



The Impaired Impairment Rating

by Catherine D. Cavenagh

In 2011, the Illinois legislature adopted a number of amendments to the Workers' Compensation Act that purported to change the way injured workers' benefits are calculated. Notable is the incorporation of the use of the most recent edition of the American Medical Association's (AMA) *Guides to the Evaluation of Permanent Impairment*. For injuries arising on or after September 1, 2011, an injured worker's level of permanent partial disability is to be determined by considering:

(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.¹

Importantly, the Act does not specify the **weight** such an impairment rating should be given when determining permanent partial disability. This has left practitioners and arbitrators alike confused on how to apply the AMA impairment rating when determining an injured worker's permanent partial disability.

This article will examine the AMA impairment rating factor and explain why it should be given no weight at all when determining the level of per-

manent partial disability in an injured worker. As will be discussed in greater detail below, impairment does not equate to a disability, the *AMA Guides* define legal issues contrary to Illinois law in reaching conclusions, the standards used in developing the AMA ratings are unscientific and unreliable, the use of the *AMA Guides* has impacted workers in a negative way, very few doctors are trained how to use the *Guides*, and many other States as well as many institutions have rejected the use of the *AMA Guides*.

I. History of the *AMA Guides*

The impairment rating process was first introduced in 1958 when the American Medical Association published the article *A Guide to the Evaluation of Permanent Impairment of the Extremities and Back*.² The first edition of the *Guides to the Evaluation of Permanent Impairment* was published in 1971.³ The most current edition of the *AMA Guides* is the sixth edition, published in December 2007.⁴ Under the current edition of the *AMA Guides*, "permanent impairments" to body parts or to the body as whole are rated. Permanent impairments are those that have reached maximum medical improvement (MMI) meaning that a patient's "condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment."⁵ What has changed in the sixth edition of the *AMA Guides* is a totally new and different approach to evaluating impairment ratings by incorporating use of the International Classification of Functioning, Disability, and Health (ICF).⁶ Under this approach evaluators assess

a patient's ability to perform activities of daily living as part of the evaluation process.⁷ This change is important because the impairment rating system only considers activities of daily living, nothing more. Additionally, to calculate impairment the examiner must ignore long-used factors such as range of motion in rating spine and pelvic impairments. Finally, the treating physician's opinion is degraded to an almost trivial status.⁸

II. Problems with the *AMA Guides*

A. Impairment Does Not Equal Disability

The primary problem with the use of the AMA impairment rating guidelines in workers' compensation cases is that impairment is not a good indicator of the impact an injury or disease can have on the ability of the worker to perform their job. Impairment is defined as the loss of function.⁹ However, Illinois Worker's Compensation cases are concerned with disability, not impairment. Disability, on the other hand, is the "effect of that impairment on the ability to perform a specific job."¹⁰

The difference in the two is not trivial. For example, a weak grip can be considered an impairment. An attorney might have a weak grip. That weak grip would likely not prevent the attorney from being able to perform all of her job duties. However, if an electrician suffers from the same condition - a weak grip - he could not perform the vast majority of his job duties, if any at all. In both scenarios the impairment rating would be identical. Yet the actual disability for the attorney would be

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far less than the disability of the electrician. The attorney would likely get far more impairment than she deserves, and the electrician would get far less than he deserves.

The *AMA Guides* nowhere address this inconsistency. Instead, they treat all impairment the same. It, however, ignores all context. It pays no mind to the real world effect of the impairment but rather assumes all impairment is the same.

Further, the *AMA Guides* rely heavily on an evaluation of the ability of the injured person to perform activities of daily living (ADL's) in determining impairment. This, too, is problematic because ADL's consist of basic self-care functions. However, the number of people who report an inability to perform ADL's is far less than the number of those who report an inability to work due to a disability.¹¹ The injured electrician with a weak grip in the above example could certainly perform most (perhaps all) of his activities of daily living. However, his weak

grip would not allow him to perform his job. Relying on ADL's to determine impairment again ignores the reality of the injured worker's life in favor of general classifications and norms. Thus, consideration of the ability to perform ADL's is not a good indicator of disability for workers' compensation purposes.

