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## Protecting Injured Workers by Eliminating the Use of the American Medical Association Guides in Evaluation of Permanent Partial Disability, 50 J. Marshall L. Rev. 589 (2017)

Dan DeBias

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PROTECTING INJURED WORKERS BY  
ELIMINATING THE USE OF THE  
AMERICAN MEDICAL ASSOCIATION  
GUIDES IN THE EVALUATION OF  
PERMANENT PARTIAL DISABILITY

DAN DEBIAS

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## I. INTRODUCTION

During the construction of a new skyscraper, a union journeyman ironworker named Skip is in the process of connecting steel beams on what will become the 62nd floor of the newest edition to the Chicago skyline. Skip, age 32, is tasked with accepting the incoming beams from a crane, and positioning the beams into place. One day, while up on the 62nd floor, Skip is accidentally struck in the back by a swinging steel beam being hoisted up by a crane. The impact heaves him off the beam until he lands 10 feet below. The impact caused a three-level disc herniation in Skip's lower back, requiring surgery to fuse the discs in his spine.<sup>1</sup>

After undergoing surgery and extensive physical therapy, Skip's doctor eventually places him at maximum medical improvement and tells him he can return to work with no restrictions.<sup>2</sup> Skip returns back to ironwork. However, he is in an incredible amount of pain while doing his regular work duties and the doctor has told him that he will likely be in pain for the rest of his life. Realization sets in that Skip may not be able to do ironwork much longer. He has been an ironworker since the day he graduated high school. He doesn't know what he would do if the day ever came where he had to find a new career.

Skip decides to file a claim for benefits with the Illinois Workers' Compensation Commission. A few months later, his employer chooses to exercise their right to send him for a medical impairment rating by a doctor of its choice.<sup>3</sup> Dr. Smith, the medical evaluator, gives Skip an eight percent whole body impairment rating using the American Medical Association's ("AMA") Guides to the Evaluation of Permanent Impairment ("Guides").<sup>4</sup> Skip

1. This is a hypothetical scenario of an injured worker's accident, medical treatment, and subsequent workers' compensation award, under Governor Rauner's proposed Turnaround Agenda.

2. See MARK WEISSBURG, *HOW TO WIN A WORKERS' COMPENSATION CLAIM IN ILLINOIS* 8 (2nd ed. 2011) (describing "Maximum Medical Improvement" as the point at which a patient's medical condition has reached a state of permanency, even though there may be ongoing treatment recommendations).

3. 820 ILCS 305/8.1b (2011).

4. See *Permanent Partial Disability Evaluations Under the Illinois Workers' Compensation Act - Application of AMA Guidelines*, RUSINLAW.COM, [www.rusinlaw.com/2014/05/ppd-evaluations-iwca-application-ama-guidelines/#Awards](http://www.rusinlaw.com/2014/05/ppd-evaluations-iwca-application-ama-guidelines/#Awards) (last visited Oct. 3, 2015) (finding that the general range of impairment ratings for a spinal injury resulting in a disc herniation, spinal stenosis, or arthritis resulting in spinal fusion is four to eight percent impairment, compared to a PPD rating of 15 percent-25 percent).

proceeds to an arbitration hearing in front of the Illinois Workers' Compensation Commission. The arbitrator looks at the impairment rating by Dr. Smith, and awards Skip eight percent disability based solely on the AMA impairment rating, which equates to roughly \$29,000.00 in total benefits for his injuries.<sup>5</sup>

Skip is outraged at the arbitrator's award. Every day he is in pain; he is no longer able to play catch with his young son, and he may one day even need another surgery, which could jeopardize his future earning capacity. Currently, Skip makes a comfortable living, earning \$90,000.00 before taxes, to support his family of four.<sup>6</sup> However, if he is one day unable to do ironwork, he will not likely have the same earning capacity. Skip demands that the arbitrator consider these other factors and adjust the award. The arbitrator informs Skip that based on the new law signed by Governor Rauner, he has the right to base his determination of disability solely on the AMA impairment rating, and that is what he has chosen to do.<sup>7</sup>

This comment will demonstrate why using an AMA impairment rating as the sole determinant in evaluating an injured worker's disability would be a fundamentally unfair concept. Part II of this comment will discuss the history of compensation remedies for injured workers, both federally and in Illinois. Part II will also explain Illinois' calculation of permanent partial disability benefits, the 2011 amendments to the Illinois Workers' Compensation Act ("Act"), and the recently proposed changes to the Act concerning the AMA Guides. Part III will analyze the AMA Guides in more detail, including research into its flaws, the constitutionality of its inclusion in the workers' compensation system, and the financial impact that they have on the injured worker and the workers' compensation system. Part IV will propose that the AMA Guides are unlikely to have any substantial impact on insurance premiums in Illinois. It will also propose an alternate system for disability calculation.

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5. See *Benefit Rates*, IWCC.IL.GOV, <http://iwcc.il.gov/benefits.htm> (last visited Oct. 3, 2015) (stating that the Illinois maximum PPD rate for 7/1/14-6/30/15 was \$735.37 per week). An eight percent body-as-a-whole calculation equates to 40 weeks of PPD benefits, totaling \$29,414.80 in PPD. *Id.*

6. See *Wage Scale for 2015-2016*, IWLOCAL1.COM, [www.iwlocal1.com/wage-scale-for-2014-2015.html](http://www.iwlocal1.com/wage-scale-for-2014-2015.html) (last visited Oct. 4, 2015) (stating that a journeyman ironworker Local #1 wage for 2015-2016 is \$44.20 per hour). Estimating an average workweek of 40 hours per week, an annual gross salary for an ironworker could approach \$91,936.00. *Id.*

7. See *About the Governor*, ILLINOIS.GOV, [www.illinois.gov/gov/about/Pages/AbouttheGovernor.aspx](http://www.illinois.gov/gov/about/Pages/AbouttheGovernor.aspx) (last visited Jan. 29, 2016) (stating that Governor Bruce Rauner is the 42nd Governor of the state of Illinois).

## II. BACKGROUND

### A. *The 1912 Illinois Workers' Compensation Act Comes to the Rescue of the Injured Worker*

Prior to any formal workers' compensation system in Illinois, an employee injured on the job had to bring a lawsuit against the employer in tort.<sup>8</sup> A tort lawsuit required the employee to prove negligence on the part of the employer.<sup>9</sup> The injured worker only succeeded in a small percentage of these claims, often leaving the injured worker without income, and with a strained relationship with his or her employer.<sup>10</sup> However, in a small portion of cases in which the worker successfully proved liability, the employer had to pay a large award for damages to the employee.<sup>11</sup> Additionally, the sheer volume of these work-related injury cases created a substantial burden on the common-law tort system.<sup>12</sup>

In 1909, a local coal mining disaster killed 259 workers, which brought the issue of work-related injuries to the forefront of legislative topics.<sup>13</sup> In response to this tragedy, the Illinois legislature created a Commission to research and develop a new system for dealing with work-related injuries.<sup>14</sup> This Commission surveyed employers, labor organizers, judges, lawyers, and Americans living abroad, and developed a system of strict liability for employers, but with limited recovery amounts for employees.<sup>15</sup>

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8. MATTHEW BENDER, ILLINOIS WORKERS' COMPENSATION GUIDEBOOK § 1.01 (2014), LexisNexis. (The employee had to prove negligence on the part of the employer, and that the employer's negligence resulted in damages).; *see also* STEVEN BABITSKY & JAMES J. MANGRAVITI, JR., UNDERSTANDING THE *AMA GUIDES* IN WORKERS' COMPENSATION § 1.01, 1-3 (5th ed. 2014) (stating that the employer was able to assert defenses such as contributory negligence and assumption of risk).

