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VOTERSINJUREDATWORK.ORG,
CALIFORNIA APPLICANTS' ATTORNEYS
7 ASSOCIATION, and J. DAVID SCHWARTZ

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SACRAMENTO

10 (UNLIMITED JURISDICTION)

11 VOTERSINJUREDATWORK.ORG,
CALIFORNIA APPLICANTS' ATTORNEYS
12 ASSOCIATION, and J. DAVID SCHWARTZ,

13 Petitioners and Plaintiffs,

14 vs.

15 ANDREA HOCH, Administrative Director of the
California Division of Workers' Compensation,
16 in her official capacity, and the DIVISION OF
WORKERS' COMPENSATION,
17

18 Respondents and Defendants.

) No.: _____

) Action Filed: January 19, 2005

) **VERIFIED PETITION FOR WRIT OF
MANDAMUS; VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE
RELIEF TO INVALIDATE AND ENJOIN
UNLAWFUL REGULATION
IMPLEMENTING PERMANENT
DISABILITY RATING SCHEDULE**

) [Code Civ. Proc., §§ 1060, 1085 and 1086;
Gov. Code, §§ 11350 and 11342.2]

1 **INTRODUCTION**

2 California's employers pay among the highest workers' compensation insurance rates in
3 the nation, yet injured workers in California receive benefits that are well below other states when
4 measured as a proportion of lost earnings. In 2004, the Legislature amended California's workers'
5 compensation law in an effort to address the root causes of high rates and low benefits. The
6 Legislature's goal was to improve California's business climate by reducing insurance rates while
7 ensuring that injured workers receive adequate benefits.

8 In devising a solution to this challenge, the Legislature relied heavily on the RAND
9 Institute for Civil Justice ("RAND"), which found that California's permanent disability rating system
10 failed workers by providing inadequate benefits and failed employers by contributing to high insurance
11 rates. RAND conducted several studies designed to find a solution that would "reduce the cost of
12 workers' compensation for employers while improving the long-term economic prospects of
13 California's injured workers." A key to reform, RAND concluded, was to reduce costs by making the
14 system for measuring permanent disabilities more consistent, uniform and objective.

15 RAND made three recommendations. First, it suggested that permanent disability
16 ratings be based on objective, observable factors in order to reduce disputes over ratings. Second,
17 RAND recommended that the ratings be adjusted to reflect empirical data on actual loss of income of
18 injured workers in order to reduce disparities in compensation for different types of injuries. Finally,
19 RAND suggested incentives to encourage employers to return injured workers to work.

20 The Legislature embraced RAND's recommendations and instructed the Administrative
21 Director of the Division of Workers' Compensation ("DWC") to adopt a new Permanent Disability
22 Rating Schedule ("PDRS") based on objective measures for rating workers' physical injuries and
23 consideration of "an employee's diminished future earning capacity." In particular, Labor Code
24 section 4660(b)(2) required the Administrative Director *to calculate diminished future earning*
25 *capacity based on empirical data and findings from RAND's report, and upon data from additional*
26 *empirical studies.* The resulting numeric formula must be based on data that "aggregate the average
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1 percentage of long-term loss of income” for various types of injuries for similarly situated employees.
2 (Senate Bill No. 899 (2003-2004 Reg. Sess.) [“SB 899”] § 32.)

3 Yet when Andrea Hoch, the Administrative Director of the DWC (“Director Hoch”),
4 created the new PDRS, she produced and used a “diminished future earning capacity” adjustment that
5 fails in every crucial respect to fulfill the mandates of Labor Code section 4660(b)(2):

- 6 • It is not based on “empirical data” (Fourth Cause of Action);
- 7 • It is not based “upon data from additional empirical studies” (Fifth Cause of Action);
- 8 and
- 9 • It fails to measure “diminished future earning capacity” (Sixth Cause of Action).

10 The consequences for injured workers are dire. According to RAND’s findings,
11 permanent disability benefits were already “inadequate” under the pre-SB 899 PDRS because they
12 replaced so little of workers’ pre-injury earnings. Director Hoch’s PDRS takes these already-
13 inadequate benefits and slashes them deeply, by as much as 50-70 percent below pre-SB 899 levels.
14 Such devastating reductions are neither permitted by California’s constitutional guarantee of
15 “adequate” benefits, nor were they authorized by the Legislature.

16 Yet Director Hoch testified before the Senate Committee on Labor and Industrial
17 Relations that she did not even know how the new PDRS would change overall benefit levels. The
18 PDRS is therefore facially invalid for an additional reason:

- 19 • Either the Legislature failed to set forth sufficient standards for adequacy, and therefore
20 delegated this responsibility to the executive branch in violation of the separation of
21 powers doctrine (First Cause of Action); or
- 22 • The Legislature incorporated RAND’s findings on adequacy as its standard for
23 adequacy, which Director Hoch failed to consider (Second Cause of Action); or
- 24 • Director Hoch violated the California Constitution by failing to consider whether the
25 new PDRS would result in adequate benefit levels (Third Cause of Action).