Even the AMA is aware that impairment is not a good indicator of disability. The *AMA Guides* state that the impairment ratings are not intended to be used to rate disability because disability "reflects a combination of medical and non-medical factors."¹² Yet this is exactly what the Illinois legislature has done. By incorporating the use of the *AMA Guides* as a factor to be considered when determining the level of permanent partial disability, the Act now attempts to use impairment in a way not even the authors of the *AMA Guides* intended, regardless of the fact that impairment is not a good indicator of disability.¹³

The inconsistency between disability and impairment becomes obvious

in application. The *AMA Guides* use an impairment rating scale with percentages based on the level of impairment. However, that scale is nowhere near comparable to the disability rating scale in the Illinois workers' compensation system. Under the *AMA Guides*, an impairment rating of 100 percent is a state close to death.¹⁴ A 90 percent impairment rating or higher is assigned when an individual is totally dependent on others.¹⁵ Under the Illinois workers' compensation system, however, such a scale is not appropriate. A worker is totally disabled when he cannot make a sufficient contribution in the work force to justify the payment of wages.¹⁶ The injured electrician who cannot ever perform his job again due to a weak grip would have a very significant disability and be entitled to a very significant award under the workers' compensation system. However, his impairment rating would be very low and theoretically it could be zero. This inconsistency is not addressed by the *AMA Guides*.



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B. Legal Issues Should Not be Defined by the *AMA Guides*

The second issue with the incorporation of the *AMA* impairment rating guidelines into the Illinois workers' compensation system is that the lines become blurred between the medical and legal world. The *AMA Guides* openly acknowledge that "the primary purpose...is to rate impairment to assist adjudicators and others in determining the financial compensation to be awarded to individuals who as a result of the injury or illness have suffered measurable and/or psychological loss."¹⁷

The problem is that the *AMA Guides* use different definitions for many legal terms that are defined by the Workers' Compensation Commission. The *AMA Guides* define such legal terms as causality, aggravation, exacerbation and recurrence,¹⁸ but none of the definitions used by the *AMA Guides* match the definitions of those terms in the legal community.

For example, medical probability is used by the *AMA Guides* in determin-

ing impairment. However, the standard used is much higher than the "more likely than not" standard of causation under the Illinois workers' compensation system.¹⁹ Further, Illinois courts have specifically noted that causation is a question of fact that should be determined by the Commission, not the *AMA*.²⁰

Disability is a legal term used to determine the level of benefits to be awarded to a worker.²¹ Impairment, on the other hand, does not take into account the non-medical factors that impact the ability of an injured worker to perform his job.²² By incorporating the *AMA* impairment rating into the Workers' Compensation Act, the Act ignores the long standing recognition that doctors cannot determine legal issues and that this should be left up to practitioners.

The inconsistent definitions are never reconciled in the *AMA Guides* or the Illinois Workers' Compensation Act. Thus, arbitrators relying on impairment ratings are, 100 percent of the time, relying on improper evidence

created using definitions which are directly contrary to Illinois law. This flaw is also fatal to the application of the impairment ratings in Workers' Compensation cases.

