

Assessment of Public Comment

The Chair and Board received approximately 50 formal written comments from Survey Monkey, emailed comments, and regular mail. Additionally, the Chair and Board received approximately 168 form letters from four sources – three from employee advocate groups, approximately 18 from individuals, approximately 135 from another group of individuals, and approximately 15 form letters in Polish from individuals.

The Board received approximately 19 form letters opining that the revised proposal was a substantial improvement over the September draft guidelines, but objecting to any reductions in awards for permanent damage to limbs. The Board took into account many of the comments received from the September proposal, but any reductions in awards result from advances in modern medicine – the outcome of surgeries is much better than it used to be. Accordingly, the Board has not made any changes in response to these comments.

The Board also received approximately 135 form letters from individuals objecting to this proposal in its entirety, specifically any benefit cuts at all. These form letters objected to any revisions at all, and because this is a legislative mandate, the Board must adopt some changes, and no change to the proposal has been made as a result of these form letters.

The Board received a packet of approximately 15 form letters in Polish from individuals requesting the withdrawal of the proposal as a whole. As above, this was a blanket objection to the entire proposal with no suggested changes. Because this is a legislative mandate, the Board must adopt some changes, and advancements in modern medicine influenced those changes. Therefore, no change to the proposal has been made as a result of these form letters.

The Board received a form letter comment from three employee advocate groups agreeing with many of the changes from the first proposal to the second, especially the removal of the “cooperation” language of the prior proposal that allowed doctors to suspend benefits if the worker had not cooperated with the medical exam.

The Board received a letter from a workers’ compensation legal group opining that questionnaires should be required for IME practitioners. The Board received many comments on the September proposal objecting to the questionnaire language and the Board took this into account, so no change to the regulation has been made as a result of this comment.

The same legal group further opined that the nature of the accident should be considered in evaluating the level of impairment and that the timeframe for MMI should be clarified. As these changes are not part of the legislative mandate contained in section 15(3)(X) of the Workers’ Compensation Law, no changes have been made in response to these comments.

The Board received a form letter comment from four employee advocate groups, and several individual comments, objecting to any revisions to the guidelines that would result in benefit cuts for workers, but supported the proposal otherwise. The Board also received a comment from the president of a local union objecting to any benefit cuts at all. The Board took into account the

comments received from across many stakeholder groups, and made many changes to the September proposal.

The Board received a detailed comment from an employee advocacy group that stated that the November proposal is much improved, but objected to several specific sections of the proposed impairment guidelines. The comment objected to the reduction in average awards for hip, knee and shoulder replacements, and objected to the elimination of “special consideration” for tears. These changes were made to the proposal as a reflection of advancements in modern medicine, and so no change to the proposal has been made as a result of this comment.

The comment from the same employee advocate group also objected to the change in the determination for range of motion, specifically that the radial abduction of the thumb should remain defined as normal at 90 degrees, objecting to 60 degrees. The comment also suggests a different mid-point for thumb range of motion measures. The Board has corrected the normal range of motion from 60 to 90 degrees. No other changes were made in response to this comment.

The Board received a comment from a carrier attorney suggesting the addition of a note to the impairment guidelines to ensure range of motion is compared to the contralateral side, as well. The Board took this into account and the draft proposal addresses this in the introduction and methods to assess permanent impairment in each section, so no change to the draft has been made in response to this comment.

The Board received a comment from a workers’ compensation representative group opining that the impairment guidelines explicitly say that sprains, strains and contusions cannot generally result in an SLU finding and that assessments of SLUs must be objective, and also take into account the nature of the accident. As these changes are not part of the legislative mandate contained in section 15(3)(X) of the Workers’ Compensation Law, no changes have been made in response to these comments.

The Board received three comments, from individuals and carriers, that the proposals are not based on advancements in modern medicine. The Board disagrees with this characterization, and as a result, no change to the proposal has been made in response to this comment.

The Board received several comments from carriers, third party administrators, self-insured employers and administrators, and businesses objecting to the most recent proposal, citing unfairness to employers and preferring the September proposal, especially the “loss of earning power” factor. The Board also received several comments from businesses and employers objecting to the use of the “subjective range of motion tests.” The Board received many comments from the last round of proposals objecting on behalf of employees, and the most recent proposal takes those comments into account. No change to the proposal has been made in response to this comment.

