STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

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Dear Ms. Eidmann, Ms. Crowther, Professor Fisk, and Ms. Reisch:

I write in response to your letter dated April 20, 2016, in which you incorrectly assert that California's workers' compensation system "penalizes women workers on the basis of stereotypes about gender and women's reproductive biology."

The Department of Industrial Relations and the Division of Workers' Compensation agree that gender-based discrimination has no place in the state workers' compensation system. However, we disagree with your facile assertion that state laws governing permanent disability and apportionment result in impermissible or discriminatory preferences of one gender over another. We also dispute the unsupported charge that women are systemically penalized in the workers' compensation system, or that discrimination occurs as a direct result of policies or practices permitted and condoned by the state. Inflammatory accusations punctuated with ultimatums are not the best means of achieving our common goal of administering an objective, effective, and sustainable system of workers' compensation; nor do they effectively promote the elimination of gender bias in society. They instead tend to coarsen public discourse and undermine collaborative efforts to improve administration of the workers' compensation system.

I will address the permanent disability and apportionment components of the workers' compensation system before responding to the specific concerns outlined in your letter.

Permanent Disability Determinations

California's workers' compensation system provides benefits to employees who suffer from injuries or illnesses that arise out of, or occur in the course of employment, irrespective of fault. Labor Code section 4658 requires that, if an occupational injury results in permanent disability, the

percentage of disability to total disability shall be determined, and the disability payment computed on the basis of the percentage of disability to total disability.

Disability determinations are based on the Permanent Disability Rating Schedule (PDRS), a methodology for determining the nature and extent of an occupational injury, which utilizes the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition) (AMA Guides), and other tools. By incorporating the AMA Guides into the workers' compensation system in 2004,[1] the Legislature's goal was to make the measurement of impairment and permanent disability ratings more objective, uniform, and fair throughout the state, and to base decisions on the best available medical evidence. The AMA Guides are a trusted source for objective, medically-based classifications of impairment and are widely used in state workers' compensation systems, as well as the federal compensation system.

The AMA Guides provide a tested and reliable platform for assessing and rating permanent impairment associated with medical injuries or conditions. It accomplishes this by establishing a standardized, objective approach to evaluating specific medical impairments' impacts on an individual's activities of daily living, such as dressing/bathing, eating, ambulating, toileting, and attending to personal hygiene. The scientific diagnostic criteria and evaluation process used in the AMA Guides' impairment assessment are based on evidence-based medicine, and consensus recommendations of specialists. Rather than assigning policy-based values or inviting doctor-shopping and systemic litigation over subjective evaluations of disabilities, the AMA Guides assess the degree to which specific conditions measurably decrease an individual's ability to perform activities of daily living.

The AMA Guides are, of course, only a tool, and their proper use and application is essential to realizing the important interests of consistency, uniformity, and objectivity in rating physical impairments under the workers' compensation system. To that end, the work of qualified medical evaluators with medical expertise and ability to exercise clinical judgment to evaluate individual injured workers cannot be overstated. The effectiveness of the legislatively-created workers' compensation system relies in large measure on the integrity of physician evaluations and the processes available to ensure their accuracy. Physicians evaluate workers to determine the level of permanent disability an injured worker has sustained.

The permanent disability evaluation occurs when an injured worker is "permanent and stationary"—i.e., when the employee's condition has reached maximal medical improvement and is unlikely to change substantially within the next year, with or without medical treatment. To ensure that injured workers obtain the benefits to which they are entitled, the examining physician must fully and completely report their findings. The AMA Guides also require consistency in testing as part of the evaluation process, and so a physician is required to take measurements or perform other types of tests to establish reproducible, objective results upon examination. In the impairment evaluation, the physician must address the employee's history and symptoms, the results of the physician's examination, the results of various tests and diagnostic procedures, the diagnosis, the anticipated clinical course, the need for further treatment, and the residual functional capacity and ability to perform activities of daily living (ADLs). And, the physician must use her entire range of clinical skill and judgment to assess whether or not the measurements or test results are plausible and consistent with the impairment being evaluated. Only after consideration of all

[1] See Senate Bill No. 899 (2003-2004 Sess.) & Cal. Labor Code, §§ 4006, 4006.1.

of these factors may the physician compare the medical findings for each condition with the AMA Guides' impairment criteria and calculate the appropriate impairment rating or ratings for each condition or conditions.

It is also important to recognize that in determining a permanent disability rating under California's workers' compensation system, the provisions of the AMA Guides specifically addressing identified medical conditions provide the starting point of the analysis. The permanent disability rating schedule provides prima facie evidence of the percentage of disability attributable to injuries covered by the schedule, however this prima facie evidence may be rebutted. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808, 826-829 *as modified* (Sept. 1, 2010).) A physician may determine that a different portion of the AMA Guides provides a more accurate description of the whole person impairment (WPI) than the strict application of the AMA Guides and specific chapter may initially suggest. Physicians are required to use their judgment, experience, training, and skill to give an expert opinion on the injured employee's WPI using the chapter, table, or method of assessing impairment of the AMA Guides that most accurately reflects the injured employee's impairment. (*City of Sacramento v. Workers' Compensation Appeals Board* (2013) 222 Cal.App.4th 1360, 1369.) Again, the fundamental and vital task is to utilize medical expertise and objective evidence to accurately determine, on an individualized basis, the level of impairment that the individual injured worker suffers.