9. BENDER, *supra* note 8, at § 1.01.

10. *See id.* at 1-4. (discussing that the injured worker was successful in approximately 20 percent of tort claims against the employer, and even in those cases, there was considerable litigation cost and delays).

11. *Id.*

12. BENDER, *supra* note 8, at § 1.02.

13. *See Cherry Mine Disaster*, ILLINOISLABORHISTORY.ORG, [www.illinoislaborhistory.org/cherry-mine-disaster.html](http://www.illinoislaborhistory.org/cherry-mine-disaster.html) (last visited Oct. 3, 2015) (detailing the story of how miners were forced to work in some dangerous conditions, due to the fact that there were minimal safety regulations and employers could find replacement workers if needed in the form of European immigrants). On November 13, 1909, 481 workers descended into the shaft to mine the coal, approximately 500 feet below ground. *Id.* A barrel of hay caught fire in the mine, which led to the tragic death of 259 people. *Id.* The mining company was bankrupted, and the families of the lost loved ones were given \$1,800.00 in contributions from various funds. *Id.*

14. BENDER, *supra* note 8, § 1.02.

15. *See id.* (stating that 1,200 employers, 1,700 labor organizations, 200 judges and lawyers, and Americans living abroad were surveyed). They

The new program became a "mechanism for providing cash-wage benefits and medical care to victims of work-related injuries . . . placing the cost of these injuries ultimately on the consumer, through the medium of insurance, by passing the premiums on to the consumer in the cost of the products."<sup>16</sup> By 1912, the Illinois legislature created the first Workers' Compensation Act, and by 1957, the Industrial Commission became Illinois' first free-standing workers' compensation agency.<sup>17</sup> The next century would see many changes made to that system.

### *B. A Century of Change Allows the Act to Take Shape*

In the early days of workers' compensation, the benefits provided to injured workers were quite low, with weekly disability benefits being paid at around 50 percent of the statewide average weekly wage ("AWW").<sup>18</sup> The legislature made several changes in 1975, allowing for an increase in weekly disability benefits and permanent partial disability ("PPD") to be paid at 66 and 2/3 percent of the employee's AWW.<sup>19</sup> In 1984, the Illinois legislature once again amended the Act, this time reducing the amount of PPD

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researched approximately 5,000 work accidents. *Id.* 40 percent of the families of workers who were killed on the job received no compensation. *Id.* 88 percent of all workers injured on the job nationwide received no compensation. *Id.* The study also showed that for every \$1.00 of insurance premiums paid by the employer, only \$0.25 was reaching injured workers. *Id.*

16. BABITSKY, *supra* note 8, at 1-3; *see also* BENDER, *supra* note 8, at § 1.03 (offering an example of how the cost of work-related injuries is passed on to the consumer). Someone must bear the cost, and society has three basic choices: 1) it may refuse aid, and the loss would fall on the employee and his family, who are now without income; 2) society may bear the cost of the injury by having some sort of public relief set up; 3) grant the employee some form of workers' compensation, in which the cost of the injury is passed on to the consumer of the "product or services whose manufacture or delivery was the occasion of the injury." *Id.*

17. *See* BENDER, *supra* note 8, at § 1.02 (discussing that initially the Act only applied to certain types of hazardous industries). The courts were inundated with new workers' compensation cases and responded by creating the Industrial Commission, which was under the umbrella of the Illinois Department of Labor. *Id.* By 1948, every state in the union provided workers' compensation in some form, with Mississippi being the last state to enact the legislation. BABITSKY, *supra* note 8 at 1-4. Presently, all 50 states, the District of Columbia, and six U.S. territories have workers' compensation legislation, in addition to federal legislation existing in the form of the Federal Employees' Compensation Act of 1993. *Id.*

18. BENDER, *supra* note 8, at § 1.04.

19. *Id.* (stating that the 1975 changes to the Act were made following Congress' passing of the Occupational Safety and Health Act). Congress also commissioned a study of the nation's current workers' compensation laws, and made recommendations for improvements, which Illinois responded to in the 1975 amendments to the Act. *Id.*

benefits down to 60 percent of the employee's AWW.<sup>20</sup> In 1991, Illinois repealed the 1907 Structural Work Act, which now made workers' compensation the sole remedy for an injured worker in the state against his or her employer.<sup>21</sup>

The Act again underwent significant changes in 2005, when the Industrial Commission changed their name to the Illinois Workers' Compensation Commission ("IWCC") and created a medical fee schedule that set maximum allowable payment amounts for work-related medical treatment.<sup>22</sup> Also, effective on February 1, 2006, the legislature increased the number of weeks awarded for each body part for a calculation of PPD benefits by over seven percent, with the exception of the man-as-a-whole calculation.<sup>23</sup> PPD benefits serve as one of the main remedies to the injured worker, and a detailed explanation of their calculation and applicability is explained in the next section.

### *C. PPD Benefits Explained*

The IWCC awards PPD benefits when an employee sustains some work-related permanent disability or disfigurement, but is eventually able to return to his or her pre-injury job.<sup>24</sup> In general, it is appropriate to begin a calculation of PPD benefits once the injured worker reaches a state of maximum medical improvement ("MMI").<sup>25</sup> MMI is defined as "the point at which the injured worker's medical condition has stabilized and further functional improvement is unlikely, despite continued medical treatment or

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20. *Id.*

21. *Id.*

22. Michael Lucci, *Illinois' 2005 Workers' Compensation Reform Law*, ILLINOISPOLICY.ORG, [www.illinoispolicy.org/illinois-2005-workers-compensation-reform-law/](http://www.illinoispolicy.org/illinois-2005-workers-compensation-reform-law/) (last visited Jan. 23, 2018).

23. *Permanent Partial Disability Evaluations Under the Illinois Workers' Compensation Act - Application of AMA Guidelines*, RUSINLAW.COM, [www.rusinlaw.com/2015/11/permanent-partial-disability-evaluations-under-the-illinois-workers-compensation-act-application-of-ama-guidelines/](http://www.rusinlaw.com/2015/11/permanent-partial-disability-evaluations-under-the-illinois-workers-compensation-act-application-of-ama-guidelines/) (last visited Jan. 23, 2014).

24. ILLINOIS WORKERS' COMPENSATION COMMISSION, HANDBOOK ON WORKERS' COMPENSATION AND OCCUPATIONAL DISEASES 4 (2011) [hereinafter IWCC HANDBOOK].

25. 2-80 LARSON'S WORKERS' COMPENSATION – DESK EDITION § 80.04 (2015), LexisNexis (stating that PPD awards are based on the employee's medical condition once MMI has been reached).

physical rehabilitation."<sup>26</sup> Only a physician can declare someone at MMI.<sup>27</sup>

1. *Section 8(e) "Schedule of Injuries" Calculation for PPD*

Once the injured worker has been placed at MMI, a calculation of PPD benefits under the "schedule of injuries" section of the Act begins, but only if a doctor determines the employee can resume the full duties of his or her employment.<sup>28</sup> Section 8(e) of the Act has set forth a schedule of injuries, in which specific body parts have been assigned a number of weeks of benefits.<sup>29</sup> For instance, the complete loss of a worker's left leg, for an injury that occurred after February 1, 2006 would be worth 215 weeks of PPD benefits.<sup>30</sup> Suppose, however, that an injured worker does not lose the complete use of the leg. Rather, the worker suffered a fracture to the left leg, it healed properly, and the doctor placed him at MMI and told to resume regular work duties.<sup>31</sup> The question for the IWCC to then decide is what percentage of the injured worker's left leg is permanently partially disabled as a result of this injury.<sup>32</sup>

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26. Orlando Florete Jr., *Establishment of Maximum Medical Improvement in Injured Workers: Perception, Truth and Fallacy*, WORKERS COMPENSATION INST. (Jan. 16, 2013), [www.wci360.com/news/article/establishment-of-maximum-medical-improvement-in-injured-workers-perception](http://www.wci360.com/news/article/establishment-of-maximum-medical-improvement-in-injured-workers-perception). MMI represents a plateau in treatment, in that the patient is likely as good as he or she is going to get. *Id.*

27. *Id.*

28. IWCC HANDBOOK, *supra* note 24, at 4. The common rationale for scheduled awards is that when a worker suffers an injury, it "detracts from the former efficiency of the worker's body in the ordinary pursuits of life. BABITSKY, *supra* note 8, at 1-6. In addition, an award for PPD is one for the rest of the worker's life, and it would be fundamentally unfair to suffer an injury, miss no time from work, and be left without benefits, especially after you have given up your right to pursue a claim under common-law. *Id.* at 1-7.

