



1600 20 Street, NW • Washington, DC 20009 • 202/588-1000 • www.citizen.org

June 9, 2016

Thomas E. Perez
Secretary, Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Leonard J. Howie III
Director, Office of Workers' Compensation Programs
200 Constitution Avenue, NW
Washington, DC 20210

CITIZEN PETITION

This petition is submitted by Public Citizen, a public interest organization with more than 400,000 members and supporters nationwide, to request that the U.S. Department of Labor stop using the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition (AMA Guides, Sixth Edition) to make or assist with the making of workers' compensation disability determinations. The Department should instead use the AMA Guides, Fifth Edition, or rely on another set of guidelines.

The AMA published the Sixth Edition of the Guides to the Evaluation of Permanent Impairment in January 2008. In 2009, the Office of Workers' Compensation Programs Division of Federal Employees' Compensation (OWCP DFEC) adopted the Sixth Edition for evaluating permanent impairment of claimants,¹ without any prior notice and comment or opportunity for public comment and debate, replacing its prior reliance on the Fifth Edition.

Although there have long been serious problems with the AMA guides, the Sixth Edition is a notable step backwards from the predecessor edition. The Sixth Edition met with immediate criticism upon publication; years of experience now make clear that reliance on the Sixth Edition results in unfair and unjust treatment of permanently disabled workers. Until a better alternative is designed, the Department of Labor should utilize the Fifth Edition in place of the Sixth, for the purpose of making workers' compensation disability determinations pursuant to the Federal Employees' Compensation Act.

The Sixth Edition is a deeply flawed document with a series of fundamental problems that – individually and in the aggregate – function to deprive injured workers of compensation they

¹ FECA Bulletin No. 09-03 (March 15, 2009), available at:
<http://www.dol.gov/owcp/dfec/regs/compliance/DFECfolio/FECABulletins/FY2006-2010.htm#FECAB0903>.

should receive under the Act. The changes in the Sixth Edition are *not* based on medical or scientific evidence; rather they reflect a series of disguised policy decisions.

- More than previous editions, the Sixth Edition confuses the medical standard of “impairment” with the legal standard of “disability,” with the result that important factors relating to how an injury affects a person’s ability to work are ignored.
- The Sixth Edition evidences a series of changes in impairment ratings that skew heavily toward reducing percentage impairments; these changes are arbitrary and without scientific basis.
- Empirical evidence shows that these changes do in fact result in sharply reduced impairment ratings.
- The Sixth Edition wrongly discounts subjective factors in assessing impairment/disability so that key issues that affect a person’s ability to work – for example, pain and range of motion in certain contexts – are ignored or improperly discounted. The Sixth Edition also manifests an explicit bias against treating physician reports, even though the treating physician is the best positioned to diagnose.
- The Sixth Edition ratings system contravenes the longstanding workers’ compensation principle that “you take the worker as you find him (or her),” meaning that pre-existing conditions tend to reduce compensation for injured workers.

There are other serious problems with the Sixth Edition that should foreclose reliance upon it:

- The Sixth Edition modifies impairment ratings based on a questionnaire that was not tested for cultural appropriateness or required reading comprehension levels, a problem significant enough that it might produce a disparate impact on impairment ratings. A medical editor for the Sixth Edition has actually suggested the solution to this problem is simply not to use the questionnaire for minorities.
- The Sixth Edition ratings are notably more complicated and time consuming for physicians, and require extensive training.

Serious questions exist about the methodology by which the Sixth Edition was developed. Although the Sixth Edition purports to represent a consensus of physicians, it does not disclose the names of those who worked on development of the Guides, except for section heads and editors.

I. ACTION REQUESTED

Public Citizen requests, pursuant to the schedule award provisions of the Federal Employees' Compensation Act (FECA) at 5 U.S.C. 8107 and its implementing regulations at 20 C.F.R. 10.404, that the DOL replace reliance on the AMA Guides, Sixth Edition with the AMA Guides, Fifth Edition, or another set of guidelines.

II. STATEMENT OF GROUNDS

A. THE SIXTH EDITION FAILS TO DISTINGUISH PROPERLY BETWEEN IMPAIRMENT AND DISABILITY

The Federal Employees Compensation Act establishes that covered employees shall be compensated for permanent partial disability according to a schedule contained in the Act, 5 U.S.C. 8107, and relevant regulations, 20 C.F.R. 10.404. The regulations specify that the Office of Workers' Compensation Programs (OWCP) determine impairment based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*; and pursuant to FECA Bulletin 09-03, the OWCP is now relying on the Sixth Edition.

Although the terms "disability" and "impairment" are synonymous in lay terms, and often are intermixed even in the workers' compensation context, they represent different concepts in the workers' compensation context. "Impairment" is a medical determination related to an injured person's physical functioning capacity, relying exclusively on matters such as range of motion, ability to lift, ability to stand and other such indicators. "Disability" is a legal determination of the degree to which an injury affects a person's ability to do work, in light of their training, education and experience. Dr. John Nimlos, an occupational medicine consultant, illustrated the difference in the concepts in testimony before the House of Representatives Committee on Education and Labor:

I injured my right shoulder years ago. My arm was so weak I could hardly lift a gallon of milk. I couldn't reach higher than my shoulders. I was impaired let's say 5 percent. I could do all my work as a doctor, so I was not disabled. I was zero percent disabled.