Lastly, it is important to note that the disability ratings are ultimately subject to adjudication by the Workers' Compensation Appeals Board (WCAB). As such, if an injured worker does not believe the physician's determination has accurately rated his or her WPI based on substantial medical evidence, the WCAB can adjudicate this dispute and determine the appropriate rating based on the existing evaluation, or order further evaluation consistent with its instructions.

Apportionment Determinations

California's workers' compensation system requires employers to compensate employees for any disability that the job itself caused, excluding non-industrial factors. Understood in the context of the fundamental policy of the no-fault workers' compensation bargain, apportionment protects employers from being forced to pay for disability that is not directly caused by an industrial injury. Section 4664 provides that the employer "shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." And a physician's report must include an apportionment determination in order to be considered complete on the issue of permanent disability. The physician does this by determining what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors, either before or after the industrial injury.

The Labor Code does not permit gender discrimination when adjusting the employee's disability rating. In fact, as you point out in your letter, Government Code section 11135 prohibits such discrimination. Apportionment is permissible only for *actual causes* of permanent disability, not gender-based stereotypes, and case law interpreting California's permanent disability and apportionment statutes is in accord.[2] Neither gender-based stereotypes nor generalized "risk

[2] As your letter references, in *Vaira v. W.C.A.B.* (*California Travel and Tourism Com'n*) (Cal.Ct.App., Dec. 3, 2007) 1 Cal. WCC 1119 (Unpublished) (*Vaira*), the Court of Appeal concluded that a risk factor of injury cannot be used as a basis to apportion a permanent disability award. Apportionment must occur when real contributing medical

factors" associated with specific genders may be used to support an apportionment finding. Instead, objective findings of the condition's existence or causal factors are required, and so any opinion or determination regarding apportionment must be based on *facts*, including an adequate examination and evaluation of medical history, and provide sound reasoning in support of its conclusions in order to constitute substantial evidence for determinations of causation and apportionment.

We are unaware of empirical data suggesting that widespread uncorrected errors have resulted in discriminatory impacts for women among the thousands of apportionment determinations that have been issued over the last decade. We are troubled, however, by your anecdotal descriptions of cases in which injured female workers have suffered unfair treatment based on impermissible apportionment determinations. Significantly, California's workers' compensation law prohibits the sort of improper apportionment determinations made in the two examples cited in your letter: (1) where the physician determined that the arthritis was attributed in part to "the risk factor of the female gender" and (2) where a worker with carpal tunnel syndrome experienced reduction of permanent disability benefits due to apportionment to "nonindustrial predisposing conditions such as the female gender, age, postmenopausal status, and obesity." We invite you to share more facts with us so that we can investigate and improve the quality of medical evaluations and ensure adherence to objective, evidence-based and gender-neutral standards for disability and apportionment determinations.

Permanent Disability Rating for Breast-Related Conditions

The AMA Guides do not provide direct ratings for conditions of "breast cancer" or "prostate cancer." Instead, they rate various specific impairments that an injured worker may experience *as a result* of those diseases. The AMA Guides provide a rating for impairment resulting from mammary gland disorders in a gender-neutral manner, but recognize that the absence of mammary glands may result in differing impacts on the activities of daily living for women as compared to men. In women, and for men with gynecomastia, the AMA Guides initially ascribe a WPI rate of 0% to 5% to the removal of mammary glands.[3] The specific value is assigned based on the physician's clinical assessment of the impact of this mammary condition, in isolation, on the individual's ability to perform activities of daily living. But, as the surgical treatment of mammary disorders such as breast cancer can result in loss of function of the upper extremities, causing range of motion problems, neurological abnormalities, lymphedema, and other complications that affect the activities of daily living, the physician performing the evaluation should also assess these impairments under Chapter 16 of the AMA Guides. Breast cancer and its surgical treatment can result in skin disfigurement, which can be assessed using Sections 8.2 and 8.3. Should the employee develop severe neuropathic pain near the site of the surgery, this could also be ratable under Chapter 18 of the AMA Guides on pain. Any one (or a combination) of these additional factors will increase the base WPI rating of 0-5% for the anatomical absence of mammary glands.

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conditions are found, but not on the basis of risk factors not rooted in a demonstrable condition. In *Escobedo v. Marshalls* (Cal. W.C.A.B. Apr. 19, 2005) 70 Cal. Comp. Cases 604, a physician's apportionment finding constitutes substantial medical evidence and is valid only if the medical opinion is (1) framed in terms of reasonable medical probability, (2) not speculative, (3) based on pertinent facts and on an adequate examination, (4) sets forth reasoning in support of its conclusion, and (5) explains how and why the apportionable factor is responsible for the disability.

[3] AMA Guides, § 10.9, Mammary Glands, at p. 239.