29. 820 ILCS 305/8(e)(2012). There is no requirement to use the "schedule of injuries" so long as the injured worker can prove a wage differential due to his work-related injury. Bender, *supra* note 8, at Ch. 1 § 7.03.

30. 820 ILCS 305/8(e)(2012). Additional rules apply depending on the amputation of the leg, and the location of the amputation. *Id.* For instance, if the amputation occurred below the knee, the employee is entitled to the complete loss of the left leg. *Id.* However, if the amputation occurred above the knee, the employee in this scenario would be entitled to an additional 27 weeks of PPD benefits. *Id.*

31. See Weissburg, *supra* note 2, at 10-11 (discussing a fictional scenario in which an employee breaks his leg, was casted, did physical therapy, and returned to work before settling his workers' compensation case).

32. Will Cty. Forest Pres. Dist. v. Ill. Workers' Comp. Comm'ns, 970 N.E. 2d 16, 22 (Ill. App. 3d. 2012).



## 2. Section 8(d)(2) "Person-as-a-Whole" Calculation of PPD

The employee may recover PPD benefits under the "person-as-a-whole" calculation when an employee's work-related injury does not result in disfigurement, and is to a part of the body that is not listed in the "schedule of injuries" of section 8(e).<sup>33</sup> Person-as-a-whole calculations are based on a maximum of 500 weeks of PPD benefits.<sup>34</sup> An example of a body part not listed in the "schedule of injuries" is the shoulder or the back.<sup>35</sup> In 2011, as Illinois did so many times in the past, the legislature once again revisited workers' compensation reform.

### *D. The 2011 Illinois Legislative Hearings on Workers' Compensation Set Out to Lower the Overall Workers' Compensation Insurance Costs to Local Businesses by Introducing the AMA Guides*

In 2011, the Illinois State Legislature once again tackled the issue of workers' compensation reform.<sup>36</sup> Illinois Congress members held meetings with various groups, including the American Federation of Labor, members of the legal and medical communities, and many major business groups.<sup>37</sup> During these meetings, researchers estimated that the total cost of the workers' compensation system in Illinois was three billion dollars per year.<sup>38</sup> One of the primary goals of the meetings was to find ways to slash the overall cost of the Illinois workers' compensation system and to reduce the insurance premiums that Illinois businesses pay.<sup>39</sup> The concern was that businesses were moving to the surrounding states

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33. 820 ILCS 305/8(d)(2)(2012); *see also* BENDER, *supra* note 8, at § 7.05 (discussing additional ways to recover PPD under § 8(d)(2) are: 1) employee can continue his or her current employment, but the injury would keep him from pursuing other employment; 2) employee is unable to continue performing all the functions of his job, but does not suffer a loss of earning capacity; or 3) the injury results in a loss of earning capacity, but the employee chooses to pursue benefits under section 8(d)(2) instead of wage differential). "An employee cannot recover both a wage differential and person-as-a-whole award for the same injury but must choose between the two." *Id.*

34. 820 ILCS 305/8(d)(2)(2012).

35. *See Will Cty. Forest*, 970 N.E. 2d at 23-24 (finding that the shoulder is not a part of the arm, and using the schedule of injuries for a shoulder injury would be improper).

36. *Illinois Workers Compensation Reforms of 2011*, WC-CHICAGO.COM, [www.wc-chicago.com/Pages/2011IllinoisWorkersCompReform.aspx](http://www.wc-chicago.com/Pages/2011IllinoisWorkersCompReform.aspx) (last visited Oct. 3, 2015).

37. 97 H.R. Transcription Debate, at 14 (May 29, 2011).

38. *See* 97 S. Transcription Debate, at 48 (May 28, 2011) (stating that half of the three billion dollars in workers' compensation costs come from medical benefits and half from indemnity benefits, approximately).

39. *Id.* at 54.

of Indiana, Missouri, and Iowa, where workers' compensation premiums were less expensive.<sup>40</sup>

During these meetings, the legislature introduced a plan to reduce the cost of the Illinois workers' compensation system by an estimated 650 million dollars per year, which would potentially reduce workers' compensation premiums by 12-18 percent.<sup>41</sup> One of the ways that the legislature intended to reduce these costs was by introducing, for the first time in Illinois, an allegedly objective standard of calculating PPD benefits.<sup>42</sup> This purportedly objective standard would come in the form of an implementation of the AMA Guides into the calculation of PPD benefits.<sup>43</sup> As of 2011, the majority of the states in the union had already implemented the use of the AMA Guides in some fashion into their workers' compensation system.<sup>44</sup>

On June 28, 2011, Illinois became the 37th state to adopt the AMA Guides into their workers' compensation system.<sup>45</sup> For injuries occurring on or after September 1, 2011, PPD "shall" be established based on an impairment evaluation by a licensed physician using the "most current edition" of the AMA Guides.<sup>46</sup> Further, in its determination of the level of PPD, the Commission "shall" base its determination on: (1) the reported level of impairment pursuant to the AMA impairment rating; (2) the injured worker's occupation; (3) the age of the injured worker at the time of the injury; (4) the employee's future earning capacity; and (5) "evidence of disability corroborated by the treating medical records."<sup>47</sup> Finally, the Act states that "[n]o single enumerated factor shall be the sole determinant of disability."<sup>48</sup> Even though the Guides have become part of Illinois law, questions still remained regarding what these Guides are and precisely how they are going to accomplish the goal of saving Illinois half a billion dollars per year.

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40. *Id.*

41. *Id.* at 57.

42. *Id.* at 65.

43. See 97 H.R. Transcription Debate, *supra* n. 37, at 17 (discussing how Caterpillar wanted a strict use of the AMA Guides in this bill).

44. 97 S. Transcription Debate, at 465 (May 28, 2011).

45. Robert Rassp, *Should California Switch to the AMA Guides Sixth Edition?*, LEXISNEXIS, [www.lexisnexis.com/legalnewsroom/workers-compensation-law-blog/archive/2011/07/11/should-california-switch-to-the-ama-guides-sixth-edition.aspx?Redirected=true](http://www.lexisnexis.com/legalnewsroom/workers-compensation-law-blog/archive/2011/07/11/should-california-switch-to-the-ama-guides-sixth-edition.aspx?Redirected=true) (last visited Mar. 19, 2016).

46. See 820 ILCS 305/8.1b (2011) (stating that an impairment rating must be done by a physician licensed to practice medicine in all of its branches).