On the other hand, if I were a carpenter with the same 5 percent impairment, I would likely be 100 percent disabled. Doctors' impairment ratings are an estimate of how much loss of function is present. Disability is how that function loss affects a person's job.²

The purpose of workers' compensation is to provide compensation for disability resulting from a work-related injury, and so clarity about the difference between the two concepts is vital.

OWCP reliance on the AMA Guides inherently creates some difficulty in this regard, yet the problem is considerably worsened with use of the Sixth Edition. While both the Fifth Edition and Sixth Edition state that the purpose of the Guides is to establish impairment rather than disability, the Sixth Edition articulation of the concept is much more obscure than the Fifth Edition explanation³ – increasing potential for confusion and misuse.

The Fifth Edition states:

² Dr. John Nimlos, testimony before the Hearing on Developments in State Workers' Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

³ Roland Legal PLLC, *Sixth Edition Six Feet Under in Kentucky? At Least for Now*, LexisNexis Legal Newsroom (Jan. 13, 2009), available at: http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/archive/2009/01/13/sixth-edition-six-feet-under-in-kentucky_3f00_-at-least-for-now.aspx.

“Impairment percentages derived from the guides criteria should not be used as direct estimates of disability. Impairment percentages estimate the extent of the impairment on whole-person functioning and account for basic activities of daily living, not including work. The complexity of the work activities requires individual analyses. Impairment assessment is a necessary first step for determining disability” (emphasis Guide’s).

By contrast, the Sixth Edition states:

“The relationship between impairment and disability remains both complex and difficult, if not impossible, to predict. In some conditions there is a strong association between the level of injury and the degree of functional loss expected in one’s personal sphere of activity (mobility and ADL’s [Activities of Daily Living]). The same level of injury is in no way predictive of an affected individual’s ability to participate in major life functions including work (when appropriate motivation, technology and sufficient accommodations are available). Disability may be influenced by physical, psychological, and psychosocial factors that can change over time.”

The Sixth Edition’s phrasing of the relationship between impairment and disability is easily misunderstood and increases the potential for confusion. Unlike the Sixth Edition, the Fifth Edition notes the distinction between impairment and disability in bold text, emphasizing its importance.⁴

Any confusion as to the Guides’ purpose increases the likelihood for misuse as a proxy for evaluating disability rather than rating impairment.

A key feature of the Sixth Edition, as opposed to earlier editions, is the incorporation of elements of the World Health Organization’s International Classification of Functioning, Disability and Health (ICF). This incorporation is central to the Sixth Edition’s “paradigm shift,” and serves to blur the distinction between impairment and disability, in ways that are not only conceptually confusing but also treat injured workers unfairly by appearing to take into account their subjective experience but doing so inadequately.

The incorporation of ICF elements adds confusion because these elements are intended to give a greater weight to functional assessment – what an injured person can and cannot do – than previous editions. In so doing, this asserted paradigm shift obscures the differences between impairment and disability.

While the incorporation of ICF elements creates confusion, its impact on percentage ratings is limited by design. The functional assessment can only modestly impact the overall impairment rating under the Sixth Edition approach. “Patients’ responses on functional assessment instruments will act as modifiers of the percentage impairment they are awarded, but the awards

⁴ Emily Spieler, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

will, in general, primarily reflect objective factors,” according to the Sixth Edition.⁵ Emily Spieler, professor of law at Northeastern University, explained this in concrete terms: In the Sixth Edition, “whole person impairment (WPI) ratings are based on placement into a class, and functional assessment can only change the actual WPI rating by a limited amount. *In essence, these are small adjustments within limited bands*” (emphasis added).

Moreover, in some important ways, the Sixth Edition effort to incorporate functional assessment creates a structured bias in the rating system against claimants, resulting in an artificial and mistaken reduction in impairment percentages (though the import of this reduction is limited by the Sixth Edition’s only modest incorporation of functional assessments). The use of ADL in assessing impairment takes into account factors such as ability to maintain basic personal hygiene, dressing, eating and functional mobility.⁶ These are very basic self-care issues that are more applicable to assessing impairment of the elderly than the majority of injured workers.⁷ An injured claimant may be able to manage these kind of activities yet be completely unable to work.

The Sixth Edition’s confusion of impairment and disability means that the purpose of FECA is compromised. Rather than compensating workers for the effect of injuries on their earnings capacity, they are given compensation based on medical impairment. This flaw alone would be sufficient reason to end reliance on the Sixth Edition. However, as discussed below, this flaw reflects both a more general failure to take into account the subjective factors that appropriately affect disability determinations and an overall treatment of injured workers that is arbitrarily more parsimonious than earlier versions of the AMA Guides.

