No. ______________

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

____

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

Petitioners,

v.

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

Respondents.

PETITION FOR WRIT OF MANDATE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

EXPEDITED HEARING REQUESTED

[Related Case: *Pulaski v. Hoch*, No. S133562]

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PETITION FOR WRIT OF MANDATE

INTRODUCTION

California's employers pay among the highest workers' compensation insurance rates in the country, yet California's injured workers receive lower benefits over time than workers in other states. The Legislature sought to address the root causes of these problems when it reformed the system for compensating permanently disabled workers as part of last year's overhaul of the workers' compensation system. (*See* Senate Bill No. 899 (2003-2004 Reg. Sess.) ["SB 899"].) As the principal author of SB 899, Senator Charles Poochigian, explained, SB 899's goals were to "redesign the system so it is efficient, reduce costs and ensure that truly injured workers are adequately compensated for injuries they suffer." (Ellis, *20 in Fresno Protest Workers' Comp Reform*, Fresno Bee (Dec. 17, 2003).) The principle behind the Legislature's reform was simple: Bring down costs by basing permanent disability ratings on concrete evidence of wage loss, instead of the subjective, non-empirically based factors previously used. The intent was to restore trust in the system so that injured workers could return to their jobs rather than being entangled in litigation with their employers. In addition, the Legislature wanted to ensure that the new ratings would result in "adequate" benefits for injured workers, thereby honoring the Constitution's promise to make adequate provision for workers' "comfort, health, safety and general well being."

The success of these reforms relied on the careful implementation of these legislative mandates by Governor Schwarzenegger's newly appointed Director of the Division of Workers' Compensation, Andrea Hoch. Under the new law, Director Hoch was

required to link the new permanent disability ratings to wage loss by using "the empirical data and findings" contained in a report by the RAND Institute for Civil Justice ("RAND"), and "data from additional empirical studies." But Director Hoch did not do this. Instead, she substituted policy judgments for empirical data and assumptions for empirical studies. Consequently, she has created post-SB 899 ratings that are no more related to wage loss than the pre-SB 899 ratings had been. Nor did she comply with RAND's recommendation that she consider the effect of the ratings on the adequacy of benefit levels. Indeed, she flatly refused to consider adequacy. The result is a Permanent Disability Rating Schedule ("PDRS") that is inconsistent with SB 899, that undermines the Legislature's balanced approach to reform, and that threatens to leave thousands of workers to subsist on constitutionally inadequate benefits.

Petitioners VotersInjuredatWork.org, the California Applicants' Attorneys Association and J. David Schwartz ("petitioners") therefore bring this taxpayer action against respondents the Division of Workers' Compensation ("DWC") and Director Hoch to challenge the PDRS as inconsistent with Labor Code section 4660. Petitioners respectfully request that this Court invalidate the PDRS at its earliest opportunity and order respondents to promulgate a PDRS that complies with the law. Alternatively, if this Court declines jurisdiction, petitioners request that the Court transfer this matter to the Court of Appeal with direction to consider the Petition so these crucial, urgent matters do not go unaddressed.

NEED FOR IMMEDIATE RELIEF

Workers have already begun to receive ratings that will define their benefit levels according to the terms of the new Permanent Disability

Rating Schedule, and the insurance industry is in the process of establishing workers' compensation insurance rates based on these ratings. The consequences of allowing this unlawful regulation to stand are immediate and widespread for all involved in the workers' compensation system, and for the state's economy as a whole. Any further delay in reviewing the regulations will only compound the harm.

Director Hoch's illegal PDRS frustrates the intent of SB 899. The Legislature sought to address the root causes of a PDRS that failed employers and workers alike with reforms that would reduce litigation over permanent disability ratings and encourage employers to return injured workers to work. The key to this approach is to tie permanent disability benefits to verifiable measures of wage loss. By failing to link permanent disability ratings with wage loss, Director Hoch ignored the legislative mandate and sacrificed an opportunity to remedy the system's fundamental problems.

