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Report to the Committee on Labor

Pursuant to Resolve 2005, Ch. 53

Resolve, Directing the Workers' Compensation Board to Consider Adoption of the "Guides to the Evaluation of Permanent Impairment," 5th Edition, in Assessing Workers' Compensation Injuries

**Submitted by:
Maine Workers' Compensation Board
January 13, 2006**

I. EXECUTIVE SUMMARY

Pursuant to Resolve 2005, Ch. 53, the Workers' Compensation Board (the "Board") is considering whether to adopt the *American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition* (the "*Guides, Fifth Edition*") as the guideline for determining the existence and degree of permanent impairment in workers' compensation cases. The decision as to whether to adopt the *Guides, Fifth Edition* is complicated because of the potential impact on the permanent impairment threshold established by the Board pursuant to 39-A M.R.S.A. section 213, subsection 2.

While the Board has not yet reached a conclusion as to whether to adopt the *Guides, Fifth Edition*, the Board is continuing to examine the issue and has narrowed its focus to three alternatives: One would leave the *American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition*, (the "*Guides, Fourth Edition*") in place; the other two would result in the Board adopting the *Guides, Fifth Edition* while making provisions to adjust, if necessary, the permanent impairment threshold to ensure that that "25% of all cases with permanent impairment will be expected to exceed the threshold and 75% of all cases with permanent impairment will be expected to be less than the threshold." (See, 39-A M.R.S.A. section 213, subsection 2.)

II. INTRODUCTION

Generally, a partially incapacitated employee is not eligible to receive compensation for partial incapacity after the employee has received 364 weeks of benefits for incapacity to work¹. (See, 39-A

¹ The duration of benefits was initially set at 260 weeks. Pursuant to 39-A M.R.S.A. section 213, subsection 4, the Board makes an annual determination as to whether the benefit limitation must be extended for 52 weeks. So far, the Board has extended the benefit limitation twice. The benefit limitation may not be extended to more than 520 weeks.

M.R.S.A. section 213, subsection 1.) However, a partially incapacitated employee whose permanent impairment exceeds the permanent impairment threshold established by the Workers' Compensation Board (the "Board") is eligible to receive benefits for the duration of the employee's disability².

The permanent impairment threshold was initially set at 15%. Every other year, the Board, if necessary, adjusts the permanent impairment threshold "so that 25% of all cases with permanent impairment will be expected to exceed the threshold and 75% of all cases with permanent impairment will be expected to be less than the threshold." (See, 39-A M.R.S.A. section 213, subsection 2.) The adjusted permanent impairment threshold is effective for cases with dates of injury on or after the effective date of the adjustment. The permanent impairment thresholds are as follows: For injuries from January 1, 1993 through December 31, 2001, the threshold is 11.8% or greater; for injuries from January 1, 2002 through December 31, 2003, the threshold is 13.2%; for injuries from January 1 2004 until the effective date of the next adjustment, the threshold is 13.4%.

In order to determine the existence and degree of permanent impairment, the Board is required to establish, by rule, a schedule for rating permanent impairment. (See, 39-A M.R.S.A. section 153, subsection 8, paragraph A.) Initially, the Board was required to use the *American Medical Association's Guides to the Evaluation of Permanent Impairment, Third Edition* (the "Guides, Third Edition") as the schedule for determining the existence and degree of permanent impairment.

Effective July 28, 1998, the Board, by rule, required that permanent impairment be determined by use of the *American Medical Association's*

² The Board may also extend the duration of benefit entitlement "in cases involving extreme financial hardship due to inability to return to gainful employment." (See, 39-A M.R.S.A. section 213, subsection 1.)

Guides to the Evaluation of Permanent Impairment, Fourth Edition (the "Guides, Fourth Edition").

During the First Regular Session of the 122nd Maine Legislature, L.D. 1329 was enacted as Resolve 2005, Ch. 53 ("Chapter 53"). Chapter 53 requires the Board to "consider adoption of the [*Guides, Fifth Edition*] as impairment guidelines pursuant to the Maine Revised Statutes, Title 39-A, section 153, subsection 8."

Chapter 53 also requires the Board to "report its findings to the Joint Standing Committee on Labor by January 15, 2006, including the board's determination of whether the [*Guides, Fifth Edition*] should be adopted and, if so, whether the 5th edition has been adopted by board rule."

III. FINDINGS

The decision as to whether to adopt the *Guides, Fifth Edition* is complicated because of the potential impact on the permanent impairment threshold set by the Board pursuant to 39-A M.R.S.A. section 213, subsection 2, and the potential impact on various categories of injuries.

The Board is currently considering three alternatives with respect to whether to adopt the *Guides, Fifth Edition*:

(1) Retain the *Guides, Fourth Edition* as the impairment guideline. This approach is being considered because of the interrelatedness of the various sections of the Workers' Compensation Act (the "Act"). While considering L.D. 1329, the Labor Committee heard testimony that ratings for injuries to the spine would increase (to a number in excess of the current permanent impairment threshold) if the Board switched to the *Guides, Fifth Edition* from the *Guides, Fourth Edition*.

Assuming, for purposes of discussion, that this is true, it is possible that the permanent impairment threshold will need to be adjusted (a point

discussed further, below). This may cause injuries that currently receive ratings in excess of the permanent impairment threshold to fall below the adjusted permanent impairment threshold. In other words, if ratings for some injuries increase under the *Guides, Fifth Edition*, and others increase by a smaller percentage, or even decrease, some injuries that now receive ratings in excess of the permanent impairment threshold under the *Guides, Fourth Edition* will receive ratings below the permanent impairment threshold if the *Guides, Fifth Edition* is adopted, and the permanent impairment threshold is adjusted.

Another possibility is that there will be no impact on the categories of injuries that fall above or below the permanent impairment. In other words, if all injuries increase or decrease proportionally, there will be no difference between the *Guides, Fifth Edition* and the *Guides, Fourth Edition* in terms of which injuries receive ratings that are above or below the threshold.

(2) Related to the above point, the Board is considering a method of determining whether an adjustment to the threshold will be necessary if the Board switches to the *Guides, Fifth Edition* from the *Guides, Fourth Edition*. To accomplish this task, the Board would need to hire a health care provider (or providers) to determine the difference in ratings between the *Guides, Fifth Edition* and the *Guides, Fourth Edition* for specific injuries. The Board would also require the services of an actuary to determine, based on the health care provider's report, whether the permanent impairment threshold needs to be adjusted, and, if so, to what extent.

(3) The Board is also considering simply adopting the *Guides, Fifth Edition*, closely tracking permanent impairment ratings after the *Guides, Fifth Edition* is adopted, and then, after gathering data for a suitable

period of time, making an adjustment to the permanent impairment threshold if an adjustment is warranted.

IV. CONCLUSION

The Board will continue to study whether to adopt the *Guides, Fifth Edition* as the impairment guideline pursuant to the Maine Revised Statutes, Title 39-A, section 153, subsection 8. The Board will keep the Joint Standing Committee on Labor apprised of its continuing deliberations and the results of those deliberations.