B. THE SIXTH EDITION CONTAINS PERVASIVE, ARBITRARY REDUCTIONS IN IMPAIRMENT PERCENTAGES

As a schedule of impairment, the AMA Guides attribute impairment percentages to certain conditions; these are the basis for determining compensation for an injured worker. In general, the impairment percentages in the Sixth Edition are lower than in the Fifth Edition. The reduction in percentages is not consistent, and in some cases the impairment percentage is increased from the Fifth to the Sixth; but the overall direction is clear. Noting that percentages have changed between all editions of the AMA Guides, one expert commentator says that previous alterations had been “evolutionary not revolutionary,” as was the case with the Sixth.⁸ This overall reduction is arbitrary and not based on empirical evidence.

Christopher R. Brigham, the primary author of the Sixth Edition, has stated clearly that he believes the rating system under the Fifth Edition and earlier editions was misapplied by reviewers, resulting in ratings that were consistently too high. Dr. Brigham’s conclusion seems to be based simply on reviews conducted through his own consulting practice and likely includes a

⁵ Guides to the Evaluation of Permanent Impairment, page 39 (American Medical Association, 6th ed. 2007).

⁶ Id.

⁷ Id.

⁸ John Kuhnlein, Member Report for the Iowa Task Force Regarding the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Sept. 8, 2008), available at: <http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/kuhnleinreport.pdf>.

sample set selected by employers and insurers;⁹ others using random samples have reached different conclusions.¹⁰

Ratings are in general lower in the Sixth Edition, often much lower. Dr. Brigham's own study comes to this conclusion. In an analysis of 200 cases, Dr. Brigham and colleagues found sharp reductions from the Fifth to Sixth edition. In cases where the injured worker was rated below 20 percent impairment applying the Fifth Edition, they found that impairment rating would be roughly 20 percent lower under the Sixth Edition. (So, for example, those rated at 16.5 percent under the Fifth Edition were rated as 12.9 percent under the Sixth Edition.) In cases where the injured worker was rated impaired by 20 percent or more when applying the Fifth Edition, they found that impairment rating would fall by stunning 40 percent or even more under the Sixth Edition. (So, for example, those rated at 26.2 percent under the Fifth Edition were rated as 15.0 percent under the Sixth Edition.)¹¹

Brigham's findings have been reinforced by numerous other analyses.

A review by the claims management firm Sedgewick CMS of 52 ratings involving extremities and spine as well as multi-injury cases found that ratings were the same or higher in six cases using the Sixth Edition, while lower – often much lower -- in the other 46 (88 percent of cases). In cases with an impairment rating of 16 percent or higher with the Fifth Edition, the Sedgewick analysis found ratings dropped on average 30 percent with the Sixth Edition.¹²

Another analysis, conducted by John Nimlos, found that the Sixth Edition lowered 3.5 times more ratings (as compared to the Fifth Edition) than did the Fifth Edition (as compared to the

⁹ "For a two year interval, from June 2006 through June 2008, experts in impairment assessment associated with Brigham and Associates, Inc. reviewed 2,798 impairment rating reports authored by other physicians and chiropractors. These experts disagreed with 2,169 of the ratings (78 percent) and of these reports that were judged to be incorrect, the average original rating was 20.4 percent whole-person permanent impairment and the average rating by the experts was 7.3 percent whole-person permanent impairment. The vast majority of the disagreements related not to differences in judgment, but rather failure to follow specific protocols in the guides." Christopher Brigham, W. Frederick Uehlein, Craig Uejo and Leslie Dilbeck, "AMA Guides Sixth Edition: Perceptions, Myths, Insights," IAIABC Journal 45(2) 65-81 (2008), available at: http://iecdp.files.wordpress.com/2011/08/iaiabc_journal_fall_20081.pdf.

¹⁰ In contrast to Brigham et. al.'s skewed sample, "I have a series of 401 independent medical examination (IME) reports received by me as attending physician, or reviewed by request from other physicians who [requested] my review of the IME's to advise the doctors whether to agree or not with the report. In this series, I found that 45 percent of the IME's were valid. The remainder has serious flaws, for a variety of reasons, one of them being incorrect impairment ratings. The majority of errors had to do with rating, and every rating but one was *too low*" (emphasis in original). Dr. John Nimlos, testimony before the Hearing on Developments in State Workers' Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg61993/pdf/CHRG-111hhrg61993.pdf>.

¹¹ Brigham CR, Uejo, McEntire A, Dilbeck L. "Comparative Analysis of AMA Guides Ratings by the Fourth, Fifth and Sixth Editions," Guides Newsletter. January-February 2010, cited in Sedgewick CMS, Performance Evaluation of North Dakota Workforce Safety and Insurance, 2010, page 123.

¹² Sedgewick CMS, Performance Evaluation of North Dakota Workforce Safety and Insurance, 2010, page 117.

Fourth).¹³ Ratings drops were severe, averaging 36 percent in this analysis.¹⁴ This analysis is attached to this petition as Appendix A.