26 Plaintiffs and Petitioners VotersInjuredatWork.org, the California Applicants’
27 Attorneys Association and J. David Schwartz (“Petitioners”) therefore bring this taxpayer and citizen
28 lawsuit, asking this Court to order Director Hoch and the DWC to set aside the new PDRS, and declare

1 that it is facially invalid and ineffective for failure to comply with various provisions of Labor Code
2 section 4660 and the California Constitution.

3 JURISDICTION

4 1. Petitioners seek declaratory relief pursuant to Code of Civil Procedure
5 section 1060 and Government Code section 11350, and relief in mandamus pursuant to Code of Civil
6 Procedure sections 1085 and 1086 compelling the DWC and Director Hoch properly to perform their
7 official duties. Petitioners are entitled to the remedy of injunctive relief to restrain the continuing
8 enforcement of the rating schedule and prevent irreparable harm pursuant to Code of Civil Procedure
9 section 526. Venue is proper in the County of Sacramento pursuant to Code of Civil Procedure
10 sections 393(b) and 401.

11 2. Mandamus is an appropriate remedy. There is no plain, speedy and adequate
12 remedy in the ordinary course of the law, given that the proper implementation of workers'
13 compensation reforms, and the level of benefits thousands of permanently injured workers will receive,
14 are issues of great public importance that merit prompt resolution. Furthermore, the public rights of
15 workers and all those interested in the proper implementation of workers' compensation reform are at
16 stake in this litigation, and the object of this proceeding is to procure the proper fulfillment of a public
17 duty. There will be irreparable injury to all those whose rights are at stake absent a writ because some
18 injured workers will begin receiving ratings pursuant to the new, unlawful PDRS as of January 1,
19 2005. The issue before the Court is of widespread interest because the proper implementation of the
20 workers' compensation system affects California's employers, insurers, workers and the dependents of
21 injured workers. Finally, this lawsuit is the first challenge to SB 899's reforms to the PDRS system
22 within the California courts. This petition therefore presents a significant issue of first impression.

23 PARTIES

24 3. Plaintiff and petitioner VOTERSINJUREDATWORK.ORG
25 ("VotersInjuredatWork") is a new statewide organization of injured workers created in the wake of
26 SB 899 to promote the common good and general welfare of working Californians, particularly those
27 who have been injured at the workplace. It seeks to bring about civic betterment and social
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1 improvement by developing public policy emphasizing the importance of protecting the rights of
2 California workers and improving the safety of California's workplaces. In carrying out these
3 purposes, VotersInjuredatWork represents the interest of injured workers and their families by, among
4 other things, providing injured workers information about the workers' compensation laws and
5 presenting positions on legislation, regulations, judicial decisions and policy matters before
6 governmental agencies, legislatures and courts. VotersInjuredatWork's headquarters is located in
7 Sacramento, California. VotersInjuredatWork is interested in ensuring the proper execution of the
8 statutory provisions of SB 899, and enforcing the duties of Director Hoch and the DWC properly to
9 administer its provisions.

10 4. Plaintiff and petitioner CALIFORNIA APPLICANTS' ATTORNEYS
11 ASSOCIATION ("CAAA") is a professional association comprised of attorneys who represent many
12 of the injured workers who would be affected by the regulations promulgated by the DWC. CAAA's
13 members recognize the need for an active voice for injured workers, and so CAAA works to provide
14 injured workers the opportunity for fair workers' compensation benefits and re-entry into the
15 community as a productive citizen. CAAA's headquarters is located in Sacramento, California.
16 CAAA has members who are citizen residents of California and practice throughout the State of
17 California. CAAA and its members have been liable to pay, and within one year before the
18 commencement of this action have paid, a tax within the state of California. CAAA and its members
19 are interested as an organization and as citizens in ensuring the proper execution of the statutory
20 provisions of SB 899, and enforcing the duties of Director Hoch and the DWC properly to administer
21 its provisions.

22 5. Plaintiff and petitioner J. DAVID SCHWARTZ is President of CAAA and is an
23 attorney who represents injured workers who would be affected by the regulations promulgated by the
24 DWC. Mr. SCHWARTZ is a citizen resident of the State of California and practices in the County of
25 Los Angeles. Mr. SCHWARTZ has been liable to pay, and within one year before the commencement
26 of this action has paid, a tax within the State of California. Mr. SCHWARTZ is also interested as a
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1 (1917) 243 U.S. 188, 202.) Under these systems, the employer sacrificed common law defenses, but
2 gained the assurance of smaller outlays; the worker sacrificed larger awards, but gained certain, speedy
3 and “moderate compensation in all cases of injury.” The Court declared, however, that “*it perhaps*
4 *may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses,*
5 *on the other, without setting up something adequate in their stead.”* (*Id.* at 201-202.) In particular, it
6 could not be said “that any scale of compensation, however insignificant, on the one hand, or onerous,
7 on the other, would be supportable.” (*Id.* at 205.) The very next year, California voters once again
8 amended their Constitution, this time to, among other things, ensure that the Legislature provide
9 workers with benefits of a particular type and scope:

10 . . . A complete system of workmen’s compensation includes *adequate*
11 provisions for the comfort, health and safety and general welfare of any
12 and all workmen and those dependent upon them for support to the
13 extent of relieving from the consequences of any injury or death incurred
14 or sustained by workmen in the course of their employment.