The Board also received several comments from self-insured employers and businesses opining that if there is no lost time for a claimant, they should not be able to have an SLU award at all, as well as suggesting the addition of a requirement in the guidelines that examiners compare

claimant's injured limbs with the baseline normal range of motion, preferring the September proposal. As above, no change to the proposal has been made in response to this comment.

The Board received a comment from a law firm suggesting awards in range of motion never equal ankyloses or amputation of the relevant joint. The Impairment Guidelines as drafted create sufficient delineation between permanent impairment, ankylosis and amputation. Accordingly, no changes were made as a result of this comment.

The Board received a comment from a worker advocacy group that the 35% schedule loss of use should only be used as a baseline for total joint replacement surgery, and range of motion deficits should be considered in addition to that figure. The baseline for joint replacements is 35% and a variety of factors are measured that may increase the overall schedule loss of use award. Accordingly, no changes were made as a result of this comment.

The Board received several comments from health care providers and claimant attorneys agreeing with many of the changes in this revised proposal and supporting the fairness of this revised proposal as a whole.

The Board received a detailed comment from a workers' compensation consultant opining that the purpose of cash benefits to claimants should be to compensate them for the economic loss caused by their work disability, not to compensate for medical impairment, and the proposed Guidelines fail to accomplish this goal. The commenter advised that the Board withdraw the current proposal, commission a wage-loss study of injured workers, and based on the results of such study issue new Guidelines. As these changes are not part of the legislative mandate contained in section 15(3)(X) of the Workers' Compensation Law, no changes have been made in response to these comments.

Section 1.3: Role of Examining Medical Providers

The Board received a comment from a law firm suggesting that examiners be required to compare an injured limb with the contralateral side, instead of saying "should." No change was made as a result of this comment as there are instances when the contralateral limb is not available for measure.

Section 1.5: Schedule Awards

The Board received a comment from a claimant attorney requesting the regulations be amended to include what happens if there are Schedule Loss of Use opinions that remain unresolved prior to the implementation of the final version of the new guidelines, and requesting that existing SLU opinions be "grandfathered in". The Board's legislative mandate required an update to the impairment guidelines, and this proposal reflects that mandate, and no change to the proposal has been made in response to this comment.

The Board received a comment from a workers' compensation legal group that section 1.5(2) should be corrected to exclude soft tissue injuries. No change was made as a result of this comment.

The Board received a comment from an insurance carrier objecting to the most recent proposal, citing unfairness to employers, and increased awards. The Board received many comments from the last round of proposals objecting on behalf of employees, and the most recent proposal takes those comments into account, while complying with the legislative mandate to make some changes based on advances in modern medicine. No change to the proposal has been made in response to this comment.

The Board received a comment from a third party administrator suggesting that benefit weeks corresponding to SLU percentage be reduced by 50% at most, or capping the maximum benefit. As these changes are not part of the legislative mandate contained in section 15(3)(X) of the Workers' Compensation Law, no changes have been made in response to these comments.

The Board received approximately six comments from health care providers suggesting the addition of various other medical conditions, including spine injuries, hernias or abdominal wall injuries, and tinnitus among others, and suggested expanding the impairment guidelines. As these changes are not part of the legislative mandate contained in section 15(3)(X) of the Workers' Compensation Law, no changes have been made in response to these comments.

The Board received a comment from a self-insured employer objecting to the most recent proposal, opining that this proposal provides schedule loss of use awards that are too big and preferring the September proposal. The Board received thousands of comments objecting to many of the proposed changes to the impairment guidelines, and has taken them into account. No change to the regulations or impairment guidelines has been made in response to this comment.

Section 2.1: Objectives for Determining Impairment for Thumb and Fingers

The Board received a comment from a broker and business objecting to the revisions, supporting elements from the September proposal, using the A, B, and C groups for baseline SLU determinations. The Board received many comments objecting to this grouping system in the September proposal and took those comments into account, so no change has been made to this proposal in response to this comment.

Section 5.3: Shoulder Range of Motion

The Board received a comment from a consultant expressing concern with the way SLU awards are determined but offered no alternative, just objecting to the way SLU awards are determined in general. No change to the regulation or impairment guidelines has been made in response to this comment.