47. *Id.*

48. *Id.*

*E. History of the AMA Guides to the Evaluation of  
Permanent Impairment: An Attempt to Develop an  
Objective Impairment Rating*

The AMA Guides initially began in 1958 as a collection of separate articles in the Journal of the American Medical Association, dealing with the rating of physical impairment.<sup>49</sup> The workers' compensation arena mentioned the AMA Guides for the first time in 1961, crediting them with developing practical approaches to rating impairment.<sup>50</sup> Medical experts admitted, however, that a scientifically accurate disability rating is impossible, due to the complex relationship that exists between impairment and disability.<sup>51</sup> Several editions of the Guides were released since 1970, most recently the sixth edition published in 2008.<sup>52</sup>

The authors of the sixth edition of the Guides state that "[a]lthough doctors wrote the *Guides*, [they are] not likely to be used in the practice of therapeutic medicine."<sup>53</sup> Further, the authors' state that the primary purpose of the AMA Guides is to "rate impairment to assist adjudicators and others in determining the financial compensation to be awarded to individuals who, as a result of injury or illness, have suffered measurable physical and/or psychological loss."<sup>54</sup> But even if the AMA Guides successfully created an objective impairment rating system, how does this factor into a calculation of disability? The disconnect between medical impairment and disability is examined in the next section.

*F. Impairment Does Not Equal Disability*

A distinctive feature of the workers' compensation system is that awards are not made for physical injury, but rather are made for the "disability" produced by the injury.<sup>55</sup> Previous editions of the

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49. BABITSKY, *supra* note 8, at 1-8. Each of the articles dealt with a specific part or parts of the body, covering the back, digestive system, endocrine system, to name a few. *Id.* at 1-8-9. The articles appeared in JAMA from 1958 until 1970. *Id.*

50. *Id.* at 1-9.

51. *Id.*

52. *See id.* at 1-9 (stating the first edition of the Guides was published as a collection of the 13 JAMA articles in 1971. The second edition was published in 1984, followed by the third edition in 1988, fourth edition in 1993, fifth edition in 2000, and the sixth edition in 2008).

53. ROBERT D. RONDINELLI ET AL., GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 19 (Elizabeth Genovese et al. eds., 6th ed. 4th prtg. 2014).

54. *Id.* at 19-20.

55. 2-80 LARSON'S WORKERS' COMPENSATION – DESK EDITION, *supra* note 25, at § 80.02.

Guides cautioned readers that an impairment rating derived from the use of the AMA Guides "may serve as a *starting point* for determinations about the consequences of the impairment, such as a disability rating or a legal entitlement. . . ."56 Indeed, the Illinois legislature in 2011 seemed to heed the advice of the AMA Guides' authors by making the AMA impairment rating just one of the several factors for the court to consider when determining PPD.<sup>57</sup>

The purpose of AMA impairment ratings is to assess physical impairment, which is a medical determination.<sup>58</sup> They are not meant to determine disability, which is a nonmedical determination.<sup>59</sup> The Guides themselves state that the impairment rating is merely one of several determinants of disablement, and should be integrated with other "nonphysician [sic] sources regarding psychological, social, vocational, and avocational issues."<sup>60</sup> The IWCC has consistently ruled that impairment does not equal disability.<sup>61</sup> Further, even in the absence of an AMA impairment rating, the IWCC "can and shall" award PPD benefits to injured workers.<sup>62</sup> The IWCC has upheld this ruling since 2011, but the ruling is now in jeopardy of being changed.

### *G. The Illinois Turnaround Agenda: An Imperfect Attempt to Make Impairment Equal Disability*

The Illinois legislature is again discussing ways to bring down costs to businesses in Illinois so that the state can remain competitive with our surrounding neighbors.<sup>63</sup> In Governor Rauner's "Illinois Turnaround Agenda," he states that despite the 2011 amendments, Illinois still has some of the highest workers'

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56. BABITSKY, *supra* note 8, at 1-9.

57. 820 ILL. COMP. STAT 305/8.1b (2011).

58. BABITSKY, *supra* note 8, at 1-10.

59. *Id.*

60. *See* RONDINELLI, *supra* note 53, at 6 (discussing the case of Christopher Reeve, an actor who suffered a traumatic spinal cord injury). A man with his injury would typically have been virtually completely vocationally disabled. *Id.* However, he was able to use his celebrity and willpower to become a spokesperson and advocate for those with spinal cord injuries. *Id.* Further, "a physical impairment can be highly disabling in one vocational context and virtually non-disabling in another." *Id.* An example of this is a ballerina who loses her big toe could be completely disabled from her career, while a construction worker with the same injury might just need to wear a fitted work boot to continue his career. *Id.*

61. *Lascody v. Giuffre Buick and Volvo*, No. 12WC 33787, 2015 Ill. Wrk. Comp. LEXIS 487, 6 (2015).

62. *Smart v. Central Grocers*, 2015 Ill. Wrk. Comp., LEXIS 352, 23-24 (2014).

63. *The Illinois Turnaround*, ILLINOIS.GOV, [www.illinois.gov/gov/documents/compiledpacket.pdf](http://www.illinois.gov/gov/documents/compiledpacket.pdf) (last visited Sept. 13, 2015).

compensation premium costs in the country.<sup>64</sup> According to a 2014 study, Illinois ranked 7th highest in terms of workers' compensation premiums.<sup>65</sup> Governor Rauner notes that in a small sample of cases in which the AMA Guides have been used in the determination of PPD, the PPD awards are down 12.24 percent.<sup>66</sup>

Governor Rauner notes that Indiana, which has the lowest workers' compensation premium costs in the country, requires mandatory use of the AMA Guides "when determining permanent partial impairment," which has resulted in lower awards for injured workers.<sup>67</sup> The Governor proposes that "the language that limits the [IWCC] from using only one of the five factors to determine PPD should be eliminated."<sup>68</sup> He goes on to note that "[t]his will allow (though not mandate) a Commissioner to solely base an award on the AMA impairment rating."<sup>69</sup>

### III. ANALYSIS

This section analyzes the problems of the first six AMA Guides' methodology. It also examines the errors in calculating impairment ratings using the Guides. The implementation of the Guides into the Illinois legal system will then be reviewed from an evidence perspective, as well as a Constitutional perspective. Last, this section will scrutinize the consistency, reliability, and accuracy of the Guides in evaluating and rating impairment.

#### *A. Problems in the First Six Editions of the Guides*

Though the majority of states now use the Guides in their workers' compensation system, different states use different editions of the Guides.<sup>70</sup> As the AMA released newer editions, most states adopted the newer versions of the Guides into their legislation. Only two states, Colorado and Oregon, currently use an

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64. See *id.* (stating that Indiana's workers' compensation costs are 50 percent less than that of Illinois).

65. See Amanda Robert, *Can workers' compensation reforms keep Illinois competitive?*, MADISON COUNTY RECORD, <http://madisonrecord.com/stories/510558145-can-workers-compensation-reforms-keep-illinois-competitive> (last visited Oct. 4, 2015) (finding that based on the 2014 Oregon Workers' Compensation Premium Rate Ranking Summary, Illinois has 7th highest, Indiana 50th, Michigan 34th, Kentucky 40th, Missouri 21st, Iowa 24th, Wisconsin 23rd).

66. *The Illinois Turnaround*, *supra* note 63.

67. Robert, *supra* note 65.

68. *The Illinois Turnaround*, *supra* note 63.