The Sixth Edition specifically states that “where there was no compelling reason to change impairment ratings from prior editions, there would be consistency from the prior edition.”¹⁵ However, there are many unexplained and seemingly arbitrary changes in the ratings:

- The top rating for the most severe category for pulmonary impairment and hypertension was lowered from 100 percent WPI in the Fifth Edition to 65 percent in the Sixth Edition.¹⁶
- A “review of representative maximum ranges for the Cardiovascular, Respiratory, Reproductive and Skin System chapters show a decrease in ratings ranging from 25 to 43 percent, for an average [of] a 34 percent reduction in the value of these impairments” from the Fifth Edition to the Sixth Edition.¹⁷
- The highest impairment rating in the central and peripheral nervous system category was increased from 90 percent to 100 percent WPI.¹⁸ However, the ranges for this category were changed from 70-90 percent in the Fifth Edition to 51-100 percent in the Sixth Edition.¹⁹ The next class down was reduced from 40-69 percent in the Fifth Edition to 31-50 percent WPI in the Sixth Edition.²⁰ Overall, neurogenic dysfunction impairment ratings are significantly reduced in the Sixth Edition as compared to the Fifth. The handling of impairment of nerves in the upper extremities is changed to the detriment of injured workers: Under the Sixth Edition, an injured worker could have “three nerve impingements or three nerve involvements, and only two of them are rated,”²¹ meaning that the Sixth Edition reduces the value of subsequent injuries when assessing impairment. Under the Fifth Edition, all three impingements would be rated.²²
- Musculoskeletal cases evidence significant diminution in WPI:
 - Spinal fusions are reduced from 24 percent to 15 percent.²³

¹³ Dr. John Nimlos, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg61993/pdf/CHRG-111hhrg61993.pdf>.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Jay Causey, Todd McFarren, and John E. Nimlos, MD, CIME, “The AMA 6th: Accelerating the Demise of Permanent Disability in Workers’ Compensation” IAIABC Journal 45(2) 49-63 (2008), available at: http://iecdp.files.wordpress.com/2011/08/iaiabc_journal_fall_20081.pdf.

¹⁸ Emily Spieler, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg61993/pdf/CHRG-111hhrg61993.pdf>.

¹⁹ Id.

²⁰ Id.

²¹ Christopher Godfrey, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg61993/pdf/CHRG-111hhrg61993.pdf>.

²² Id.

²³ Emily Spieler, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg61993/pdf/CHRG-111hhrg61993.pdf>.

- An ankle replacement with a poor result is reduced from 30 percent to 24 percent.²⁴
- A total knee replacement with “good” result is reduced from 37 percent to 25 percent.²⁵
- Hip fractures are reduced from 25 percent to 12 percent.²⁶
- Bladder dysfunction is reduced from 60 percent to 30 percent.²⁷
- Sexual dysfunction is reduced from 20 percent to 15 percent.²⁸
- Respiratory problems are reduced from 90+ percent to 65 percent.²⁹
- Station and gait disorders are reduced from a maximum of 60 percent to 50 percent.³⁰
- Class four episodic loss of consciousness or awareness decreased from a range of 50-70 percent in the Fifth Edition to 36-50 percent in the Sixth Edition.³¹
- Class four sleep arousal disorders decreased from a range of 70-90 percent in the Fifth Edition to 31-50 percent in the Sixth Edition.³²

While many of these reductions appear arbitrary, there are also some intentional decisions that account for some of the reduced percentages in the Sixth Edition; yet these too are reasons to reject use of the Sixth Edition. For example, in previous editions, the upper impairment limit in most chapters was 100 percent. The upper limit in the Sixth Edition was reduced in many or most instances, on the principle that a 100 percent impairment is equivalent to near death.³³ Yet whatever the merits of that position as a medical determination, it does not track the principles of workers’ compensation law, which recognize that a claimant may be permanently and totally disabled while able to live.

An empirical investigation of the impact of the transition to the Sixth Edition conducted for the National Council on Compensation Insurance (NCCI) confirms that the Sixth Edition results in lower impairment ratings in practice. Its key finding: “For the states studied, a decrease in the average impairment is observed in the years immediately after the implementation of the Sixth Edition.” The NCCI examined average impairment ratings in states that switched from the Fifth to the Sixth Edition, maintaining as a control states that did not make the switch. The control states provide some confidence that any observed changes in the changing states were due in whole or substantial part to the switch to the Sixth Edition rather than exogenous factors.³⁴

²⁴ Id.

²⁵ Dr. John Nimlos, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

²⁶ Emily Spieler, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ Id.

³⁴ Robert Ross, David McFarland, CJ Mohin, Ben Haynes, “Impact on Impairment Ratings From Switching to the American Medical Association’s Sixth Edition of the Guides to the Evaluation of Permanent Impairment,” National

The NCCI study shows sharp declines in impairment ratings with the switch to the Sixth Edition:

The results of this study provide evidence that a decrease in the average impairment rating is realized when a state switches from the Fifth Edition to the Sixth Edition of the AMA Guides, all else being equal. After controlling for claim maturity, the three states studied show:

- In Montana, the average impairment decreased by approximately 28 percent.
- In Tennessee, the average impairments decreased by approximately 25 percent and 16 percent for whole body and part of the body, respectively.
- In New Mexico, the average impairments decreased by approximately 32 percent and 6 percent for whole body and part of the body, respectively.³⁵

The NCCI study makes clear that there are some nuances to these results. It notes that some of the decline in the average impairment is due to factors other than the switch to the Sixth Edition, and that some injuries are ratable under the Sixth that are not under the Fifth.