The Board received a comment from a broker objecting to the additional 10% schedule loss of use where both forward flexion and abduction defects are moderate or higher and within 10 degrees of each other, expressing concern that case law says that the values should not be cumulative. The Board discussed this section with advisors and the draft proposal states that the

greater of the two defects is utilized, not both – consistent with case law, these are not additive. Therefore, no change has been made in response to this comment.

Section 5.4: Calculating Loss of Use

The Board received a comment from a health care provider opining that atrophy assessment should be based on observation of side to side difference, in categories of mild, moderate and severe. No changes have been made as a result of this comment as the Impairment Guidelines adequately address this issue.

Section 5.5: Special Considerations

The Board received three comments from claimant attorneys objecting to the reduction for a rotator cuff tear, but otherwise supporting the proposed regulations.

The Board received a comment from a carrier representative requesting clarification for if a distinction should be made between accidental ruptures and surgical resections. The Board made a minor clarification in section 5.2 to identify non-surgical ruptures. No other changes have been made in response to this comment.

Section 6.5: Special Considerations

The Board received a comment from a broker opining that the section regarding hip replacement surgery does not reflect advances of modern medicine, because it has not been changed since 1996. The Board discussed the draft proposal with advisors in great detail, and believes that the changes accurately reflect advances in modern medicine, so no change has been made in response to this comment.

Section 7.1: Objectives for Determining Impairment for Knee and Tibia

The Board received a comments suggesting that the guidelines should be changed to add meniscal tears with and without surgery, and chondromalacia other than patella and rotator cuff tears. Except as noted, the Impairment Guidelines are drafted to evaluate permanent impairment to a body part, rather than based on the injury itself. Accordingly, no changes were made as a result of this comment.

The Board received a comment from an insurance carrier opining that the determinations related to permanency in the September proposal better reflected advancements in modern medicine than this current proposal and suggestion returning to that proposal. The Board received many comments on the September proposal opining that the original proposal did not reflect advancements in modern medicine, and the Board took these comments into account in drafting this new proposal, so no change has been made in response to this comment.

Section 7.3 Knee Range of Motion

The Board received a comment from a health care provider opining that the drawings in this section need to be revised and percentages deleted because it's not applicable. No rationale or evidence was provided to support this request, and the Board believes the drawings are correct, so no change has been made in response to this comment.

Section 7.4: Calculating Loss of Use

The Board received a comment from a health care provider recommending the revision of the second row (extension) to say: mild is 0-10, moderate is 11-20, marked is 21-30. The Board discussed this chart in detail with advisors during the drafting process, and no evidence was provided by this health care provider to support the request, so no change has been made in response to this comment.

Section 7.5: Special Considerations

The Board received a comment from a health care provider opining that atrophy for knee problems should be measured in the thigh, not calf. The Board has made this proposal with input from its medical director, and no change to the proposal has been made in response to this comment.

The Board received three comments from claimant attorneys objecting to no award for a meniscal tear, but supporting the proposal overall. The Board took into account many of the comments received, and believes any changes to be the result of advances in modern medicine, so no change to the proposal has been made as a result of these comments.

The Board received a comment from a carrier representative requesting guidance on permanent impairment due to fibula fractures. Except as noted, the Impairment Guidelines are drafted to evaluate permanent impairment to a body part, rather than based on the injury itself. Accordingly, no changes were made as a result of this comment.

Changes to the Proposal

- Section 1.2: “stated or” added between “otherwise” and “agreed”
- Section 1.5(2): “The impairment must involve anatomical or functional loss such as soft tissue bone, sensation, atrophy, scarring deformity , mobility defects, loss of power, shortening, impaired dexterity or coordination” has been changed to “The severity of the permanent residual physical defect is not based on the mechanism of injury. It reflects the permanent residual physical defect at the time of maximum medical improvement and may include physical damage to bone, muscles, cartilage, tendons, nerves, blood vessels and other tissues” to conform to the language contained in section (x)(2) of each section.
- Figure 2.4(A)(4): The Board corrected an error in the description of the diagram.
- Section 5.5(6): “Non-surgical” was added before “Rupture”
- Section 7.5 (13): “mid calf” was changed to “mid-thigh” in the 4th bullet.