C. The Standards Used in Developing *AMA* Ratings are Unscientific and Unreliable

Another flaw in allowing *AMA* impairment ratings to be introduced into the workers' compensation system is that the standards for developing the impairment ratings are not reliable or evidence-based. The *AMA Guides* have a long history of being non-scientific. In section 1.2 of the Sixth Edition of the *Guides*, the editors confess that previous editions were flawed in that they were not evidence-based, did not have reliable ratings, and were not comprehensive.²³ It states that the Fifth Edition "had limited validity and reliability of the ratings."²⁴ It further admits that the ratings used in past editions were estimates and "more legal fiction than reality."²⁵ In fact, the *AMA*

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Guides themselves do not even claim to be reliable or scientifically valid.²⁶

Although the editors of the Sixth Edition would argue that they created this edition to fix those issues, the editors have marketed the *AMA Guides* as “the disability professional’s reference of choice for more than three decades” and that the “*AMA Guides Fifth Edition* provides important information regarding impairment, workers compensation and disability that health care professionals can put to practical use in their everyday practice.”²⁷

The editors of the *AMA Guides* clearly have a history of endorsing whatever the most current edition is as the one that is most reliable. The fact that the editors claim that the Sixth Edition is more reliable than those in the past should not inspire confidence in its use.

There is reason to question the validity of the Sixth Edition. The new ratings were developed in “near secrecy” and the evidence used and the reasoning behind the value of assigned

impairment ratings has never been explained.²⁸ The AMA has not identified who it is that assigns such values or why certain values change with the introduction of a new edition. Under a veil of secrecy and without explanation of any evidence, the AMA wants courts to accept its word that the new edition is scientifically valid. History teaches us that is not the case.

In some cases radical changes are made with no explanation. For example, an impairment rating for a total knee replacement with good results is 37 percent impairment of the lower extremity in the Fifth Edition. However, in the Sixth Edition, that impairment rating is dropped by 1/3 to just 25 percent.²⁹ No one knows why this is so, and the *AMA Guides* have not indicated that any of these changes are based on actual scientific studies.

By incorporating the historically unreliable *AMA Guides* into our Illinois workers’ compensation system, we have introduced an unreliable rating system in determining the level of permanent partial disability to an injured

worker. Consequently, workers have been placed at risk to receive permanent partial disability awards that are based on inaccurate evidence.

D. The Use of the *AMA Guides* Improperly Consider Prior Limitations

A bedrock principle of the Illinois workers’ compensation system is to take the injured worker as a whole, including any underlying disease or degenerative process.³⁰ This means that an injured worker can recover for an aggravation of a pre-existing condition. The *AMA Guides* try to separate out a portion of impairment that was not caused by the injury. This apportionment system allows for the final impairment rating to be determined by subtracting from the current impairment any preexisting impairment.³¹ This apportionment system is hugely problematic because it directly contradicts Illinois law.³²

Further, there have been recent changes in the *AMA Guides* to the whole person impairment ratings that serve to reduce the impairment rating overall. For example, pain no longer

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plays any role in determining impairment. In prior editions, an “add on” of up to 3 percent could be made for pain. This has been eliminated from all the ratings in the organ systems chapters.³³

Most curious, the Sixth Edition exhibits bias against the use of treating physicians as evaluators in the impairment rating process. The purported purpose for this is that a treating physician would not be “independent” in his or her evaluation of the patient.³⁴ However, the vast majority of the doctors performing the AMA impairment rating evaluations who are not treating the patient are those that have been hired by the defense. They are paid by the defense for their opinion, and therefore, the independent nature of their conclusions is questionable at best.

On the other hand, a treating doctor faces malpractice charges if he or she were to incorrectly treat a patient. The incentive to recommend treatment that is not needed or to incorrectly evaluate the nature of a patient’s injury is low for a treating doctor. Further, a

treating physician would most likely be able to more accurately evaluate a patient in which they are familiar with the injury and history of treatment. Yet the AMA ignores this lack of bias in favor of hired guns who have every financial bias conceivable.

E. The AMA Ratings Only Reduce Awards for Injured Workers

These changes in the Sixth Edition have served to reduce the AMA impairment ratings assigned to individuals overall.³⁵ The natural and predictable result has been a decrease in the amount of benefits given to injured workers.³⁶ Once again, no explanation has been made by the AMA as to why the new impairment ratings are lower, why the old ratings were wrong, or whether the new ones are based on any evidence showing they are now “right.”

