W. Frederick Uehlein, Esq.
959 Concord Street
Framingham, MA 01701

STATEMENT FOR THE RECORD

Hearing in the House Education and Labor Committee

Developments in State Workers' Compensation Systems

"American Medical Association

Guides to the Evaluation of Permanent Impairment: Sixth Edition"

November 17, 2010

I am pleased to discuss with you today, injured worker disability, a topic that I am still passionate about after 40 years of work in the field of workers compensation and social security, including work as a plaintiff's attorney, a defense attorney, starting a social security advocacy company and in service companies that support disability claims activities. I am Chairman of Insurance Recovery Group of Framingham, Massachusetts, and a Director of Impairment Resources of San Diego, California. I am an associate editor of the American Medical Association *Guides Newsletter*. However, I am before you today as an individual who wishes to share what knowledge I have accumulated over these decades from the vantage of the many participants in this complex system, particularly the two primary stakeholders: injured workers themselves and the employers who pay for their care and benefits throughout their recovery.

I have remained active in this field for so long because I believe that we can significantly help disabled Americans improve their health and achieve the kind of contributions they are capable of by structuring our compensation systems to be clear, simple, and to the

greatest extent possible, based on science and fact. Employers in turn gain from the reduction of friction costs associated with poorly designed systems. The allocation of funds, then, can more equitably be distributed.

My colleague, Christopher Brigham, MD, Chairman of Impairment Resources, is submitting written testimony for your consideration today, the focus of which is two-fold: first, preventing needless disability and, second, advocating for the use of the most current edition of the AMA *Guides to the Evaluation of Permanent Impairment*, the Sixth Edition. Going forward, I will refer to these as "the Guides" in my testimony.

Dr. Brigham regrets not being able to attend in person, but is on a long-standing commitment in Australia. His biography and extensive experience are included in his Testimony. Suffice it to say that he has voluntarily, without pay, devoted thousands of hours to the effective development and utilization of the Guides, serving as the Senior Contributing Editor and working with physicians and other experts from all over the country in developing the most recent edition of the Guides. These Guides are based on expert consensus and the best science- and evidence-based medicine available today. I can attest that Dr. Brigham is the country's most widely recognized expert in the utilization of the Guides and the development of data involving their use. Dr. Brigham speaks from fact, and from the heart, when he says that the most recent version of the Guides is best for both employees and for the employers. It is evidence based, affords consistency and ease of use, and it results in fewer errors.

Let me take a minute to give a brief, but important, primer on the role of the Guides in our disability systems and its relationship to benefit payments. An employee who has had a serious work injury and has improved to the maximum extent that he can is

usually entitled to a benefit for his permanent disability. Disability means loss of the employee's earning capacity. He was able to earn a certain wage and now he cannot as a result of this injury. Thus, he is entitled to a benefit to replace that wage. The first step in determining this entitlement is to turn to the medical profession for a report on the employee's medical functionality (impairment). The Guides are used in most systems to determine an injured person's functionality. That is what impairment refers to, medical functionality. So when you see the title "Guides to Impairment," it is referring to a book designed to help a physician give a determination of medical functionality.

What is confused, even by experts, is that the impairment or medical functionality determined by physicians is not now, nor should it ever be, synonymous with disabilities—i.e., loss of wages. In the workers compensation and social security fields, disability means loss of wage earning capacity. Impairment is something that doctors seek to minimize. Their mission is to maximize medical functionality. It is obvious to all of us that there are many other factors than medical functionality—such as age, occupation and education—that determine loss of wage-earning capacity. The problem is that these other factors are difficult to objectively and consistently measure. Therefore, legislators all over the country and the world make different decisions as to how to reconcile a person's injury and functionality/impairment, with the amount of benefit that should be paid or that society can afford to pay.

That reconciliation is not the job of the Guides, nor should the Guides be used as a proxy for the amount of benefits to be paid. Rather, impairment is only the starting point to the determination of a benefit structure for wage loss.

The Guides create a consistent approach for physicians and for injured workers to have the same determination of impairment and loss of functionality. A physician who looks at three different injured employees with the same condition should arrive at the same rating for each. Likewise, three physicians who look at the same injured employee should come up with the same rating. The goal of the Guides is to foster equity, fairness and objectivity to the greatest extent possible, rather than subjectivity and personal opinion.