On balance, however, the NCCI study provides compelling evidence that, on average, the Sixth Edition results in much lower impairment ratings. These reductions are arbitrary and not justified by scientific or empirical evidence. They very significantly disadvantage injured claimants, and in so doing frustrate the purpose of the FECA.

C. THE SIXTH EDITION IMPROPERLY ELIMINATES SUBJECTIVE FACTORS IN IMPAIRMENT/DISABILITY DETERMINATIONS

The Sixth Edition has the admirable objective of promoting consistency in impairment determinations. Yet in seeking to promote consistency, the Sixth Edition has emphasized “objective” factors, an emphasis which does not necessarily advance the consistency goal but which does wrongly disadvantage claimants by downgrading key issues and data inputs that tend to demonstrate greater severity of injury.

The Sixth Edition abandons the longstanding workers’ compensation program emphasis on treating physician reports as a key element in disability determinations. The consensus view has been that treating physicians are most familiar with a person’s functional capacity and reductions in capacity due to injury. The commonsense judgment has been that the treating physician would be the most familiar with the patient, putting him or her in the best position to properly diagnose the patient.³⁶ In the Fifth Edition, treating physician reports are considered reliable. Under the

Council on Compensation Insurance. (July 2012), available at: https://www.ncci.com/documents/impact_of_ama_guides.pdf.

³⁵ Id. page 25

³⁶ See Kathryn L. Mueller, “The 6th Edition of the AMA Guide to Permanent Impairment: Its Foundation, Implications for Jurisdictional Use, and Possible Future Directions” IAIABC Journal 45(2) 35-47 (2008), available at: http://iecdp.files.wordpress.com/2011/08/iaiaabc_journal_fall_20081.pdf.

Sixth Edition, however, treating physician reports are treated with skepticism and as inherently biased, on the grounds that treating physicians are not “independent.”³⁷

The Sixth Edition also rejects consideration of the crucially important feature of pain, in keeping with its disfavor of subjective factors. Pain is assumed to be included in the rating for conditions included in the organ systems chapters; an additional 3 percent may be added for pain for conditions not in the organ systems chapters. By contrast, the Fifth Edition permitted an additional 3 percent for pain generally. In this regard, notes Professor Spieler, the Sixth Edition chooses objective factors “over accuracy in assessing the actual outcomes for disabled persons.”³⁸

Similarly, and again in the interest of elevating “objective factors,” the Sixth Edition eliminates range of motion as a basic metric for rating spine and pelvic impairments, a step away from the more common sense approach of the Fifth Edition.³⁹ The elimination of range-of-motion conflicts with the purported emphasis on functionality in the Sixth Edition, to the unfair detriment of injured claimants. Range of motion is a key indicator of functionality, and highly relevant to assessing disability.

The rationale of the Sixth Edition of the Guides in downplaying or discarding treating physician reports, pain and range of motion assessments is to decrease inter-rater variability. Yet there is reason to question whether the reduction in variability is due to the emphasis on “objective” factors, or other, distinct and arbitrary factors. An Iowa state task force that reviewed the Sixth Edition (and ultimately recommended against its adoption in Iowa) deemed the decreased inter-rater variability an “artificial creation” that was virtually guaranteed because an evaluating physician only has five numbers from which to choose within a diagnostic category.⁴⁰ Moreover, while achieving consistency is an important objective, the obtained consistency is illusory if it is based on the refusal to consider key factors and data inputs that provide the most robust information on impairment/disability; even worse, the false consistency is obtained by the systematic exclusion of information in such a way as to disadvantage injured claimants.

D. THE SIXTH EDITION QUESTIONNAIRE RAISES SERIOUS DISPARATE IMPACT CONCERNS

The questionnaires that are used to modify ratings under the Sixth Edition may produce a racially and economic class disparate impact on impairment ratings.⁴¹ These questionnaires have a large impact on WPI since they are not only used to modify the overall impairment. If the questionnaire evaluation scores are inconsistent with other WPI modifiers by two or more

³⁷ The Sixth Edition “downgrades the role of treating physicians who would be most familiar with the individual’s functional capacity and actually restricts the effect of any assessment of functional loss.” Emily Spieler, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg61993/pdf/CHRG-111hhrg61993.pdf>.

³⁸ Id.

³⁹ Id.

⁴⁰ John Kuhnlein, Member Report for the Iowa Task Force Regarding the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Sept. 8, 2008), available at:

<http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/kuhnleinreport.pdf>.

⁴¹ Id.

grades, then “the grade modification process is thrown out entirely.”⁴² If the questionnaire score is above 60, the injured worker “may be classified as a symptom magnifier or in need of a psychiatric diagnosis.”