The potential impact to our workers’ compensation system is significant. Certainly, awards are decreased if the AMA ratings are given significant weight but that fact alone is not as significant as the impact on the sys-

tem itself. Workers subjected to the biased and unreliable ratings are less likely to accept the settlements offered to them if the dollar amounts are effectively reduced due to the introduction of the AMA impairment rating into the system. This could result in increased levels of litigation bringing about increased costs.³⁷ Arbitrators, feeling constrained to consider the impaired ratings, admittedly give awards lower than they think are proper simply because the math changes. Thus, the awards given are not based on reality but forced, unreliable, and biased calculations. Any award based on a biased and unreliable reality is dangerous at best and unfair at worst.

F. Doctors Do Not Know How to Use the AMA Guides

The AMA claims the Sixth Edition is totally new. The AMA requires that physicians be trained before using them. The number of doctors trained in the use of the Sixth Edition of the *AMA Guides* is very limited. There-

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fore, injured workers may be required to travel greater distances for an impairment rating to be performed by a physician who is actually trained in use of the *AMA Guides*, placing yet another burden on the workers themselves.

This fact alone should call into question the validity of the Sixth Edition. If doctors with decades of practice cannot use the system, how can the system be reliable at all? If an orthopaedic surgeon with 20 years of experience cannot rate the impairment of the worker with an injured leg – something he sees and treats every day – how can the Sixth Edition be at all based on the reality of injured workers? The answer is simple, it cannot.

G. The *AMA Guides* Shift the Burden for Injured Workers Medical Care to the Government

When injured workers need medical care, they use the workers' compensation system to provide that care. But when the *AMA Guides* are used to calculate disability, they improperly

limit disability and, therefore, limit care. Faced with the need for treatment and the lack of compensation in the workers' compensation system, injured workers must turn to the only place left: governmental benefits. As has been observed by others, the use of the *AMA Guides* in workers compensation cases results in cost shifting to the state.³⁸

For example, an injured worker unable to perform his job duties is forced to undergo an *AMA* impairment rating. Based on the rating, his employer denies him medical benefits. In need of medical treatment, the worker then has no choice but to turn to the government for medical care. With his TTD terminated, he is forced to seek unemployment or social security benefits as well. This allows the employer to shift his responsibility for benefits to the state or federal government.

H. Other States and Institutions and Have Rejected Use of the *Guides*

The sixth Edition of the *AMA Guides* has proven to be controversial

due to many of the issues addressed above. In fact, it is so controversial that Iowa, Kentucky, Wyoming, Utah, and Colorado have refused to adopt it.³⁹ Shortly after it was published, the Institute of Medicine Committee, a committee that studied veterans disability benefits, rejected the *AMA Guides* because the *AMA Guides* measure and rate impairment and daily functioning, but not disability or quality of life.⁴⁰

The refusal to adopt the *AMA Guides* is highly unusual and speaks to the controversy surrounding them. Many states, institutions and organizations have examined the *AMA Guides* and found them not only controversial but so unreliable they refused to follow them. Illinois is one of the few states that has decided to follow these unreliable guidelines in determining disability in their workers' compensation system. This begs the question, what can be done?

III. What Can Be Done?

The incorporation of an *AMA* im-

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impairment rating as a factor to be used when determining a permanent partial disability rating is already Illinois law.⁴¹ However, the Illinois Workers' Compensation Act does not specify how much weight an AMA impairment rating should be given when determining a permanent partial disability award. Therefore, practitioners should work to reduce the weight to be given to AMA impairment ratings

First, practitioners can invalidate the use of AMA ratings in the workers' compensation system by pointing out that AMA impairment ratings are not accurate. As outlined above, the *AMA Guides* are historically inaccurate and unreliable. The new guides have no published scientific basis. As such, they fail to pass the threshold analysis for even the most basic evidentiary reliability standard. The refusal of many states and organizations to follow the *AMA Guides* is testament to the unreliability of the book and its authorship.

