public and interested parties of the workshop and public hearing, the Division prepared the Small Business Impact Statement required by NRS 233B and a *draft* regulation, which the Division submitted to the Legislative Counsel Bureau pursuant to NRS 233B.

A copy of this informational statement may be obtained by contacting the Division of Industrial Relations' Industrial Insurance Regulation Section at the following locations:

Industrial Insurance Regulation Section
1301 N. Green Valley Pkwy., #200
Henderson, NV 89074
Telephone: (702) 486-9080

Industrial Insurance Regulation Section
400 W. King St., #400
Carson City, NV 89703
Telephone: (775) 684-7270

2. The number of persons who attended the hearing, testified at each hearing, and submitted written statements to the agency.

The workshop and public hearing were conducted at two sites via video conference: the main site was at the Bradley Building in Las Vegas; the other site was at the Department of Business and Industry's conference room in Carson City. In Las Vegas, 38 people attended and 3 testified; in Carson City, 20 attended and 1 testified. The oral testimony is summarized as follows:

Dr. Francisco Villanueva-Weber

Dr. Villanueva-Weber wondered whether the Division had arranged for training raters in the AMA Guides, 5th Edition, like the Division did for the 4th Edition.

Leslie Bell, Nevada Self-Insured Association

Ms. Bell's comments, primarily, concerned what she believed was a conflict between the statutory requirement that limits impairment ratings to *physical* impairments and the AMA Guides, 5th Edition. In her view, the AMA Guides, 5th Edition, by including consideration of *activities of daily living* (ADL), violated the statutory requirement of a *physical* impairment.

Secondarily, Ms. Bell expressed concern respecting the rating of carpal tunnel syndrome. It was her opinion that a "lot" of the rating for this condition was subjective. Accordingly, she proposed that the Division adopt a regulation requiring an electromyogram (EMG) and nerve conduction studies prior to a rating. These tests, she concluded, were objective evidence of nerve injury.

Thirdly, she requested that the Division develop a regulation to "shore up" apportionment based on "degeneration."

Finally, she asked that there be greater accountability on the part of rating physicians and chiropractors. In her opinion, there were too many rating errors. She, therefore, suggested that physicians and chiropractors should not get paid for ratings with errors.

Ms. Bell also testified during the public hearing on the proposed regulation (copies of the proposed regulation, as revised by the Legislative Counsel Bureau were available at the workshop and public hearing that followed). During this testimony, Ms. Bell stressed that only "objective" physical impairments should be rated; accordingly, she requested that the Division "modify" the AMA Guides, 5th Edition, by regulation to exclude ADL's and "other" subjective areas. She also repeated her request to withhold payments to raters if there were errors in the permanent partial disability evaluation.

Dean Hardy, Nevada Trial Lawyers Association

Mr. Hardy was concerned that Ms. Bell's suggested regulations would impair a rating physician's flexibility. He also disagreed with Ms. Bell's conclusion that there was a conflict between ADL's and the physical impairment requirement. He concluded that the Division should not attempt to diminish the AMA Guides, 5th Edition, in its regulations.

Ray Badger, Attorney

Mr. Badger suggested the Division address certain chapters of the AMA Guides, 5th Edition, which, in his view, were not necessarily consistent with the statutory requirements of a physical impairment. He singled out the chapter on mental disorders - a chapter he stated had been excluded from ratings by the Nevada Supreme Court - and the pain chapter.

Mr. Badger also disagreed with Ms. Bell's conclusion that ADL's were in conflict with the statute. He stated that the AMA Guides, 5th Edition, merely authorized increasing the percentage of disability *if* the injury affected the injured worker's physical ability.

After the workshop and public hearing, the Division received written comments concerning the adoption of the AMA Guides, 5th Edition, and related matters. The written comments are summarized as follows:

R. A. Wong, Third-Party Administrator

Mr. Wong wanted the Division to reconsider the adoption of the AMA Guides, 5th Edition, because, in his opinion, the average PPD awards would increase by 100% to 400% and, in his experience, 50% of workers' compensation claims are "invalid."

Jayne & Associates, Inc., Nevada Self-Insurers' Association

Mr. Jayne proposed specific amendments to several existing regulations and the proposed regulation:

Mr. Jayne proposed a new subsection to NAC 616C.212 which would authorize insurers to withhold payment for a rating if it contained errors that necessitated another rating.

Mr. Jayne also proposed amending NAC 616C.476 in several respects. First, he requested language repeating the statutory requirement that a rating must be based on a *physical* impairment. Second, he requested that the Division incorporate specific tables continued in the AMA Guides, 5th Edition (table 16-6 and table 13-15, respectively) for rating extremity upper reflex sympathetic dystrophy and lower extremity reflex sympathetic dystrophy. He also echoed Ms. Bell's testimony by requesting that ADL's not be considered when rating the spine.