The questionnaire’s lack of testing for cultural sensitivity and required reading comprehension level can result in invalid scores for minorities and those with less formal education.⁴³ For example, a worker from another county may answer the questions honestly (e.g. that he/she does not want surgery), given that person’s cultural influences, and then be inaccurately accused of either being a “symptom magnifier or having a surgical phobia ...”⁴⁴ Moreover, “the questionnaires have not been tested to determine the reading proficiency level which a native English speaker must possess in order to be able to read, understand, and answer questions appropriately.”⁴⁵

In response to the Iowa task force’s concern about potential cultural issues with the WPI rating, Dr. Rondinelli, a medical editor for the Sixth Edition, stunningly suggested that the questionnaires not be utilized when assessing minorities.⁴⁶

That such a problem is acknowledged, unaddressed and this remedy suggested is a devastating indictment of the flaws in the Sixth Edition, its failure to be rigorously tested, and its systematic bias against workers.

E. COST AND COMPLICATION ASSOCIATED WITH THE SIXTH EDITION

The ratings process in the Sixth Edition is notably more complicated and time-consuming than in the Fifth, imposing needless monetary and resource costs on the workers’ compensation system – costs which divert physicians from clinical duties, and raise patient and ultimately federal workers’ compensation costs.

Experts using the Fifth Edition ratings for sample cases take, on average, 5 minutes compared to an average time of 25 minutes per case under the Sixth Edition.⁴⁷

The ratings methodology in the Fifth Edition is mainly based on physical examination, rather than disability measures.⁴⁸ With the Fifth Edition, the physician conducts a physical examination

⁴² Christopher Godfrey, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

⁴³ John Kuhnlein, Member Report for the Iowa Task Force Regarding the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Sept. 8, 2008), available at: <http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/kuhnleinreport.pdf>.

⁴⁴ Id.

⁴⁵ Christopher Godfrey, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

⁴⁶ Id.

⁴⁷ Dr. John Nimlos, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

⁴⁸ Id.

and sometimes conducts additional tests. Then he or she goes to a table for each measurement or claimant characteristic, and matches the claimant's measurement or description with an impairment percent from the table. There may be multiple tables.

The Sixth Edition contains many more steps. The physician conducts an examination. The injured person must fill out a questionnaire, or sometimes two, to be scored. Then the physician goes to a chart for the diagnosis. The diagnosis has a number associated with it, as well as a range from A to E. Then the doctor must find three other charts, for examination results, test results; and the claimant function estimate. Scores ranging from "no problem" to "severe" must be used in each of these three charts. The doctor gets a number from these three tables, then adds those three results together. The results are added or subtracted from the number on the diagnosis chart. The sum is the number that determines how far up or down the A through E range the final rating is, as adjusted from the average for that diagnosis.

Physicians using the Sixth Edition need to attend an eight-hour training course – often out of state – or undertake 30 hours of self-study.⁴⁹ Doctors report charging between 15 and 20 percent more for the increased time it takes to use the Sixth Edition and to make up the cost of training and certification.⁵⁰

F. THE SIXTH EDITION WAS DEVELOPED WITH A DISQUALIFYING EDITORIAL AND REVIEW PROCESS, AND MAY BE FURTHER MARRED BY CONFLICT OF INTEREST AND POTENTIAL BIAS

The reliance on externally developed standards by OWCP and other federal agencies obviously offers resource- and time-saving benefits to the government. But ultimately the incorporation of private standards is not a matter of convenience; it is an effort to tap external expertise and benefit from academic or industry consensus standards. It is presumed that consensus standards represent the best available thinking and draw on the best available evidence. This presumption assumes and depends on consensus being derived from an open and legitimate process. The Sixth Edition purports to represent a consensus, but it is not derived from a legitimate process, and this itself is reason to reject reliance on the Sixth Edition.

It is impossible to say what kind of "consensus" the Sixth Edition represents, because the Sixth Edition editors refuse to list all of the authors and editors for all chapters, a departure from all previous editions of the guides.⁵¹ The section heads are the only contributors disclosed.⁵² No

⁴⁹ Christopher Godfrey, testimony before the Hearing on Developments in State Workers' Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

⁵⁰ Dr. John Nimlos, testimony before the Hearing on Developments in State Workers' Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

⁵¹ Christopher Godfrey, testimony before the Hearing on Developments in State Workers' Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhr61993/pdf/CHRG-111hhr61993.pdf>.

public comments were solicited or accepted on the Sixth Edition, nor was it subjected to full peer review.⁵³ This process is a startling deviation from the transparency norms of academic and medical research, as well as industrial standard setting.