The Guides have been updated every five or so years by the medical profession under the direction of the AMA in an effort to improve their objectivity, consistency, ease of use, and relationship to the then state of medical science.

Our company, Impairment Resources, is involved in consultation on the use of the Guides and has reviewed many thousands of ratings. This experience has led to our unequivocal statement that the latest version of the Guides is easier to use and more consistent with the realties of modern medicine.

Additionally, Impairment Resources has performed a number of comparative analyses of ratings. We recently looked at the same injuries rated by the Fourth, Fifth and Sixth Editions of the Guides. What these studies indicate is that the rating percentages on the whole are not—and I repeat *not*—significantly different between editions. The methodology and approach to reach the ratings are different, and in our experience the latest edition, the Sixth, extends ratings to more injuries than the Fifth Edition. In the Fifth Edition certain ratings, such as surgical spine cases, increased without explanation over the Fourth Edition. High ratings occurred even with excellent outcomes. This has been addressed in the Sixth Edition.

In our training role and in our consultations and speaking engagements, we have experienced natural push back from some physicians around the country who, after spending years utilizing the Fifth Edition, are now reluctant to take the time to retrain in the Sixth.

We have experienced, while testifying before various state legislators around the country, push back from the plaintiffs bar. I believe, in all candor, that the reason for that is that the Fifth Edition rates impairment in the spine higher than the Sixth Edition. The expert doctors who wrote the spine chapter of the Sixth based their ratings more on the end result and impact on the patient. All treatment is designed to increase functioning, ability to participate in activities of daily living, and, therefore, to decrease impairment. Therefore, impairment should reflect the outcome, not just that surgery was performed to improve function.

I fear that a battle over benefit rates is being fought as a proxy battle using the Guides rather than directly addressing benefit rates before legislators. This is probably because legislators have simply not been educated on the purpose of the Guides and the distinction between impairment and disability. To the extent this may be true, this does a disservice to the effective functioning of compensation systems that are improved by the use of the Guides.

The underlying premise of the Sixth Edition is something that you and I, as lay people, have been observing and reading about for a long time: modern medicine is improving health and functionality. That means that we can and should acknowledge that impairment is trending down, not up, and health is improving. I simply do not believe

that it is better to use the Fifth Edition and tell an injured worker who has had a successful spine surgery that he has a permanent impairment of 25%; i.e., he has loss of one quarter of who he or she was, when in fact the surgery was successful. I know for myself that, if you tell me I have that kind of impairment, I am going to adjust my behavior to meet it.

To be frank, as I watch testimony before state legislators across the country take up the issue of using the Fourth, Fifth or Sixth Editions, I am struck by the absence of a discussion about the purpose of the Guides. First the purpose should be articulated. Then the debate should turn to whether the latest edition, an older edition or some other system is best.

Because the Fifth Edition, in relation to the other chapters and to medicine today, overrates the spine and because it is not as clear, concise and simple to use as the Sixth, it lends itself to abuse and error, costing employers and eventually taxpayers millions, if not billions of dollars annually. Furthermore, I believe the psycho/social burden of such errors and overrating on injured workers is harder to measure, but likely much costlier.

My hope is that this committee and labor leaders, as well as employers, agree that the goal of utilizing the Guides is to create a level playing field that is based on evidence and fact or, at a minimum, consensus of a broad group of physicians and experts. Legislators should look at the facts and not the fiction.

I would like to emphasize that the mission of our company, Impairment Resources, is to drive accurate impairment ratings. To dispel any notion that our recommendation is based on self-interest or profit, let me make it clear that our company stands to earn more when the Fifth Edition is in widespread use because the error rate for that edition exceeds 70%, while the error rate is significantly lower in reports from trained doctors using the Sixth Edition.

I conclude with this thought as you address the issue the Guides further: Would you go down to the hospital with a fractured arm and ask your orthopedic doctor to use an outdated textbook to repair it or would you ask them to use the latest textbook version?

Our conviction is based on our belief that the Sixth Edition is fairer to all stakeholders because physicians will not only utilize a new methodology more in keeping with modern medicine but with more consistency and less friction.

The Sixth Edition is a reflection of the latest medicine created by hundreds of the leading experts in medicine in the country and put through a rigorous peer review process. It is clear and easier to use. It offers the best opportunity today to achieve the role it is designed for, to create a fair and equitable playing field to reflect impairment consistent with the advances in medicine.

Thank you.