By failing to consider what impact the ratings will have on the adequacy of benefit levels, Director Hoch has placed workers in what independent studies by the insurance industry and an economist with the University of California at Davis predict will be dire circumstances. (*See* Brigham & Associates, Inc., Permanent Impairment-Disability Rating Study (May 17, 2005) ["Brigham Study"]; J. Paul Leigh, Estimates of Differences in Workers' Comp. Disability Ratings Under Current (2004) Law and Impairment Ratings Under Future (2005) Law in California (Dec. 2004) ["Leigh Study"].) Both studies anticipate that already-inadequate benefits could be slashed by as much as 71%. (Brigham Study at A-11; Leigh Study at 2.) If this comes to pass, mortgages will go unpaid, family health insurance policies will lapse, and families will be driven into

debt or even destitution. California's Constitution guarantees workers and their dependents adequate benefit levels. The PDRS adopted by Director Hoch flies in the face of this guarantee, which is crucial to the basic well-being of the workers of this state.

As explained below, (pp. 31-34), this Petition is quite simply the last opportunity to review the PDRS for at least a year. To provide certainty for workers, employers and insurers, the critical issues raised by this Petition must be resolved quickly. Petitioners urge this Court to accept review of this Petition now.

JURISDICTION

1. This Court has original jurisdiction over this Petition for Relief in Mandamus to compel the DWC and Director Hoch to properly perform their official duties pursuant to article VI, section 10 of the California Constitution, Labor Code section 5955, Code of Civil Procedure sections 1085 and 1086, and California Rule of Court 56.

PARTIES

2. Petitioner VOTERSINJUREDATWORK. ORG ("VotersInjuredatWork") is a statewide organization of injured workers created in the wake of SB 899 to promote the general welfare of working Californians, particularly those who have been injured in the workplace. Today, VotersInjuredatWork has 1,500 members who have been injured on the job. Together, they seek to develop public policy protecting workers' rights and improving the safety of California's workplaces. VotersInjuredatWork provides information about workers' compensation laws and presents positions on legislation, regulations, judicial decisions

and policy matters before governmental agencies, legislatures and courts. VotersInjuredatWork's headquarters is located in Sacramento, California.

3. Petitioner CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION ("CAAA") is a professional association comprised of attorneys who represent many of the injured workers who would be affected by the regulations promulgated by the DWC. CAAA's members recognize the need for an active voice for injured workers, and CAAA works to provide injured workers the opportunity for fair workers' compensation benefits and re-entry into the community as productive citizens. CAAA's headquarters is located in Sacramento, California.

4. Petitioner J. DAVID SCHWARTZ is President of CAAA and is an attorney who represents injured workers who would be affected by the regulations promulgated by the DWC. Mr. SCHWARTZ is a California resident and practices in the County of Los Angeles.

5. VotersInjuredatWork and its members, CAAA and its members, and Mr. SCHWARTZ have been liable to pay, and within one year before the commencement of this action have paid, a tax within the state of California. Petitioners are also interested as organizations and citizens in ensuring the proper execution of the statutory provisions of SB 899, and enforcing the duties of Director Hoch and the DWC to properly administer its provisions.

6. Respondent DIVISION OF WORKERS' COMPENSATION ("DWC") is the governmental body charged by Labor Code sections 133 and 4660(c) with amending the schedule for the determination of permanent disability ratings.

7. Respondent ANDREA HOCH ("Director Hoch") is the Administrative Director of the DWC and is charged by law with

administering the DWC and its rules and regulations. Director Hoch is sued in her official capacity.