13 (Ballot Pamp., Gen. Elec. (Nov. 5, 1918)
14 text of Prop. 23 [currently Cal. Const.,
art. XIV, § 4, emphasis added].)

15 10. One component of providing for “the comfort, health and safety and general
16 welfare of any and all [workers] and those dependent upon them for support” is the indemnity benefit
17 for workers whose disabilities are “permanent.” In 1970, the United States Congress responded to
18 “serious questions” about “the fairness and adequacy of present workmen’s compensation laws” by
19 creating the National Commission on State Workmen’s Compensation Laws to study the issue and
20 make recommendations to the states. (The Rep. of the Nat. Com. on State Workmen’s Comp. Laws
21 (July 1972) pp. 13-14.) The Commission declared that indemnity benefits should not be, on the one
22 hand, so high as to reduce the incentive to return to work, or on the other hand, so low that the worker
23 is reduced to “such dire circumstance that he may be forced to return to work before he is properly
24 recovered or he may become so demoralized as to be indefinitely disabled.” (*Id.* at p. 56.) The
25 Commission recommended that benefits “be at least 66 2/3 percent of [the worker’s] gross weekly
26 wage,” subject to a maximum benefit level imposed by the state. (*Id.* at p. 57.)

1 11. The California Commission on Health and Safety and Workers' Compensation
2 ("CHSWC") subsequently became concerned about the adequacy of benefits in California. In 1996, it
3 commissioned a series of studies by the RAND Institute for Civil Justice ("RAND"). These studies
4 repeatedly "found evidence that benefits were inadequate in California." (*See, e.g.*, RAND Institute
5 for Civil Justice, Trends in Earnings Loss from Disabling Workplace Injuries in California: The Role
6 of Economic Conditions (2002) p. vii ["RAND 2002 Report"].) Specifically, RAND recognized two-
7 thirds of wage-replacement as the "standard commonly cited for adequacy." (*Id.* at p. xv.) According
8 to this standard, indemnity benefits in California were inadequate. They replaced less than half of pre-
9 injury earnings over a ten-year period. (*Id.*)

10 12. Out of concern about the inadequacy of benefits for injured workers in
11 California, the Legislature passed bills to increase benefits in 1999, 2000 and 2001. Each bill was
12 vetoed by the Governor. Finally, in 2002, the Legislature passed and the Governor signed AB 749,
13 which increased permanent disability benefits for injured workers.

14 **B. The Pre-SB 899 Permanent Disability Rating Schedule and The Need for Reform**

15 13. Before the enactment of SB 899, Labor Code section 4660 required that
16 permanent disability benefits be based on four factors: (1) the "nature of the physical injury or
17 disfigurement"; (2) the worker's age; (3) the worker's occupation; and (4) the worker's diminished
18 ability "to compete in an open labor market." To implement these statutory directives, the DWC
19 created the Permanent Disability Rating Schedule ("the pre-SB 899 PDRS"), which translated these
20 factors into a rating percentage describing how disabling an injury was to a particular worker's ability
21 to compete in the open labor market. The pre-SB 899 PDRS defined the "nature of the physical
22 injury" with respect to objective outcomes like observable physical losses (e.g., amputations), and
23 subjective outcomes like pain or vertigo, which are not directly observable. The PDRS measured the
24 diminished ability "to compete in an open labor market" by considering how an injury affected work
25 capacity (e.g., loss of approximately 25 percent of the worker's pre-injury capacity for lifting). If the
26 worker's occupation required more than average use of the injured aspect of the worker, the rating
27 increased (and vice versa). If the worker was older than average, the rating increased (and vice versa)

1 to account for the greater challenges older workers face in adjusting to disabilities and competing in
2 the labor market. Considered together, these factors led to a final rating percentage defining the extent
3 of the disability. Finally, the rating percentage was converted into a benefit amount according to a
4 formula in Labor Code section 4658, which translated the percentage points into the number of weeks
5 the worker was eligible to receive benefits.

6 14. In 2003, RAND issued another report, which summarized its research regarding
7 the PDRS. It asserted that the schedule “failed” not only workers by providing benefits that were too
8 “low” compared to other states, but also employers because it contributed to making California
9 workers’ compensation premiums the highest in the United States. (RAND, Evaluation of California’s
10 Permanent Disability Rating Schedule: Interim Report (2003) pp. 3-6 [“RAND Interim Report”].)
11 RAND found that a key problem with this system was that disputes about ratings led to too much
12 litigation. (*Id.* at p. 7.) RAND suggested three reforms. First, it suggested that ratings be based on
13 more objective, observable factors so they would be subject to less dispute. Second, it suggested that
14 ratings be adjusted to reduce disparities in compensation for different injuries as measured by
15 “proportional earnings losses.” For example, RAND found that workers with some types of injuries
16 receive much lower benefits than workers with other injury types of equal or less severity. Reducing
17 these disparities would improve equity, and basing benefits on proportional earnings losses would
18 provide a more concrete and verifiable basis for the schedule. Third, RAND suggested that the
19 Legislature encourage return to work. (*Id.* at pp. 43-47.) In RAND’s view, the “considerable
20 challenge” for reformers was to lower costs for employers “while improving the long-term economic
21 prospects of California’s injured workers.” (*Id.* at p. 6; *see also* p. 46 [concluding in banner headline
22 that “Changes in Ratings Should Consider Impact on Adequacy”].)