69. *Id.*

70. 2-80 LARSON'S WORKERS' COMPENSATION – DESK EDITION, *supra* note 25, at § 80.07.

edition older than the fourth.<sup>71</sup> Throughout the first five editions of the Guides, the AMA has not indicated whether the methods used to determine the impairment ratings were scientifically derived.<sup>72</sup> The AMA did not claim that the Guides were even an "accurate representation of actual physical impairment."<sup>73</sup> In fact, it was not until the arrival of the fourth and fifth editions of the Guides did the authors caution users about the lack of evidence-based studies used in the Guides.<sup>74</sup>

### 1. Causes for Concern: Lack of Scientific Evidence

The fourth edition did not use objective data for several different body parts or for psychiatric and pain function.<sup>75</sup> For body parts and systems that lacked objective data, the authors estimated the extent of impairment, basing their estimations on "experience, judgment, and consensus."<sup>76</sup> Similarly, the fifth edition states that many of the impairment percentages are merely estimates based on the "consensus of the chapter authors and not on scientific evidence."<sup>77</sup>

Perhaps the strongest example of the Guides' lack of scientific evidence is in the preface of the sixth edition, which acknowledges the criticisms of the previous five editions of the Guides.<sup>78</sup> One notable criticism acknowledged by the sixth edition's authors is that

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71. *See id.* (stating that Colorado and Oregon are the only two states still using the third edition of the Guides, and no states are presently using the second or first editions).

72. *See* John Kuhnlein, *Member Report for the Iowa Task Force Regarding the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition*, IOWAWORKCOMP.GOV, [www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/kuhnleinreport.pdf](http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/kuhnleinreport.pdf) (last visited Mar. 19, 2016) [hereinafter Iowa Task Force Member Report] (discussing that in 2009, the Iowa's workers' compensation system had already implemented use of the Fifth Edition of the AMA Guides). In an attempt to determine whether Iowa should implement the new 6th Edition of the AMA Guides, a task force was formed to investigate the 6th Edition. *Id.* The task force was composed of Administrative Law Judges, employer attorneys, injured workers' attorneys, and physicians. *Id.*

73. *Id.*

74. BABITSKY, *supra* note 8, at 3-3.

75. *See id.* (citing the authors of the fourth edition of the Guides, who state that they used "scientific data accepted and derived from normal functioning for those systems for which such data are available."); *see also* AMA, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT 3 (4th ed. 1993) (listing those systems as the respiratory, cardiovascular, visual, auditory, endocrine, hematologic, and digestive systems). The fourth edition does not claim to be scientifically valid and reliable for the remaining parts and systems of the body. *Id.*

76. *Id.*

77. *Id.*

78. *See* RONDINELLI, *supra* note 53, at 2 (discussing some of the criticisms of the first five editions of the Guides).

the "impairment ratings did not adequately or accurately reflect loss of function."<sup>79</sup> Further, the authors recognize the public's critique that "[n]umerical [impairment] ratings were more the representation of 'legal fiction than medical reality.'"<sup>80</sup> The authors attribute these problems, in part, to "limited validity and reliability of the ratings, lack of meaningful and consistent application of functional assessment tools, and lack of internal consistency."<sup>81</sup> The AMA's failure to acknowledge these issues early on is alarming, considering 19 states still use the earlier editions in their workers' compensation systems.<sup>82</sup>

The sixth edition of the Guides claims to be "more diagnosis based with these diagnoses being evidence-based when possible."<sup>83</sup> However, Robert Rondinelli, the Medical Editor of the sixth edition of the Guides, points out the sixth edition's flaws in a 2010 Commentary with the *Journal of Occupational and Environmental Medicine*.<sup>84</sup> There, Dr. Rondinelli states that although the AMA Guides strive to use evidence-based platforms in its ratings system, many of the body's organs lack the sufficient evidence to do so.<sup>85</sup> The result of lacking evidence is a largely consensus-based ratings system in the sixth edition of the Guides.<sup>86</sup> If the goal of the Guides was to remove subjective disability ratings by judges and replace them with objective impairment ratings based on science, the AMA Guides seem to fall short of this goal.

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79. *Id.*

80. *Id.*

81. *See id.* (discussing that another problem noted by the authors of the sixth edition was confusing and antiquated terminology in the first five editions).

82. 2-80 LARSON'S WORKERS' COMPENSATION – DESK EDITION, *supra* note 25, at § 80.07 (listing ten states that use the fifth edition, seven states that use the fourth edition, and two states that use the third edition).

83. *See* RONDINELLI, *supra* note 53, at 2 (stating that the sixth edition also claims to include the goal of optimizing interrater and intrarater reliability).

84. *See* Robert D. Rondinelli, *Commentary on Reliability of the AMA Guides to the Evaluation of Permanent Impairment*, *J. OF OCCUPATIONAL AND ENVIRONMENTAL MED.* 1205, 1204-05 (2010) (discussing how the AMA strives to achieve an evidence-based platform, but sufficient evidence is fairly lacking for many of the organ systems).

85. *See id.* (stating that specifically, the musculoskeletal system lacks sufficient evidence). Dr. Rondinelli states that no "gold standard" exists for impairment rating, and acknowledges that each edition of the Guides attempts to improve on prior editions. *Id.*

86. *Id.*

2. *A Different Method Creates Different Concerns:  
Consensus Based Ratings Made by an Unknown  
Consensus*

Since much of the sixth edition is consensus based, consensus composition is of paramount importance in determining bias.<sup>87</sup> However, the AMA has not been overtly transparent with the makeup of each chapter's consensus.<sup>88</sup> An Iowa Task Force researching the sixth edition attempted to gain access to this consensus information.<sup>89</sup> The Task Force contacted Dr. Mark Melhorn, one of the chapter contributors for the sixth edition, to find out who was part of the consensus on the Upper Extremity chapter.<sup>90</sup> Dr. Melhorn declined to reveal the information, and advised the Task Force to contact the American Medical Association directly.<sup>91</sup> When the Task Force contacted the American Medical Association, it was told to consult the sixth edition book itself.<sup>92</sup> The sixth edition specifically lists all of the Chapter Contributors, but fails to elaborate on who contributed to which chapter.<sup>93</sup> Without knowing who specifically contributed to each chapter, we are left guessing as to the potential biases, affiliations, and credentials of the chapter contributors.

3. *Impairment Ratings Drop Significantly from Fifth to  
Sixth Edition*

Adding to the intrigue, the mean impairment ratings in the sixth edition are significantly lower than they were for the fifth edition of the Guides.<sup>94</sup> This means that injured workers will receive less compensation for their injuries in states that use the sixth edition.<sup>95</sup> For example, an injured worker requiring a total knee replacement would receive approximately 32 percent less if the

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87. See Kuhnlein, *supra* note 72 (mentioning that consensus decisions "depend upon the composition of the group making the determination" and that "if the group is biased, the outcome is biased.").

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. See RONDINELLI, *supra* note 53, at vii-viii (listing Chapter Contributors by name, professional association, and location, but without designation for their specific chapter contributions to the book itself).

94. See Linda Forst et al., *Reliability of the AMA Guides to the Evaluation of Permanent Impairment*, 52 J. OF OCCUPATIONAL & ENVTL. MED. 1202, 1201-03 (2010) (concluding that the impairment ratings using the sixth edition are somewhat lower than those of the fifth edition).

95. See *id.* (recommending that it is critical to perform more research on the AMA Guides, given the effect they can have on monetary settlements and society as a whole).



sixth edition were used instead of the fifth.<sup>96</sup> The decrease in impairment ratings between the fifth edition and the sixth edition is dramatically larger than the gap between any previous editions.<sup>97</sup> This dramatic drop in ratings makes the chapter consensus of paramount importance to determine any possible bias.

### *B. Mistakes in the Sixth Edition Lead to Profits for Physicians*

The sixth edition is far from flawless. Approximately eight months after its publication in 2008, the AMA released a 52 page errata to the sixth edition.<sup>98</sup> This amount of error is significant, and was partially blamed on a rush to publish in order to avoid financial penalty.<sup>99</sup> Some errors were related to measurements taken by the impairment rater during examination, which could fundamentally change an impairment rating score.<sup>100</sup> Lower impairment scores could affect injured workers' disability awards at trial if the judge chooses to rely on the rating.