Questions have been raised about bias in the authorship of the Sixth Edition, but most of these questions cannot be meaningfully explored because of the secrecy surrounding the authors and editorial team. Dr. Douglas Martin, an Iowa physician on the editorial board of the Guides, has expressed concerns about “hidden agendas and biased allegiances which many physicians (involved in the development of the Sixth Edition) cannot say”⁵⁴ – nor can anyone else, because of the unknown authorship. Noted John Kuhnlein, who served on the Iowa Task Force on the Sixth Edition,

Such behavior [refusal to disclose the Sixth Edition’s authors and editors] raises questions as to why the Editors and the AMA are being vague as to who was involved in developing the chapters. When values are derived by consensus, the results may vary significantly depending upon those who are included or excluded from the consensus process. Without knowing the composition of the groups that determined the ratings in this book, the Task Force could not determine the biases of the individual physicians to determine if there was a fair group composition. If the authors were heavily biased one way or the other, the resultant chapters would be heavily biased to one side or the other. The Task Force could not determine whether such bias in authoring this book existed; we were unable to identify the specific members of the consensus that determined the impairment rating values, and so have no idea what biases are inherent in the book.⁵⁵

III. DETAILED DESCRIPTION OF REQUESTED ACTION

Pursuant to the schedule award provisions of the Federal Employees’ Compensation Act (FECA) at 5 U.S.C. 8107 and its implementing regulations at 20 C.F.R. 10.404, the Office of Workers’ Compensation Programs Division of Federal Employees’ Compensation (OWCP DFEC) should publish a bulletin announcing that it will replace reliance on the Sixth Edition for evaluating permanent impairment of claimants,⁵⁶ and use the Fifth Edition in its place, beginning six weeks after the announcement.

⁵² John Kuhnlein, Member Report for the Iowa Task Force Regarding the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Sept. 8, 2008),

<http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/kuhnleinreport.pdf>

⁵³ Emily Spieler, testimony before the Hearing on Developments in State Workers’ Compensation Systems before the House Subcommittee on Workforce Protections, Committee on Education and Labor, 111th Congress (Nov. 17, 2010), available at: <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg61993/pdf/CHRG-111hhrg61993.pdf>.

⁵⁴ John Kuhnlein, Member Report for the Iowa Task Force Regarding the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition (Sept. 8, 2008), available at:

<http://www.iowaworkcomp.gov/sites/authoring.iowadivisionofworkcomp.gov/files/kuhnleinreport.pdf>.

⁵⁵ Id. page 9

⁵⁶ FECA Bulletin No. 09-03 (March 15, 2009), available at:

<http://www.dol.gov/owcp/dfec/regs/compliance/DFECfolio/FECABulletins/FY2006-2010.htm#FECAB0903>.

The transition to the Fifth Edition should follow prior practice for a transition to a different edition of the Guides.

First, claims examiners should begin using Fifth Edition at the date of adoption. All schedule awards issued on or after the date of adoption of the Fifth Edition (with statutory and other exceptions) should be based on the Fifth Edition.

Second, any recalculations of previous awards which result from hearings or reconsideration decisions issued on or after the adoption of the Fifth Editions, should be based on the Fifth Edition.

Third, in accordance with DFEC's established practice when moving to a new version of the AMA guides, awards made prior to date of adoption of the Fifth Edition, should not be recalculated merely because a new edition is in use. A claimant who has received a schedule award calculated under the Sixth or other editions and who claims an increased award, should receive a calculation according to the Fifth Edition for any decision issued on or after the date of adoption of the Fifth Edition. Should the later calculation result in a percentage impairment lower than the original award, the Claims Examiner or Hearing Representative should make the finding that the claimant has no more than the percentage of impairment originally awarded, that the evidence does not establish an increased impairment and that therefore the Office has no basis for declaring an overpayment.

IV. CONCLUSION

The Fifth Edition of the AMA Guides is acknowledged to be an imperfect document, but it is a far superior alternative to the Sixth Edition.

This petition has elaborated a series of serious faults with the Sixth Edition, any one of which is sufficient basis for rejecting the Sixth Edition. In combination, these faults make an overwhelming case for ending reliance on the Sixth Edition. These problems are systemic, in that they are pervasive problems, and also in that they reflect a flawed approach. The “paradigm shift” embodied in the Sixth Edition obscures the distinction between medical and legal judgments; and, in the interest of promoting a (false) consistency, downplays key inputs to making a disability determination – key factors related to a person’s ability to work. The changes overwhelmingly tilt against the interest of injured claimants in obtaining a fair disability determination; an anti-claimant bias that is reflected as well in the overwhelming tilt of the schedule to reductions in impairment percentages.

These anti-claimant changes could perhaps be defended if they were rooted in new science or empirical information. But, by and large, they are not. Instead, they represent policy choices – policy choices that should not be imposed on claimants under the federal workers’ compensation program simply because of the preferences of a small and unidentified group operating under the aegis of the American Medical Association but outside the transparency norms of the medical profession.

There is a certain momentum to the AMA Guides, and a notion that the most recent edition is “updated” and therefore best. As detailed in this petition, that is not the case with the Sixth Edition. It represents a considerable break from previous editions, but the shift to a new paradigm is not evidence-based.

The DOL has experience with changing the version of the AMA Guides on which it is relying for the impairment schedule, and the proposed change to the Fifth Edition should not cause undue burden. State usage of the AMA Guides varies across the country, with many states not relying on the AMA Guides at all, and many others continuing to use older versions;⁵⁷ so physicians throughout the country remain conversant with impairment evaluation guides other than the Sixth Edition.



Robert Weissman,
President,
Public Citizen

⁵⁷ Multiple States have rejected the Sixth Edition or otherwise chosen to use earlier editions of the AMA Guides. These include: Iowa, Vermont, Nevada, Kentucky, New York, Utah, Washington, Colorado and Georgia. As of June 2010, two and a half years after the Sixth Edition’s publication, 11 states still used the Fifth Edition, compared with 10 states that used the Sixth Edition.