23 **C. The Governor and the Legislature Reformed Permanent Disability Ratings By Promoting**
24 **“Consistency, Uniformity, and Objectivity” But Not By Reducing Benefit Levels**

25 15. After Arnold Schwarzenegger was sworn in as Governor of California on
26 November 17, 2003, he sought to build momentum to reform the workers’ comp system and reduce its
27 costs. “California employers are bleeding red ink from the workers’ comp system,” he proclaimed on
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1 January 6, 2004 in his State of the State Address. “Our high costs are driving away jobs and
2 businesses.”

3 16. The Governor also emphasized his desire to protect truly injured workers. The
4 Sacramento Bee quoted him as saying “I never want to hurt any one of the workers or the people that
5 get the benefits.” (Chan, *Workers’ Comp Cuts Aired*, Sac. Bee (Nov. 19, 2003).) Members of the
6 Legislature emphasized the same goal. For example, Senator Charles Poochigian, the principal author
7 of SB 899, denied there was any effort to harm those workers who need benefits under the guise of
8 “reform.” He said the goal is to “redesign the system so it is efficient, reduce costs and ensure that
9 truly injured workers are adequately compensated for injuries they suffer.” (Ellis, *20 in Fresno Protest*
10 *Workers’ Comp Reform*, Fresno Bee (Dec. 17, 2003).)

11 17. The Legislature reformed the PDRS based on the 2003 RAND Interim Report.
12 It adopted each of RAND’s recommendations, and required the Administrative Director to embrace its
13 “empirical data and findings.” It called for revision of the PDRS “[o]n or before January 1, 2005”
14 (Lab. Code, § 4660(e)), and required that the revised schedule “shall promote consistency, uniformity,
15 and objectivity.” (*Id.* at § 4660(d).) First, under the new PDRS, the “nature of the physical injury”
16 would have to incorporate the more objective descriptions and measurements of impairments included
17 in the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition
18 (“AMA Guides”). (*Id.* at § 4660(b)(1).) Second, instead of considering the worker’s ability “to
19 compete in an open labor market,” the new system was to consider “an employee’s diminished future
20 earning capacity . . . based on empirical data and findings” from RAND’s Interim Report and “data
21 from additional empirical studies.” (*Id.* at § 4660(b)(2).) Third, the Legislature amended Labor Code
22 section 4658 to introduce “return to work” incentives, as recommended by RAND. (*Id.* at § 4658(d)
23 [increasing by 15% benefit levels when employers do not offer further work opportunities to
24 permanently injured workers, and decreasing by 15% benefit levels when employers do offer further
25 work opportunities].)

1 The amended Labor Code section 4660 provided that:

2 (a) In determining the percentages of permanent disability, account shall
3 be taken of the nature of the physical injury or disfigurement, the
4 occupation of the injured employee, and his age at the time of the injury,
5 consideration being given to an employee's diminished future earning
6 capacity.

7 (b)(1) For purposes of this section, the "nature of the physical injury or
8 disfigurement" shall incorporate the descriptions and measurements of
9 physical impairments and the corresponding percentages of impairments
10 published in the American Medical Association (AMA) Guides to the
11 Evaluation of Permanent Impairment (5th Edition).

12 (b)(2) For purposes of this section, an employee's diminished future
13 earning capacity shall be a numeric formula based on empirical data and
14 findings that aggregate the average percentage of long-term loss of
15 income resulting from each type of injury for similarly situated
16 employees. The administrative director shall formulate the adjusted
17 rating schedule based on empirical data and findings from the Evaluation
18 of California's Permanent Disability Rating Schedule, Interim Report
19 (December 2003), prepared by the RAND Institute for Civil Justice, and
20 upon data from additional empirical studies.

21 18. In addition, the Legislature sought cost savings by reducing the number of
22 weeks injured workers would be eligible to receive benefits if they were less than 70 percent
23 permanently disabled. (Lab. Code, § 4658(d)(1).) Nowhere else in SB 899 did the Legislature express
24 or imply an intent to reduce permanent disability benefit levels. Indeed, the Legislature even increased
25 the number of weeks injured workers would be able to receive benefits if they were more than
26 70 percent disabled. (Lab. Code, § 4658(d)(1).)

27 19. These changes became law as part of SB 899 on April 19, 2004. One week
28 later, Governor Schwarzenegger appointed Andrea Hoch as Administrative Director of the DWC. In
announcing the appointment, the Governor stated:

I have every confidence that Andrea will ensure the reforms we passed
with bipartisan support will be implemented swiftly and properly so that
employers can see reduced costs and *injured workers can benefit from
appropriate care and better benefits in a timely manner.*

(Office of the Governor, Press Release:
Governor Schwarzenegger Appoints Andrea
Hoch Admin. Director of the DWC
[Apr. 26, 2004], emphasis added.)