Further, some physicians profit off of the errors of the sixth edition, involving fundamental book error and physician rating error.<sup>101</sup> Dr. Christopher Brigham, a physician who served as the Senior Contributing Editor of the sixth edition, advertises impairment rating correction services in his private practice.<sup>102</sup> Dr.

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96. *Developments in State Workers' Compensation Systems: Before the Subcommittee on Workforce Protections*, 110th Cong. (2010) (Written testimony of Dr. John E. Nimlos MD) [hereinafter Nimlos] (stating that the reasoning given for this decrease by Dr. Chris Brigham, a member of the Editorial Panel for the sixth edition, is that medical technology has improved). While this suggests that the decrease was science based, the actual reason rests with the fact that fifth edition and the sixth edition use different processes for determining those ratings. *Id.* The fifth edition classifies a "good" result for a total knee replacement using a numerical score. *Id.* This score is derived from several measurements used by orthopedic surgeons to describe knee replacement outcomes. *Id.* The sixth edition uses outcome degrees of mild, good, and severe. *Id.* The method to calculate these degrees are undefined, and thus are likely subject to the bias of the rating examiner. *Id.*

97. *Id.*

98. *See* Kuhnlein, *supra* note 72 (discussing that issues with consistency and a rush to publish the sixth edition may have played a part in the errors).

99. *Id.*

100. *See id.* (mentioning that the Pain Disability Questionnaire had listed an incorrect measurement line, which would have overestimated impairment). Other changes were made to the Conversion Table in the Upper Extremity Impairment Rating section. *Id.*

101. *See* Nimlos, *supra* note 96 (stating that Dr. Brigham advertises in his private practice a service to review and correct impairment ratings). Dr. Nimlos also suggests that Dr. Brigham markets this service to defense attorneys, employers, and workers' compensation insurance companies. *Id.*

102. *Impairment Analysis - Brigham and Associates*, CBRIGHAM.COM, [www.cbrigham.com/our-services/impairment-analysis/](http://www.cbrigham.com/our-services/impairment-analysis/) (last visited Oct. 31, 2015).

Brigham acknowledges that "most physicians lack skills in the use of the Guides."<sup>103</sup> He also admits that physician bias can play a part in the impairment rating, stating that while impairment ratings should be free of bias, most are not.<sup>104</sup>

Dr. Brigham is of the opinion that the majority of physician impairment ratings are too high, an estimated eight percent too high on an individual level.<sup>105</sup> On a global level, Dr. Brigham estimates that 89% of impairment ratings are too high, and 78% of ratings are incorrect.<sup>106</sup> It stands to reason that Dr. Brigham's advertisement in private practice for the correction of impairment rating is for the purpose of lowering impairment ratings, not raising them.<sup>107</sup> Given his position as the Senior Contributing Editor of the sixth edition of the Guides, it is alarming that Dr. Brigham is now profiting off of the errors of the Guides.

Dr. John Nimlos, a board-certified doctor in Occupational Medicine, has been practicing medicine in Washington State for 43 years.<sup>108</sup> He conducted a study of his own on impairment ratings in 2010 and reported the results to the House Committee on Labor and Education.<sup>109</sup> Of 401 independent medical exams that he reviewed, only 45% were valid.<sup>110</sup> Dr. Nimlos reached the same overlying conclusion as Dr. Brigham – that the impairment ratings are the source of the issue here. However, unlike Dr. Brigham, Dr. Nimlos reported that 99% of the ratings he reviewed were too low, as opposed to too high.<sup>111</sup> If established physicians are having such a hard time agreeing on these impairment ratings, it must be difficult for the court system to trust these ratings.

### *C. The Lack of Scientific Evidence May Render Expert Testimony Concerning the Guides Inadmissible Under Illinois' Frye Standard*

The Frye standard governs the admissibility of expert testimony into evidence in Illinois.<sup>112</sup> The Frye standard holds that

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103. *Id.*

104. *Id.*

105. *See* Nimlos, *supra* note 96 (stating that Dr. Brigham estimates that impairment ratings are routinely eight percent too high).

106. *Id.*

107. *See id.* (discussing that mostly defense parties would be interested in paying Dr. Brigham a fee of \$150.00 to correct their AMA impairment rating report, given that he believes most ratings are too high).

108. *Dr. John Nimlos, Preventive Medicine Physician in Shoreline, WA* | US NEWS DOCTORS, <http://health.usnews.com/doctors/john-nimlos-580706> (last visited Nov. 13, 2015).

109. Nimlos, *supra* note 96.

110. *Id.*

111. *Id.*

112. *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 76 (2002).

the methodology or scientific principle used by an expert to deduce a scientific principle or discovery must be "sufficiently established to [gain] general acceptance in the particular field in which it belongs."<sup>113</sup> This "general acceptance test" does not require that a majority of experts in the field accept the test.<sup>114</sup> However, if the principle or methodology is merely experimental or of uncertain validity, then the test has not gained "general acceptance," and thus has not satisfied the Frye standard.<sup>115</sup>

Given the historical lack of evidence-based methodology by the Guides, the errors in the sixth edition, and the admission that much of the methodology is consensus-based as opposed to scientific, it will not be long before the Guides are challenged on a Frye evidence standard. Questions may arise regarding the validity of the AMA Guides, and their "general acceptance" by the medical community as being an effective methodology for rating impairment.<sup>116</sup> A Constitutional challenge concerning the wholesale adoption of future editions of the AMA Guides may also be ripe.

#### *D. Statutory Language Automatically Adopting the Most Current Edition of the AMA Guides may be Challenged Constitutionally*

When Illinois adopted the AMA Guides into the Workers' Compensation Act in 2011, it did so with the following language: "[t]he most current edition of the American Medical Association's 'Guides to the Evaluation of Permanent Impairment' shall be used by the physician in determining the level of impairment."<sup>117</sup> Based on this language, issues are likely to occur now and in the near future. The legislature's adoption of the language stating that the "most current edition" of the Guides shall be used might in effect

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113. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (deciding from an appeal from a criminal trial, in which the defendant attempted to offer expert testimony regarding a "systolic blood pressure deception test."); see e.g., *id.* at 1013 (holding that the test had not yet gained the requisite standing and scientific recognition in the physiological and psychological communities to justify admitting expert testimony deduced from test).

114. *Donaldson*, 199 Ill. 2d at 78.

115. *Id.*; see also *Reed v. State*, 283 Md. 374, 381 (1978) (holding that voiceprint technology did not satisfy the Frye standard of evidence admissibility as it had not achieved general acceptance in the scientific community).

116. See *Kuhnlein*, *supra* note 72 (stating that several of the editors of the Guides have mentioned that the book is written "by physicians for physicians. . ."). The editors referred to are Drs. Rondinelli, Melhorn, and Brigham. *Id.* These editors also state that there is not a problem with the Guides themselves, but with the workers' compensation systems, who need to "catch up." *Id.* The Iowa Task Force members take offense to this, stating that the AMA Guide's authors are not considerate of their end users. *Id.*

117. 820 ILL. COMP. STAT 305/8.1b (2011).

give the AMA the power to create workers' compensation law. Essentially, future editions of the AMA Guides would become law upon their publication.