Second, but equally important, the *AMA Guides* improperly invade the

province of the Commission by improperly defining and using legal terms. They fail to follow definitions for terms like causality, aggravation, exacerbation and recurrence that have served Illinois well for decades.

Proving the unreliability of the guides, practitioners should argue that an impairment rating prepared under the guise of the Sixth Edition should be given a zero weight. An impairment rating is not helpful, reliable and does not provide consistent results. By raising such arguments, we can work to reduce the weight to be given to impairment ratings to zero percent.

V. Conclusion

The *AMA Guides* have a long and sordid history. By the AMA's own confession, the guides have a history of unreliability. Many states acknowledge the flaws and refuse to follow the Sixth Edition. Illinois is not one of them. However, the flaws described above demonstrate why AMA impairment ratings should be given no weight. They are unreliable; inadmissible and

inaccurate data has always been excluded. A court determining the disability of an injured worker should not look to impairment as playing any role because, they have no relationship to each other. Courts, arbitrators and practitioners would be wise to ignore these impaired impairment ratings.

Endnotes

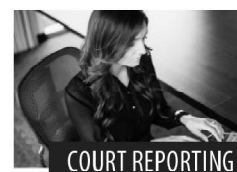
- ¹ 820 Ill.Comp.Stat. § 305/8.1b.
- ² "A Guide to The Evaluation of Permanent Impairment of the Extremities and Back," *The Journal of the American Medical Association*, Feb. 15, 1958 at 112.
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- ⁴ Robert Moss, David McFarland, C.J. Mohin, Ben Hayes, "Impact on Impairment Ratings From Switching to the American Medical Association's Sixth Edition of the Guides of the Guides to Evaluation of Permanent Impairment," *Workers Compensation Legislative Research* (Jul. 2012), https://www.ncci.com/documents/Impact_of_AMA_Guides.pdf.



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⁵ Corey Ingber, “The Examiner’s Guide to a Medical Report and Report Evaluation Checklist,” *LexisNexis Legal News Room Workers Compensation Law* (Nov. 12, 2010), <http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/archive/2010/11/12/the-examiner-s-guide-to-a-medical-report-and-report-evaluation-check-list.aspx>.

⁶ World Health Organization. *International Classification of Functioning, Disability and Health*. Geneva: World Health Organization; 2001.

⁷ Robert D. Rondinelli, “Changes for the New AMA Guides to Impairment Ratings, 6th Edition: Implications and Applications for Physician Disability Evaluations,” *PM&R Journal* (Apr. 28, 2009), [http://www.pmrjournal.org/article/S1934-1482\(09\)00438-9/fulltext](http://www.pmrjournal.org/article/S1934-1482(09)00438-9/fulltext).

⁸ *Developments in State Workers’ Compensation Systems: Hearing before the H. Subcomm. On Workforce Protections Comm. on Education and Labor*, 111th Cong. 12 (2010) [hereinafter Hearing] (prepared statement of Emily A. Spieler, J.D.,

Dean and Edwin W. Hadley Professor of Law, Northeastern University School of Law).

⁹ *AMA Guides Fifth*, American Medical Association (Oct. 14, 2014, 4:53 P.M.) https://commerce.ama-assn.org/store/catalog/productDetail.jsp?product_id=prod1240042&navAction=push.

¹⁰ *Id.* at 26 (statement of John Nimlos, M.D., Occupational Medicine Consultant).

¹¹ *Id.* at 11 (prepared statement of Emily A. Spieler, J.D., Dean and Edwin W. Hadley Professor of Law, Northeastern University School of Law).

¹² *Id.* at 10.

¹³ Much like using a screw driver to pound a nail, the Act states that an impairment rating is a factor in calculating disability. While the screw driver might be able to pound a nail, the result is not effective nor conducive to producing good result. Likewise, using impairment in calculating disability is equally silly and ineffective.