1 20. Labor Code section 124 requires the DWC to “protect the interests of injured
2 workers who are entitled to the timely provision of compensation.” Labor Code section 3202 requires
3 that workers’ compensation laws “be liberally construed by the courts with the purpose of extending
4 their benefits for the protection of persons injured in the course of their employment.”

5 **D. The Need to Conduct a Crosswalk Study to Implement the New PDRS**

6 21. As discussed above, the Legislature required the Administrative Director to
7 “formulate the adjusted rating schedule based on empirical data and findings from [RAND’s Interim
8 Report] and upon data from additional empirical studies.” (See ¶ 17, *supra*.) The empirical data from
9 RAND is based on the pre-SB 899 PDRS. One of the main goals of the RAND Interim Report was to
10 analyze how accurately the pre-SB 899 PDRS assigned rating percentages for a particular injury type
11 in comparison to all other injury types. In essence, it asked whether a worker who was rated as
12 50 percent disabled because of a shoulder injury experienced the same loss of earnings as a worker
13 who was rated as 50 percent disabled because of a back injury, or a hand injury, or any other type of
14 injury. To find the answer, RAND divided the average rating (e.g., 50 percent) by the average
15 proportional loss of earnings (e.g., 50 percent) for each of 22 separate categories of injury. RAND’s
16 working premise was that benefit equity is maximized if the resulting ratios were approximately
17 constant across injury categories. This would mean that workers with the same earnings losses would
18 receive the same disability rating regardless of the type of injury. However, RAND found a “wide
19 disparity” in the resulting ratios, shown in the chart below, which means that workers with different
20 injuries but the same earnings losses were receiving different ratings under the pre-SB 899 PDRS:

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| <u>Part of the Body</u> | <u>Ratio of Rating Over Losses</u> |
|-------------------------|--|
| Hand/fingers | 1.810 |
| Vision | 1.810 |
| Knee | 1.570 |
| Other | 1.530 |
| Ankle | 1.520 |
| Elbow | 1.510 |

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|----|-------------------------|-------|
| 1 | Loss of grasping power | 1.280 |
| 2 | Wrist | 1.210 |
| 3 | Toe(s) | 1.110 |
| 4 | Spine Thoracic | 1.100 |
| 5 | General lower extremity | 1.100 |
| 6 | Spine Lumbar | 1.080 |
| 7 | Spine Cervical | 1.060 |
| 8 | Hip | 1.030 |
| 9 | General upper extremity | 1.000 |
| 10 | Heart disease | 0.970 |
| 11 | General Abdominal | 0.950 |
| 12 | PT head syndrome | 0.930 |
| 13 | Lung disease | 0.790 |
| 14 | Shoulder | 0.740 |
| 15 | Hearing | 0.610 |
| 16 | Psychiatric | 0.450 |

22. These ratios could be used to determine how much the pre-SB 899 disability ratings had to be adjusted to assure that workers with similar loss of earnings receive the same disability rating (and consequently the same permanent disability benefits) regardless of the type of injury. The challenge is to apply these ratios, which are based on pre-SB 899 disability ratings, to post-SB 899 ratings, which are based on impairment ratings under the *AMA Guides*. As described above, the pre-SB 899 PDRS produced a rating based on *disability*, indicating the extent to which a worker's injury limits his or her ability to compete in an open labor market. (See ¶ 13, *supra*.) The *AMA Guides*, in contrast, produce a rating based on *impairment*, which indicates the extent to which a worker's injury limits his or her body's ability to function. This is a significant difference. Consider two individuals who lose a finger in a workplace accident. If one individual is a bank president, this loss may cause only a minor disability. If the other individual is a concert pianist, the loss of her finger would cause major disability. Both individuals, however, would have the same impairment rating because it limits their body's ability to function to the same degree. For this reason, the RAND ratios

1 – which derive from dividing the average pre-SB 899 *disability* ratings by the average proportional
2 earnings losses – cannot be mechanically applied to post-SB 899 *impairment* ratings without
3 determining how to adjust for their differences.

4 23. To bridge this difference, a “crosswalk” study must be conducted to adjust
5 disability ratings to impairment ratings. A crosswalk study would rate the range of injuries under both
6 systems to produce adjustment factors that enable the disability data from RAND’s Interim Report to
7 be applied to impairment ratings from the *AMA Guides*.

8 24. Director Hoch, however, did not conduct a crosswalk study. She also did not
9 conduct any additional empirical studies to determine diminished future earning capacity prior to
10 issuing her proposed PDRS.