Section One of the Illinois Constitution states that the "legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives. . . ."118 As a general rule, the power granted to the legislature cannot be delegated.119 It can, however, authorize others to perform functions that the General Assembly cannot do itself.120 Still, delegation of authority by the General Assembly would be improper where the authority delegated creates so much discretion that the body could in effect make the law itself.121 The purpose of this delegation is not to allow another body to create law, but rather to confer discretion as to its execution.122 As a result, "[p]roper delegation of authority must provide sufficient standards to guide the administrative body in the exercise of its functions."123 The Illinois legislature failed to prescribe any standards for the AMA to follow in creating their new and future editions to the Guides. This lack of guidance, coupled with the current language of the law, may create constitutionality issues for future editions of the Guides. The Pennsylvania Commonwealth Court recently heard a case raising this very issue.124

In *Protz v. Workers' Comp. Appeal Bd.*, the constitutionality of Pennsylvania's workers' compensation statute was called into question, for language stating that impairment would be determined by the "most recent edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. . .

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118. IL. CONST. art. IV, § 1.

119. *Chicagoland Chamber of Commerce v. Pappas*, 378 Ill. App. 3d 334, 348 (Ill. App. 1st. 2007).

120. *Id.*

121. *Id.*; see *People ex rel. Bernat v. Bicek*, 405 Ill. 510, 517 (1950) (holding that "[a]n act which vests any person with arbitrary discretion to determine what the laws shall be in a particular situation is invalid.").

122. *Chicagoland Chamber of Commerce*, 378 Ill.App.3d at 349; see *Wright v. Cent. DuPage Hosp. Ass'n*, 63 Ill. 2d 313 (1976) (holding that an Illinois statute which required a medical malpractice case be heard by a medical review panel prior to a jury trial was unconstitutional). The medical review panels were comprised of a circuit court judge, a practicing physician, and a practicing attorney. *Id.* at 319. The court in *Wright* found that the physician and attorney function on the panel was unconstitutional, as it gave both of the non-judicial members of the panel judicial powers. *Id.* at 322.

123. *Chicagoland Chamber of Commerce*, 378 Ill.App.3d at 349.

124. In *Protz v. Workers' Comp. Appeal Bd.* (Derry Area Sch. Dist.), No. 1024 C.D. 2014, 2015 Pa. Commw. LEXIS 404 (Pa. Commw. Ct. Sept. 18, 2015), *aff'd on reh'g in part rev'd on reh'g in part*, 161. A. 3d 827 (Pa. 2017), the Supreme Court of Pennsylvania held that the provision requiring physicians to conduct impairment ratings pursuant to the *most current edition* of the AMA Guides was unconstitutional, as a violation of the non-delegation doctrine (emphasis added).

.<sup>125</sup> The Pennsylvania court held that this part of the statute was unconstitutional as the legislature failed to "prescribe *any* intelligible standards to guide the AMA's determination regarding the methodology to be used in grading impairment."<sup>126</sup> As Pennsylvania and Illinois have similar rules in their Constitutions regarding delegation of legislative authority, a Constitutional challenge to the Illinois' workers' compensation statute may be imminent.<sup>127</sup>

### *E. Consistent Ratings May Save Money, But They Do Not Increase Accuracy*

Proponents of using the AMA Guides in the Illinois workers' compensation system may argue that despite the flaws discussed above, this is an objective standard to evaluate impairment.<sup>128</sup> Consistency, after all, was one of the primary goals listed by the sixth edition of the Guides.<sup>129</sup> Dr. Rondinelli suggests that the goal of the Guides is to attempt to "codify impairment ratings whose tradition is largely historically and intuitively based. . . ."<sup>130</sup> States have an interest in reliability and consistency between ratings, as a varied group of impairment ratings for similar injuries can drive up the costs of a case, thus burdening the workers' compensation system of that state.<sup>131</sup>

However, despite attempts by the AMA for the sixth edition to produce more consistency among impairment raters, research shows that the newest edition of the Guides comes up short.<sup>132</sup> Even if the ratings were consistent, that doesn't mean that the impairment ratings are indicative of the injured worker's actual medical impairment.<sup>133</sup> The Iowa Task Force argues that the real issue with the Guides is not one of consistency, but of accuracy; that

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125. *See id.* at 3-4 (discussing how at the time of the statute taking effect, the fourth edition was the most current, but the sixth edition was the one used for the impairment rating in this case).

126. *Id.* at 20.

127. PA. CONST. art. II, § 1 (stating that the legislative power of the Pennsylvania Commonwealth shall be vested in a General Assembly consisting of a Senate and a House of Representatives).

128. *See* 97 S. Transcription Debate, at 65 (May 28, 2011) (stating that for the first time ever, Illinois will be introducing objective standards for impairment calculation into a bill).

129. *See* RONDINELLI, *supra* note 53, at 2 (listing one of the goals of the sixth edition as "optimizing interrater and intrarater reliability").

130. Rondinelli, *supra* note 84, at 1205.

131. *See* Kuhnlein, *supra* note 72 (discussing how varying impairment ratings drive up costs).

132. *See* Forst, *supra* note 94, at 1202 (stating that impairment ratings using the sixth edition do not meet claims of improved reliability).

133. Kuhnlein, *supra* note 72.

is, how close is the AMA impairment rating to reality?<sup>134</sup> The Task Force attributes the Guides' problems with the grids used in the calculations, the quality of the numbers in the grids, and physician bias.<sup>135</sup> If the system being used by the raters is flawed, then it does not matter how consistent the ratings are among the doctors using the flawed system. Hence, the whole goal of consistency is thrown out the window.<sup>136</sup>

#### IV. PROPOSAL

This comment proposes that Illinois should reject the AMA Guides and explore other options for medical impairment ratings. Also, Illinois should examine the realistic monetary effects that the Guides currently have, and likely will continue to have on workers' compensation premiums. This proposal also suggests that an alternate body, commission, or group should examine medical impairment in a more comprehensive way. Finally, it proposes how to deal with that impairment rating, once it is obtained.

##### *A. Conduct Further Research to Determine if Lower PPD Awards Will Lead to Lower Premiums*

Governor Rauner's Turnaround Agenda seemingly has Illinois' best interests in mind; bring more jobs to the state by reducing the workers' compensation premium costs on businesses.<sup>137</sup> His proposal to do this, in part, is to lower PPD awards by implementing the conservative AMA Guides into their calculation.<sup>138</sup> However, even ignoring all of the bias and fundamental errors with the Guides, it is far from a guarantee that lower PPD awards will have much of an effect on workers' compensation premiums.<sup>139</sup>

Economist Victor Bongard from Indiana's Kelley School of Business argues that "there is not always a strong correlation between insurance premium rates and workers' compensation awards. . . ."<sup>140</sup> California, the state that currently has the highest workers' compensation premium rates in the nation, has PPD

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134. *Id.*

135. *Id.*

136. *Id.*

137. See *The Illinois Turnaround*, *supra* note 63 (discussing how Illinois is losing jobs to Indiana, who has 50 percent less workers' compensation costs than Illinois).

138. See *id.* (stating that the 2011 workers' compensation reform adopted the AMA Guides in hopes of lowering awards).

139. See Robert, *supra* note 65 (stating that workers' compensation insurance premiums are not the only factor that employers consider when deciding where to do business).

140. *Id.*

awards that are fairly close to the national average, and significantly lower than Illinois.<sup>141</sup> In fact, despite their sky-high premium rates, California's PPD awards come in fairly similar to Indiana's, the state with which Illinois is competing for jobs.<sup>142</sup> Bongard cites Illinois' higher corporate tax rate, individual tax rate, and state tax as several important differences between Illinois and Indiana.<sup>143</sup> All of these could be reasons that jobs are moving to Indiana.

Illinois should further explore the actual effect that lower PPD awards would have on workers' compensation insurance premiums before taking any more money out of the injured worker's pocket. The Illinois legislature fought hard to implement the AMA Guides into the workers' compensation system in 2011 and will likely view any further research into potential replacements for the AMA Guides as a costly expense. However, given the collective interest from the various groups involved, there may be a cost-effective way to put a group together for further analysis into this important issue.