¹⁴ *Id.* at 15.

¹⁵ *Id.*

¹⁶ *Ceco Corp. v. Indus. Comm’n*, 95 Ill. 2d 278, 286, 447 N.E.2d 842, 845 (1983).

¹⁷ *Id.* at 13.

¹⁸ *Id.* at 40 (prepared statement of Christopher James Godfrey, Workers’ Compensation Comm., Iowa Division of Workers’ Compensation).

¹⁹ *Id.*

²⁰ *Bernardoni v. Industrial Com’n*, 362 Ill. App.3d 582, 597 (3rd Dist. 2005).

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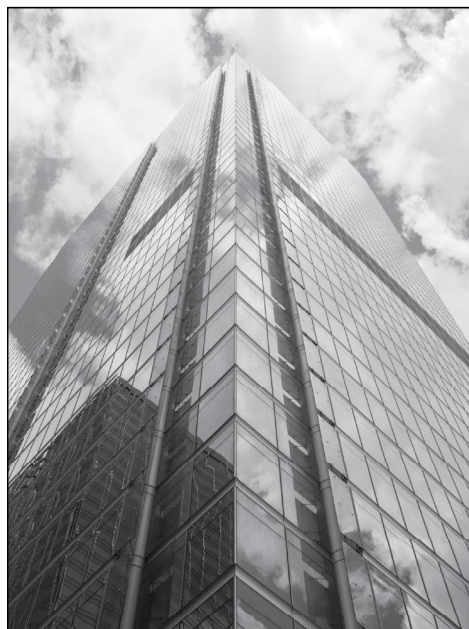
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²³ *AMA Guides* (6th ed. 2008) at 2 (stating fifth edition of Guides had “limited validity and reliability of the ratings”).

²⁴ *Id.* at 3-4.

²⁵ *Id.*

²⁶ Steven Babitsky & James J. Mangraviti, Jr., “Understanding the AMA Guides in Workers’ Compensation,” § 3.02 at 3-3 (*Wolters Kluwer Law & Busi-*
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²⁷ *AMASore*, American Medical Association (Oct. 5, 2014, 2:20 P.M.) https://commerce.ama-assn.org/store/catalog/productDetail.jsp?product_id=prod1240042&navAction=push.

²⁸ *Hearing, supra*, 4 (prepared statement of Hon. Lynn C. Woolsey, Chairwoman, Subcomm. on Workforce Protections).

²⁹ *Id.* at 27 (statement of John Nimlos, M.D., Occupational Medicine Consultant).

³⁰ *St. Elizabeth's Hosp. v. Workers' Compensation Com'n*, 371 Ill.App.3d 882, 888 (5th Dist. 2007).

³¹ *Id.* at 40 (prepared statement of Christopher James Godfrey, Workers' Compensation Commissioner, Iowa Division of Workers' Compensation).

³² *St. Elizabeth's Hosp.*, 371 Ill App.3d at 888.

³³ *Hearing, supra*, 14 (prepared statement of Emily A. Spieler, J.D., Dean and Edwin W. Hadley Professor of Law, Northeastern University School of Law).

³⁴ Babitsky & Mangraviti, *supra*, §2.03 at 2-8.

³⁵ Moss, McFarland, Mohin, & Hayes, *supra*, at 3.

³⁶ *Hearing, supra*, 38 (prepared statement of Christopher James Godfrey, Workers' Compensation Commissioner, Iowa Division of Workers' Compensation).

³⁷ *Id.* at 43.

³⁸ *Id.*

³⁹ *Id.* at 31 (prepared statement of John Nimlos, M.D., Occupational Medicine Consultant).

⁴⁰ *Id.* at 16 (prepared statement of Emily A. Spieler, J.D., Dean and Edwin W. Hadley Professor of Law, Northeastern University School of Law).

⁴¹ 820 Ill.Comp.Stat. § 305/8.1b

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