11 25. Instead, Director Hoch focused on the *relationship between the ratios in*
12 *RAND’s chart* as the basis for the new “diminished future earning capacity” adjustment factors
13 (“DFEC adjustment factor”). That is, she compared the difference between the highest ratio of 1.81
14 for hands and fingers and the lowest ratio of .45 for psychiatric injuries to arrive at an overall ratio of
15 4:1 (i.e., $1.81 : .45 = 4.1$). She made a “policy judgment” to use 1.1 as the base DFEC adjustment
16 factor, and then inaccurately applied the 4:1 ratio to develop DFEC adjustment factors that range from
17 1.1 to 1.4. She distributed these adjustment factors among the injury categories listed in the chart in
18 paragraph 22 above, so that hand, finger and vision injuries receive a 1.1 adjustment; hearing and
19 psychiatric injuries receive a 1.4 adjustment; and all other injuries receive an adjustment between these
20 two numbers. The DFEC adjustment factor is multiplied by the *AMA Guides* impairment rating and
21 combined with the age and occupational adjustment to yield the new post-SB 899 PDRS rating.

22 **E. Director Hoch Failed to Consider Comments from California Legislators and CAAA,**
23 **and Empirical Data Indicating that Her Proposed Schedule Violates the Labor Code**
and California Constitution

24 26. The DWC posted its proposed new PDRS with its 1.1 – 1.4 DFEC adjustment
25 factors on November 17, 2004. Because it classified the proposed schedule as an “Emergency
26 Regulation,” the DWC gave the public only 10 days to comment on it.

1 27. On November 29, 2004, CAAA submitted written comments to the DWC,
2 objecting to the adoption of the proposed PDRS as contrary to the language and intent of the
3 underlying statute and the California Constitution.

4 28. On December 7, 2004, economist Dr. J. Paul Leigh, Ph.D., of the University of
5 California, Davis, released a study on the impact of the proposed post-SB 899 PDRS. Dr. Leigh
6 conducted a crosswalk study using 218 reports of injuries to backs, shoulders, wrists and knees. He
7 found that the impairment ratings for these injuries under the new system would be approximately
8 33 percent the size of the disability ratings under the pre-SB 899 system. Because the rating
9 percentage converts directly to the benefit amount according to the formula in Labor Code
10 section 4658, this means that the average worker with these injuries would receive a two-thirds
11 reduction in benefits under the new schedule.

12 29. On December 7, 2004, CHSWC released a draft report on the new PDRS. It
13 concluded that “[b]ased on a sample of hypothetical ratings that illustrate common disabilities from
14 occupational injuries . . . it appears that the FEC ratings proposed by the [Administrative Director] do
15 not bring the adjusted ratings into the same range as the [pre-SB 899 PDRS]. The adjustment clearly
16 does not bring most ratings into the range of the actual percentage wage loss from each type of injury.”
17 (CHSWC, Policy Considerations for Permanent Disability Rating Under AMA (2004) p. 4,
18 Attachment A.)

19 30. On the same day, Director Hoch appeared before the Senate Labor and
20 Industrial Relations Committee to testify about the proposed PDRS. Members of that Committee told
21 Director Hoch that the proposed adjustment factors were not based on empirical data in violation of
22 Labor Code section 4660, and that they resulted in reduced benefit levels that the Legislature never
23 intended. Director Hoch testified that she would take those comments under consideration.

24 31. Yet the DWC submitted substantially the same PDRS and regulations to the
25 Office of Administrative Law (“OAL”) on December 23, 2004. CAAA submitted written comments to
26 the OAL on December 23, 2004, objecting to the adoption of the proposed PDRS as contrary to the
27 language and intent of the underlying statute and the California Constitution, and enclosing copies of
28 the letters CAAA had submitted to the DWC.

1 38. The DWC is a division of the Department of Industrial Relations, which is a
2 subordinate arm of the executive branch of government. It does not possess constitutional authority for
3 the exercise of legislative powers.

4 39. Administrative rulemaking is a “quasi-legislative” power exercised pursuant to a
5 statutory delegation enacted by the Legislature. The existence and scope of the DWC’s quasi-
6 legislative authority derives entirely from the statute authorizing the regulation.

7 40. Labor Code section 4660 requires that:

8 (a) In determining the percentages of permanent disability, account shall
9 be taken of the nature of the physical injury or disfigurement, the
10 occupation of the injured employee, and his or her age at the time of the
11 injury, consideration being given to an employee’s diminished future
12 earning capacity.

13 (b)(1) For purposes of this section, the “nature of the physical injury or
14 disfigurement” shall incorporate the descriptions and measurements of
15 physical impairments and the corresponding percentages of impairments
16 published in the American Medical Association (AMA) Guides to the
17 Evaluation of Permanent Impairment (5th Edition).

18 (2) For purposes of this section, an employee’s diminished future earning
19 capacity shall be a numeric formula based on empirical data and findings
20 that aggregate the average percentage of long-term loss of income
21 resulting from each type of injury for similarly situated employees. The
22 administrative director shall formulate the adjusted rating schedule based
23 on empirical data and findings from the Evaluation of California’s
24 Permanent Disability Rating Schedule, Interim Report (December 2003),
25 prepared by the RAND Institute for Civil Justice, and upon data from
26 additional empirical studies.