*B. Eliminate the Use of the AMA Guides, and Create a Task Force to Explore a New System of Disability*

Given the errors, potential bias, secrecy, and lack of scientific evidence found in the AMA Guides, it is difficult to imagine a positive workers' compensation reform plan that still includes the AMA Guides. It seems likely that most states use the AMA Guides not because of their consistency, fairness, and accuracy in calculating impairment, but rather because they are the only game in town. However, Illinois can do better.

Illinois must rid their workers' compensation system of the AMA Guides, and start fresh. Historically, Illinois dealt with workers' compensation reform through a collective bargaining process. Accordingly, the Illinois legislature should create a Workers' Compensation Task Force, similar to the one created in Iowa, to work on the creation of a new system of PPD calculation with representatives from all interested parties.<sup>144</sup> This Task Force would include members from the Illinois Workers' Compensation Commission, petitioner attorneys, respondent attorneys, as well as

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141. *See id.* (pointing out that the award for the full loss of an arm in Illinois is approximately \$440,000, while the same loss in California is worth approximately \$191,000).

142. *Id.*

143. *See id.* (mentioning a ProPublica study that shows workers' compensation awards in Indiana are higher than the national average).

144. *See* Kuhnlein, *supra* note 72 (mentioning that the Iowa Task Force served at the request of the Iowa Workers' Compensation Commissioner, Christopher Godfrey).

representatives from the medical, insurance, and labor fields.<sup>145</sup> In addition, the Illinois Task Force should engage the services of a new group that can work on a more objective and accurate determination of medical impairment.

One possible group the Illinois Task Force can engage in the PPD process is the Institute of Medicine.<sup>146</sup> The Institute of Medicine ("IOM") is a division of the National Academies of Sciences, Engineering and Medicine.<sup>147</sup> A distinct feature of the IOM is that they are a non-profit group of scientists that are all serving pro bono.<sup>148</sup> Part of their stated mission is to provide objective answers to questions of national importance.<sup>149</sup> The IOM offers a transparency to their process that is of value here.

The most appealing part of the IOM's transparency is that they open up all of their information-gathering meetings to the general public.<sup>150</sup> Further, any written materials provided from outside members are available for public examination.<sup>151</sup> The IOM also has a system of checks and balances at every step, to "protect the integrity of the reports and to maintain public confidence in their findings."<sup>152</sup> This system of checks and balances includes an external review by an independent group of experts who provide anonymous comments to the IOM committee members.<sup>153</sup> This transparency is what the Illinois legislature needs to be sure that no bias is at play.

If the IOM were successful in creating an objective and fair medical impairment rating system, the question would then become how to incorporate the impairment rating into a calculation of disability. After all, impairment does not equal disability. By the AMA's own account, the relationship between impairment and disability can be impossible to determine.<sup>154</sup> Disability is hard to

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145. *See id.* (the Iowa Task Force was composed of Administrative Law Judges, attorneys for both injured workers and employers, and physicians).

146. *See* John F. Burton, Jr., *The AMA Guides and Permanent Partial Disability Benefits*, 45 INT'L ASS'N OF INDUS. ACCIDENT BOARDS & COMMISSIONS J. 13, 30 (2008) (suggesting the Institute of Medicine as a potential candidate to replace the AMA in doing disability ratings).

147. *Institute of Medicine*, IOM.NATIONALACADEMIES.ORG, <http://iom.nationalacademies.org/About-IOM/Study-Process.aspx> (last visited Nov. 14, 2015).

148. *See id.* (stating that the IOM applies the rigorous research process of the National Academies of Sciences, Engineering, and Medicine). Further, the IOM carefully selects their committees to ensure that the proper expertise is present, but to also avoid conflicts of interest. *Id.*

149. *Id.*

150. *Id.*

151. *See id.* (mentioning that the public is provided with summaries of any closed-door IOM meetings, including a list of committee members that were present).

152. *Id.*

153. *Id.*

154. *See* RONDINELLI, *supra* note 53, at 5 (mentioning that the relationship



quantify, as it can be "influenced by physical, psychological, and psychosocial factors that can change over time."<sup>155</sup> An impairment rating is just the start of a disability evaluation, and it must be used in conjunction with determinations of psychological, social, vocational, and avocational issues.<sup>156</sup>

John Burton Jr., a Professor Emeritus at the Rutgers School of Management and Labor Relations identified seven factors pertinent to a disability calculation.<sup>157</sup> Those factors include medical impairment (both anatomical loss and functional loss), limitations on activities of daily living,<sup>158</sup> work disability (loss of earning capacity<sup>159</sup> and actual loss of earnings), and noneconomic loss (loss of capacity<sup>160</sup> and actual loss.)<sup>161</sup> The Task Force can meet with experts on these factors to gather further information on which of these factors are most determinative of disability.

It seems unlikely that there is any one formula that can accurately project the disability of an individual. Individuals are unique. Their job duties differ, their personal daily activities vary, and earning potentials vary. Even if all of this data was gathered in a quantitative form, intangible elements, such as a person's motivation, will still exist.<sup>162</sup> I propose that Illinois steer clear of adopting any "one size fits all" disability calculation.

Accordingly, the Illinois Task Force would work in conjunction with the IOM to see if an accurate system of rating medical impairment can be determined. If this goal were achieved, then the impairment rating would serve as one of the factors of disability to be considered by the Illinois Workers' Compensation Commission. Further, the Illinois Task Force can examine the non-medical factors to be considered by the Commission, and make

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between impairment and disability is complex and difficult, if not impossible, to predict).

155. *Id.* at 6.

156. *See id.* (stating that the source of these psychological, social, vocational, and avocational opinions are typically provided by non-physician [sic] sources).

157. *See* Burton, *supra* note 146, at 14-16 (discussing how these factors can be used in a model that incorporates the "permanent consequences of a work-related injury or disease, and divides impairment, work disability, and noneconomic loss into subcomponents in order to facilitate analysis.").

158. *See id.* at 15 (describing "activities of daily living" as "basic self-care activities, such as feeding, bathing, and sleep. . .").

159. *See id.* (stating the loss of earning capacity is affected by a worker's age, education, and work experience).

160. *See id.* at 16 (describing the loss of capacity as the presumed loss in quality of life).

161. *See id.* at 14 (mentioning that The World Health Organization has also developed a disability model, known as the International Classification of Functioning, Disability, and Health, which was used to some extent in the sixth edition of the AMA Guides).

162. *See* RONDINELLI, *supra* note 53, at 5 (discussing how motivation, technology, and sufficient accommodations can impact a person's ability to participate in major life functions).

recommendations to the Commission as to which factors should be given the most weight in determining PPD awards.

## V. CONCLUSION

When the workers' compensation system was first established in Illinois, injured workers and employers both made sacrifices to create a fair and compromised system of benefits that would benefit all parties. That sense of fairness to the system ended with the legislature's adoption of the AMA Guides. Not only do the Guides prejudice the injured worker by lowering the value of PPD awards, but they are also wrought with mistakes and non-scientific evidence. Illinois must expel the AMA Guides from the statute, and create an Illinois Workers' Compensation Task Force to ensure a legitimate system for employees and employers alike. The Task Force would consist of members from all interested parties, and would work on examining and creating a fairer system of disability calculation in Illinois. If a truly objective medical impairment rating system can be created, it should be used as just one of the several factors of disability calculation. Since each individual and each case is unique, the judge hearing the evidence should be tasked with determining how much weight to give to the several factors of disability when making an award. This task, while a large undertaking, would be worth it.