As an illustration of this, a single mastectomy due to breast cancer may, as a starting point, constitute a WPI rating of 3% under the AMA Guides. But, skin disfigurement as a result of the loss of the breast and scarring may result in a separate 9% WPI rating. Should this individual experience significant residual pain as a result of the mastectomy, this will result in an additional 3% WPI. Associated loss of shoulder motion may further rate at a 4% WPI. Ultimately, in this example the combination of these particular impairments (loss of breast, skin disfigurement, pain, loss of range of motion) will result in a combined WPI of 19%. For a 38 year old female firefighter that has undergone a mastectomy due to breast cancer, this would result in an overall permanent disability rating of 36%. It should be noted that the WPI ratings assigned in this illustration do not reflect the maximum potential impairment ratings for each of these classifications; again, the AMA Guides require ratings tailored to the clinical assessments of a specific injured worker's objective impairments in performing activities of daily living, rather than generalized and inappropriate assumptions concerning women.

Dr. Linda Cocchiarella, co-editor and contributing author of the AMA Guides, has confirmed that the Guides include sections that specifically account for the impact of breast disorders on the ability to produce milk, sexual function, appearance, and mental health. Contrary to the assertions in your letter, the ratings were not based on pernicious gender-based stereotypes. Indeed, allegations of gender bias in the Guides devalues the hard work and medical research that went into the creation of a comprehensive, consistent, reproducible, unbiased and evidence-based system that reflects demonstrable loss of function.

In your letter, you draw a false comparison between ratings associated with the removal of the male prostate and removal of the breasts. The organs do not perform analogous physiological functions, and casual suggestions that they should be rated equivalently casts aside the objective, gender-neutral medical evaluations on which the disability ratings are based. Furthermore, as explained above, if a physician determines that, based on medical evidence, an individual's mastectomy results in comparable impairment, a doctor may be able to provide a WPI rating comparable to the removal of the prostate.[4]

The comparison of AMA Guides ratings to those of the Veteran's Administration's disability compensation program ("VA disability program") is equally inapt. The Department of Veterans Affairs confirms that "comparisons of VA's disability compensation program with other workers' compensation programs are not meaningful because the programs are so dissimilar." (*See* GAO Report on VA Disability Compensation: Comparison of VA Benefits with those of Workers'

[4] Following your approach of drawing rough comparisons between impairment ratings for conditions unique to male or female physiology, we could note that the AMA Guides rate prostate conditions *lower* than arguably comparable conditions specific to females. Chapter 7 of the AMA Guides covers Urinary and Reproductive Systems. This chapter includes female specific conditions such as: vulval vaginal disease, cervical and uterine disease, and fallopian tube and ovarian disease. These conditions rate between 0 to 35%. For example, vulval disease where sexual intercourse is not possible would rate at 26%-35% WPI. Urethral disease which leads to stress incontinence would rate at 25% WPI. Chapter 7 also includes male-specific prostate and seminal vesicles and testicular disease. These conditions rate between 0 to 20%. In some instances, the AMA Guides rate WPI due to penile disease as low as 0-10%. This is not to suggest that the Guides discriminate against males, or that it is medically appropriate to arbitrarily assign equivalent ratings for disorders unique to respective male and female physiologies untethered to evidence-based evaluations of functions and impacts. Instead, the examples illustrate that while biology prevents direct comparison, objective consideration of the AMA Guides' ratings for gender-specific conditions do not support your contention of gender bias.

Compensation Programs, GAO/HEHS-97-5, February 1997, p. 21.) For instance, workers' compensation programs and the VA disability program differ with respect to program goals, types of benefits provided, and eligibility requirements for benefits. The VA disability program focuses on economic security for veterans (s*ee* VA Recovery Act Program – Specific Plan, May 2009), whereas state workers' compensation programs emphasize returning employees to work while limiting employers' liability. The VA disability program also compensates for losses other than earning capacity, such as diminished quality of life.

Differences in the permanent disability ratings of breast conditions and prostate conditions under the AMA Guides reflect the medical community's objective, scientific analysis of the degree to which disease in these organs respectively impair one's ability to perform activities of daily living. Differences in these ratings are rationally founded on expert medical evidence, not stereotypes and gender bias, as you allege.

California's Workers' Compensation Laws Do Not Discriminate Against Women

Any discrimination against women in California's workers' compensation system would be intolerable, which is why the Division of Workers' Compensation is vigilant about gender discrimination issues. Contrary to the unsupported assertions in your letter, however, neither the permanent disability or apportionment laws adopted by the Legislature, nor the workers' compensation system itself, discriminate against women. In the permanent disability framework, the AMA Guides look solely at impairment, while permanent disability is awarded based on the severity of injury. Although adjustments may be made for occupation and age, there are no adjustments for race, gender, or religion. As to apportionment, California's laws protect against gender-based apportionment by limiting it only to actual causes of permanent disability.

We hope that we have addressed the concerns expressed in your letter. We welcome a constructive dialogue and invite you to work collaboratively with us to identify and address any tangible evidence of gender-based discrimination in the workers' compensation system.

Sincerely,

Christine Baker
Director