27 41. In enacting this provision, the Legislature failed to determine what level of
28 benefit constitutes an “adequate” benefit. While it determined that the percentage of permanent
disability must consider “diminished future earning capacity” through a formula based on empirical
data and findings from the RAND Interim Report and data from additional empirical studies, it failed
to determine the amount of diminished future earning capacity the benefit levels must replace. It
therefore left the Administrative Director with the authority to determine adequacy without sufficient
standards to guide the exercise of that authority. With such unfettered discretion, the Administrative
Director could set benefit levels so low that they force injured workers into poverty, or so high that
they frustrate the policy goal of encouraging return to work, all without guidance from the Legislature.

1 employees. *The administrative director shall formulate the adjusted*
2 *rating schedule based on empirical data and findings from the*
3 *Evaluation of California's Permanent Disability Rating Schedule,*
4 *Interim Report (December 2003), prepared by the RAND Institute for*
5 *Civil Justice, and upon data from additional empirical studies.*

6 (Emphasis added.)

7 47. In the alternative to petitioners' First Cause of Action, petitioners allege that the
8 Legislature did not delegate its authority to determine the fundamental issue of adequacy to the
9 Administrative Director. Instead, it incorporated the findings on adequacy included in the RAND
10 Interim Report and required the Administrative Director to promulgate the PDRS according to the
11 standards set forth in those findings.

12 48. RAND considered the standard for determining "adequate" benefits to be
13 replacement of two-thirds of pre-injury wages. (RAND 2002 Report at p. xv; *see also* RAND Interim
14 Report at 5.) RAND's Interim Report found that California benefit levels "fail[ed]" workers because
15 they were "low" relative to other states. (RAND Interim Report at pp. 5-6.) The Interim Report also
16 found that "Changes in Ratings Should Consider Impact on Adequacy." (*Id.* at p. 46.) RAND's earlier
17 studies confirmed that California's benefit levels were "inadequate" in that they replaced less than two-
18 thirds of pre-injury wages. (*See* ¶ 11, *supra.*)

19 49. On December 7, 2004, after posting her proposed PDRS, Director Hoch testified
20 before the Senate Committee on Labor and Industrial Relations that she had not done a calculation to
21 determine the overall impact of her proposed PDRS on the disability benefits injured workers would
22 receive, though she had run "some numbers" based on examples in the AMA *Guides* and would look at
23 additional examples. Nevertheless, she adopted the relevant provisions of the proposed PDRS after
24 OAL approved it. Petitioners therefore allege that Director Hoch did not consider whether the
25 proposed PDRS met the standard for adequacy set forth in RAND's findings.

26 50. Available evidence indicates that the PDRS does not meet the adequacy
27 standards included in RAND's findings. Prior to January 1, 2005, J. Paul Leigh, Ph.D., an economist
28 from the University of California, Davis released a study measuring the impact of the proposed PDRS
on the permanent disability ratings injured workers would receive. He found that the impairment

1 ratings under the new system would be approximately 33 percent of the disability ratings under the
2 pre-SB 899 system for the types of injuries included in his study. Also prior to January 1, 2005,
3 CHSWC released a draft report that concluded that, based on ten examples, the new PDRS would not
4 bring ratings into the same range as the pre-SB 899 PDRS, nor bring most ratings into the range of the
5 actual percentage wage loss from each type of injury. (See ¶¶ 28, 29, *supra*.)

6 51. Because Director Hoch and the DWC developed the DFEC adjustment factors
7 without considering RAND's findings on adequacy, in the face of evidence that the new PDRS may
8 not result in "adequate" benefits within the meaning of RAND's findings, petitioners allege that the
9 new PDRS violates Labor Code section 4660(b)(2).

10 **THIRD CAUSE OF ACTION**
11 **[Cal. Const., art. XIV, § 4]**

12 **Failure to Consider Adequacy as Required by Article XIV, Section 4**

13 **The New PDRS is Invalid and Ineffective Because it Fails to Consider**
14 **the Adequacy of Benefit Levels in Violation of**
15 **Article XIV, Section 4 of the California Constitution**

16 52. Petitioners incorporate the allegations contained in paragraphs 1 through 51,
17 inclusive, as if fully set forth herein.

18 53. The California Constitution requires that:

19 . . . A complete system of workers' compensation include[] *adequate*
20 provisions for the comfort, health and safety and general welfare of any
21 and all workers and those dependent upon them for support to the extent
22 of relieving from the consequences of any injury or death incurred or
23 sustained by workers in the course of their employment. . .

24 (Cal. Const., art. XIV, § 4.)

25 54. In the alternative to petitioners' First and Second Causes of Action, petitioners
26 allege that if Labor Code section 4660 is not an unconstitutional delegation of the Legislature's
27 responsibility to determine adequacy, and if the Legislature did not intend to incorporate RAND's
28 findings on adequacy as the standard for adequacy, then Director Hoch failed to fulfill her duty, as
delegated by the Legislature, to determine what constitutes adequate benefits, and to take steps to
ensure that the new PDRS would result in adequate benefit levels.

1 (b)(2) For purposes of this section, an employee's diminished future
2 earning capacity shall be a numeric formula based on empirical data and
3 findings that aggregate the average percentage of long-term loss of
4 income resulting from each type of injury for similarly situated
5 employees. The administrative director shall formulate the adjusted
6 rating schedule based on empirical data and findings from the Evaluation
7 of California's Permanent Disability Rating Schedule, Interim Report
8 (December 2003), prepared by the RAND Institute for Civil Justice, and
9 upon data from additional empirical studies.