AMA Guides State-by-State Chart, LexisNexis (2010), available at: <http://www.spinemetrics.us/AMA-states-recognizing.pdf>.

APPENDIX A: DR. JOHN NIMLOS ANALYSIS OF CHANGES IN PERMANENT IMPAIRMENT RATINGS CHANGES FROM AMA GUIDES 4, 5 AND 6

Case	Diagnosis	Injury Ratings 4th, 5th, 6th			Change 4th to 5th	Change 4th to 5th	Change 5th to 6th	Change 5th to 6th	Change 4th to 6th	Change 4th to 6th
		Ratings are: Percent of Upper or Lower Extremity	4th Ed.%	5th Ed.%	6th Ed.%	Chg 4 -->5	% up or down	Chg 5-->6	% up or down	Chg 4-->6
15-1	Impingement Syndrome	4	4	3	0	0%	(1)	-25%	(1)	-25%
15-2	Blunt Trauma to Forearm	30	30	7	0	0%	(23)	-77%	(23)	-77%
15-3	Wrist Injury	33	33	28	0	0%	(5)	-15%	(5)	-15%
15-4	Complex Regional Pain Syr	3	3	4	0	0%	1	33%	1	33%
15-5	Peripheral Nerve Injury	12	12	3	0	0%	(9)	-75%	(9)	-75%
15-6	Rotator Cuff Repair	8	8	11	0	0%	3	38%	3	38%
15-7	Lacerated Extensor Tendo	5	10	5	5	100%	(5)	-50%	0	0%
15-8	Wrist Arthroplasty	56	52	34	(4)	-7%	(18)	-35%	(22)	-39%
15-9	Carpal Instability	6	8	8	2	33%	0	0%	2	33%
15-10	Arthritic Thumb	8	9	10	1	13%	1	11%	2	25%
15-11	Elusive Cumulative Trauma Disorder	0	0	0	0		0		0	
15-12	Severe Degenerative Arthritis of the Wrist	35	33	24	(2)	-6%	(9)	-27%	(11)	-31%
15-13	Carpal Instability	12	17	15	5	42%	(2)	-12%	3	25%
15-14	Nerve Injury	50	50	40	0	0%	(10)	-20%	(10)	-20%
15-15	Joint Instability	11	7	4	(4)	-36%	(3)	-43%	(7)	-64%
15-16	Arthritic Shoulder	18	8	11	(10)	-56%	3	38%	(7)	-39%
15-17	Saw Injury to the Hand	44	45	42	1	2%	(3)	-7%	(2)	-5%
15-18	Arthroplasty of the Meta-Carpophalangeal Joint	5	5	5	0	0%	0	0%	0	0%
15-19	Injuries to Multiple Nerves in the Upper Extremities	40	40	41	0	0%	1	2%	1	2%
15-20	Brachial Plexus Injury	58	58	44	0	0%	(14)	-24%	(14)	-24%
15-21	Carpal Tunnel Syndrome	0	2	1	2		(1)	-50%	1	
					0		0		0	
16-1	Total Knee Replacement	50	50	31	0	0%	(19)	-38%	(19)	-38%
16-2	Below Knee Amputation *	92.5	86	86	(7)	-7%	0	0%	(7)	-7%
16-3	Osteomyelitis Secondary to Frostbite *	7.5	7.5	6	0	0%	(2)	-20%	(2)	-20%
16-4	Total Hip Replacement				37	37%	21		0	
16-5	Total Hip Replacement with Catastrophic Result	76	76	67	0	0%	(9)	-12%	(9)	-12%
16-6	Patellar Injury	5	5	1	0	0%	(4)	-80%	(4)	-80%
16-7	Knee Injury *	7.5	7.5	6	0	0%	(2)	-20%	(2)	-20%
16-8	Talus Fracture	30	27	22	(3)	-10%	(5)	-19%	(8)	-27%
16-9	Femoral Neck Fracture *	10.5	35	35	25	233%	0	0%	25	233%
16-10	Internal Knee Derangement *	10	10	12	0	0%	2	20%	2	20%
16-11	Ankle Injury	9	10	12	1	11%	2	20%	3	33%
16-12	Osteomyelitis Secondary to Trauma *	25	25	37.5	0	0%	13	50%	13	50%
					0		0		0	
Ch. 3-1	Fibromyalgia	0	0	0	0		0		0	
Ch. 3-2	Post-Traumatic (Alleged) Headache	0	0	0	0		0		0	

Note: In Lower Extremities, Cases 2, 3, 7, 9, 10 and 12 required "whole person" ratings to be adjusted to convert to "lower extremity ratings" to remain consistent. Finding a proper estimate required use of artificial decimals in the rating figures because at time the 4th or 5th editions only gave "whole person" ratings. Table 17-3 of the Fifth Edition was used for this adjustment.

John E. Nimlos MD, Occupational Medicine Consultation, 16711 39th Place NE, Lake Forest Park, WA 98155