Mr. Jayne then proposed that the Division prohibit a rating for carpal tunnel syndrome unless EMG and nerve conduction studies "document objective findings of residual impairment." Mr. Jayne also wanted to prohibit a rating for fibromyalgia and for a clavicle resection unless the resection is a result of trauma to the clavicle.

Don Smith, Employers' Insurance Company of Nevada

Mr. Smith initially requested that the Division issue rating guidelines, much like the Division did for the 4th Edition. Mr. Smith also noted that the AMA Guides, 5th Edition, allowed for impairment ratings for pain which, in his opinion, violated NRS 616C.490(5).

Next, Mr. Smith, as Mr. Badger did, requested that the Division preclude ratings for psychological and psychiatric impairment based on the holding in Maxwell v. SIIS, 109 Nev. 327, 849 P.2d 267 (1993).

Finally, Mr. Smith noted there may be other areas - areas other than pain and psychological/psychiatric impairment - in the AMA Guides, 5th Edition, that conflicts with Nevada law and, therefore, should be excluded by regulation.

2. If the regulations were adopted without changing any part of the proposed regulations, a summary of the reasons for adopting the regulations without changes.

The regulations were changed as a result of the comments received. For example, the Division chose to repeat in regulation the statutory requirement that rating must be based on a *physical* impairment as suggested by the Nevada Self-Insurers' Association. The Division chose to repeat the statutory language in regulation in order to reiterate the requirement in a manner and place that may be more accessible to rating physicians and chiropractors.

The Division also chose to exclude Chapter 14, *Mental and Behavioral Disorders* of the AMA Guides, 5th Edition, based on the Nevada Supreme Court holding in SIIS v. Maxwell, 109 Nev. 327, 849 P.2d 267 (1993).

The Division, however, does not believe it is appropriate to prohibit physicians and chiropractors from considering ADL's in spine evaluations. As stated in the AMA Guides, 5th Edition, ADL's are an essential and necessary part of the impairment rating process:

The Division also is excluding Chapter 18, Pain, of the AMA Guides, 5th Edition, based in part, on the comments of Ray Badger, Don Smith and others who questioned its applicability to "physical" impairment. While there is, as is noted in the 5th Edition, conflicting medical opinions respecting pain, the Division believes it is not appropriate to authorize ratings as contemplated by chapter 18.

1.2 Impairment

The *Guides* continues to define **impairment** as "**a loss, loss of use, or derangement of any body part, organ system, or organ function.**" This definition of impairment is retained in this edition. A medical impairment can develop from an illness or injury. An impairment is considered permanent when it has reached **maximal medical improvement (MMI)**, meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment. The term *impairment* in the *Guides* refers to **permanent impairment**, which is the focus of the *Guides*.

An impairment can be manifested objectively, for example, by a fracture, and/or subjectively, through fatigue and pain. Although the *Guides* emphasizes objective assessment, subjective symptoms are included within the diagnostic criteria. According to the *Guides*, determining whether an injury or illness results in a permanent impairment requires a medical assessment performed by a physician. An impairment may lead to functional limitations or the inability to perform activities of daily living. . .

In evaluating impairment, the *Guides* considers both anatomic and functional loss. Some chapters place a greater emphasis on either anatomic or functional loss, depending upon common practice in that specialty. *Anatomic loss* refers to damage to the organ system or body structure, while *functional loss* refers to a change in function for the organ or body system. An example of an anatomic deviation is development of heart enlargement; functional loss includes a loss in ejection fraction or the ability of the heart to pump adequately. Anatomic loss receives greater emphasis in the musculoskeletal system, as in measurements such as range of motion. Functional considerations receive greater emphasis in the mental and behavioral section.

The impairment criteria outlined in the *Guides* provide a standardized method for physicians to use to determine medical impairment. The impairment criteria include diagnostic criteria, incorporating anatomic and functional measures. The impairment criteria were developed from scientific evidence as cited and from consensus of chapter authors or of medical specialty societies.

Impairment percentages or ratings developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living (ADL), *excluding* work. Impairment ratings were designed to reflect functional limitations and not disability. The whole person impairment percentages listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work*, . . .
(Emphasis in original).

AMA Guides, 5th Edition, pgs. 2 and 4.

The Division also chose not to incorporate other changes requested by the Nevada Self Insurers' Association because the changes are: (1) not required by existing law; (2) are inconsistent with the AMA Guides, 5th Edition; (3) a modification of the AMA Guides, 5th Edition; and/or (4) interfered with the physicians' or chiropractors' medical expertise and judgment.