6 (Emphasis added.)

7 66. Director Hoch testified that the only empirical data she used to develop her
8 proposed PDRS was empirical data from the RAND Interim Report. The proposed PDRS became
9 effective on January 1, 2005.

10 67. Director Hoch did not use additional existing empirical data to develop her
11 proposed PDRS because she testified that she determined that no such data existed.

12 68. Director Hoch did not request that any individual, institution or organization
13 complete any additional empirical studies like a crosswalk study. According to her testimony, she did
14 not believe there was time to complete a crosswalk study in advance of January 1, 2005, and because
15 she questioned the usefulness of information from a crosswalk study based on her concerns regarding
16 the ratings under the pre-SB 899 PDRS.

17 69. There was time to complete additional empirical studies in advance of
18 January 1, 2005, or shortly thereafter. For example, economist J. Paul Leigh, Ph.D., of the University
19 of California, Davis, completed a crosswalk study and released his results by December 7, 2004.

20 70. Director Hoch did not have discretion under the Labor Code to decline to rely
21 "upon data from additional empirical studies."

22 71. Furthermore, Director Hoch did not have discretion under the Labor Code to
23 decline to conduct further empirical studies because she doubted the usefulness of data from the pre-
24 SB 899 ratings. The Legislature directed the Administrative Director to base the schedule on
25 "empirical data and findings from the [RAND Interim Report] . . ." RAND's Interim Report relied on
26 data from pre-SB 899 PDRS ratings. Therefore, Director Hoch was required to base her revision of the
27 PDRS on such data, consistent with Labor Code section 4660.

1 rights and obligations pursuant to Labor Code section 4660 and the California Constitution. Further,
2 such declaration is necessary to compel Director Hoch and the DWC to enforce the legislatively
3 mandated requirements for the post-SB 899 PDRS.

4 **EIGHTH CAUSE OF ACTION**
5 **[Code Civ. Proc., § 526]**

6 **Injunctive Relief**

7 83. Petitioners incorporate the allegations contained in paragraphs 1 through 82,
8 inclusive, as if fully set forth herein.

9 84. The new PDRS is invalid and ineffective in light of its failure to comply with
10 the requirements of Labor Code section 4660 and the California Constitution, as set forth in the first
11 through seventh causes of action.

12 85. Petitioners have no adequate remedy at law since enforcement of the invalid
13 PDRS will result in harm that cannot be compensated by an ordinary award for damages. Specifically,
14 some injured workers who receive ratings pursuant to the new PDRS, and their dependents, will suffer
15 the loss of benefits they would have otherwise received; California's employers, insurers and workers
16 will be harmed because the improper implementation of SB 899 will undermine the Legislature's
17 efforts to reform workers' compensation; and taxpayers will be harmed by the illegal and wasteful
18 expenditure of public funds to enforce the new PDRS.

19 86. Accordingly, petitioners seek injunctive relief to restrain the enforcement of the
20 new PDRS.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, petitioners pray:

23 1. That this Court issue an alternative writ or peremptory writ of mandate
24 commanding Director Hoch and the DWC to set aside the new PDRS that became effective on
25 January 1, 2005;

26 2. For a declaration that:

27 a. The new PDRS is invalid and ineffective because it fails to properly
28 determine and provide "adequate" benefits, for one of three alternative reasons:

1 (i) Labor Code section 4660 and the new PDRS are invalid and
2 ineffective because the Legislature delegated its responsibility to determine the fundamental issue of
3 “adequacy” in violation of the separation of powers doctrine;

4 (ii) The new PDRS is invalid and ineffective because it fails to
5 consider and is inconsistent with RAND’s finding that “adequacy” requires replacement of two-thirds
6 of pre-injury earnings; or

7 (iii) The new PDRS is invalid and ineffective because it fails to
8 consider the “adequacy” of benefit levels in violation of article XIV, section 4 of the California
9 Constitution.

10 b. The new PDRS is invalid and ineffective because it violates Labor Code
11 section 4660(b)(2)’s requirement that the PDRS be based on empirical data;

12 c. The new PDRS is invalid and ineffective because it violates Labor Code
13 section 4660(b)(2)’s requirement that the PDRS be based “upon data from additional empirical
14 studies”;

15 d. The new PDRS is invalid and ineffective because it violates Labor Code
16 section 4660(a)’s requirement that the PDRS consider “diminished future earning capacity;” and

17 3. For temporary, preliminary and permanent injunctive relief according to verified
18 application and proof;

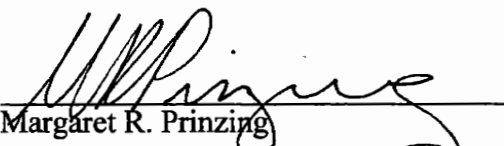
19 4. For attorneys’ fees and costs of suit; and

20 5. For such other and further relief as the Court deems appropriate.

21 Dated: January 19, 2005

Respectfully submitted,

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