Finally, the Division does not think that it is appropriate to adopt a regulation authorizing insurers to withhold payment for "errors" or to publish guidelines for the use of the AMA Guides, 5th Edition.

Insurers and injured workers already have methods to challenge ratings and the Division has arranged for training to ensure that rating physicians and chiropractors are well versed in using the AMA Guides, 5th Edition. In addition, the Division has created a panel which, periodically, reviews rating evaluations and notifies physicians and chiropractors of any errors found.

4. The estimated economic effect of the adopted regulations on the businesses which it is to regulate and on the public

The Division believes that the immediate adverse economic effect of the proposed regulations is minimal due, in part to conflicting information concerning the “overall” premium impact of the adopting of the 5th Edition, AMA Guides There will, however, be costs associated with training rating physicians and chiropractors. The Division has received some information that suggests that individual PPD ratings may increase, thus benefiting some injured workers. In the long-term, the Division does not anticipate that the adoption of the 5th Edition, AMA Guides, will have either an adverse or beneficial economic effect; changes necessary to implement or enforce the proposed regulations will not have any adverse or beneficial economic effect, either immediate or long-term.

5. The estimated cost to the agency for enforcement of the adopted regulations.

The Division estimates that the cost of implementation and enforcement is minimal. The Division already enforces substantially similar regulations. The legislative changes and the regulations necessary to implement and enforce them do not appear to place a significant economic burden on the Division.

6. A description of any regulations of other state or government agencies which the proposed regulations overlap or duplicate and a statement explaining why the duplication or overlapping is necessary. If the regulations overlap or duplicate a federal regulation, the name of the regulating federal agency.

The Division believes that the proposed regulations do not overlap or duplicate any existing regulations.

7. If the regulations include provisions which are more stringent than a federal regulation which regulates the same activity, a summary of such provisions.

The proposed regulations are not required by federal law; they are, however, more stringent than federal law; there is no equivalent federal law.

8. If the regulations provide a new fee or increase in existing fees, the total annual amount the agency expects to collect and the manner in which the money will be used.

The regulations do not provide for a new fee or increase an existing fee.

Dated this 31st day of July, 2003.

By: /S/
JOHN F. WILES, ESQ, Division Counsel
Department of Business and Industry
Division of Industrial Relations
1301 N. Green Valley Pkwy., #200
Henderson, NY 89074

**STATE OF NEVADA
DIVISION OF INDUSTRIAL RELATIONS
SMALL BUSINESS IMPACT STATEMENT**

This statement was prepared to comply with NRS 233B.0608 and 233B.0609. The statement addresses the fiscal impact of the proposed regulations concerning the adoption of the 5th Edition of the *Guides to the Evaluation of Permanent Impairment*, American Medical Association (AMA Guides), potential regulations stemming from legislative changes made during the 2003 session, and related matters.

In order to determine whether these regulatory matters are likely to have an impact on small businesses, the Division considered the purpose and scope of the proposed and potential regulations in conjunction with existing regulations. Based on this review, the Division determined that some of the proposed regulations are likely to have an adverse affect on small businesses.

In particular, one legislative change (Assembly Bill 168) requires the Division to adopt the AMA Guides by August 1, 2003. The adoption of the AMA Guides is likely to have an adverse impact on small businesses. However, the Division believes the impact will be minimal due, in part, to conflicting information concerning the "overall" premium impact. There will also be some cost associated with training.

Other potential regulations may also have an impact on small businesses. For example, one legislative change (Senate Bill 193) requires the Division to make a special assessment of \$500,000 on workers' compensation insurers; the assessment will be distributed to injured employees who were determined to have a permanent total disability prior to January 1, 1996. The impact of this change on small businesses is estimated to be minimal.

Another change (Assembly Bill 168) requires workers' compensation insurers to have an adequate panel of providers of health care and authorizes regulations to ensure this legislative requirement is met. It is unclear whether this change will have any impact on small businesses.

Assembly Bill 168 also broadens the scope of benefit penalties. While the impact on small businesses cannot be estimated with any degree of certainty, it is possible that the more benefit penalties will be imposed. In conjunction with this change, the legislature also authorized Appeals Officers of the Department of Administration's Hearings Division to hear benefit-penalty determinations. It is also possible that this change could result in more benefit penalties.

Finally, Senate Bill 320 requires the adoption of a maximum benefit under 616C.245. This statute provides an injured employee may receive a motor vehicle as an accident benefit under certain circumstances. The Division estimates that this change could have a minimal impact on small businesses.