FACTUAL BACKGROUND

A. The Constitution's Unfulfilled Promise of "Adequate" Benefits

8. On October 10, 1911, California voters approved a constitutional amendment authorizing the Legislature to create a system of workers' compensation. The system replaced the workers' common law right to sue for injuries with a system requiring employers to compensate employees for all workplace injuries, regardless of who was at fault for the injury. (Ballot Pamp., Special Elec. (Oct. 10, 1911) text of Prop. 10 [adding art. XX, § 21].)

9. The California Legislature subsequently enacted workers' compensation legislation in 1914, which was soon challenged as unconstitutional. (*Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 692-693.) The California Supreme Court upheld the legislation, proclaiming it to be "within the bounds of fairness and reason." (*Id.* at 699, 703.) Similarly, in 1917, the U.S. Supreme Court upheld New York's workers' compensation system as a "just settlement of a difficult problem." (*New York Central Railroad Co. v. White* (1917) 243 U.S. 188, 202.) The employer sacrificed common law defenses, but gained the assurance of smaller outlays; the worker sacrificed larger awards, but gained certain, speedy and "moderate compensation in all cases of injury." (*Id.* at 201.) The Court questioned, however, whether a state could abolish all rights of action or defenses "without setting up something adequate in their stead." (*Id.*) In particular, the Court doubted "that *any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be*

supportable." (*Id*. at 205, emphasis added.) In 1918, California voters once again amended their Constitution to guarantee workers benefits of a particular scope:

> . . . A complete system of workmen's compensation includes *adequate* provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workmen in the course of their employment. . . .
>
> (Ballot Pamp., Gen. Elec. (Nov. 5, 1918) text of Prop. 23 [currently Cal. Const., art. XIV, § 4, emphasis added].)

10. A crucial component of workers' compensation is the permanent disability indemnity benefit. While other benefits focus on restoring workers' health, indemnity benefits relieve workers of the financial hardship they experience when an industrial injury permanently reduces their ability to earn a living.

11. According to national standards, an indemnity benefit is "adequate" if it replaces two-thirds of the worker's pre-injury wage. (Deposition of Robert T. Reville, Ph. D. ["Depo."][1] at 24-25; Exh. 2 to Exhibits in Support of Petition for Writ of Mandate ["Writ Exhibits"]; Report of the Nat. Com. on State Workmen's Comp. Laws (July 1972) ["National Report"] p. 57.) That standard prevents benefits from being so high as to reduce the incentive to return to work, or so low as to reduce the

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[1] Dr. Reville is the Director of RAND and a principal author of the RAND studies cited in these papers. (Depo. at 8-9.) Petitioners deposed Dr. Reville in connection with their superior court action challenging the PDRS. (*See* Statement of Case, pp. 29-30 below.)

worker to "dire circumstance[s]." (National Report at 56.) In 1996, the California Commission for Health and Safety and Workers' Compensation ("CHSWC") commissioned RAND to study California's permanent disability rating system. RAND's first three studies, completed between 1998 and 2002, concluded that California's indemnity benefits fell well below two-thirds of workers' pre-injury wages. Consequently, benefits were already "inadequate" in the years leading up to SB 899. (RAND, Trends in Earnings Loss from Disabling Workplace Injuries in California: The Role of Economic Conditions (2002) p. vii, xv ["RAND 2002 Report"]; Depo. at 23-24; CAAA's Nov. 29 letter to DWC, Exh. 3 to Writ Exhibits.)

B. The Pre-SB 899 System Rated Permanent Disabilities in Part Through Subjective, Non-Empirically Based Factors

12. Calculating permanent disability benefit levels involves a two-step process. First, Labor Code section 4660 sets forth the factors that affect benefit levels. Second, a "permanent disability rating schedule," created by the DWC, translates these factors into numerical ratings, which are subsequently converted into a benefit amount according to a formula in Labor Code section 4658.

13. Before SB 899, the Legislature based ratings on four factors: (1) the "nature of the physical injury"; (2) the diminished ability "to compete in an open labor market"; (3) the worker's age; and (4) the worker's occupation. (Former Lab. Code, § 4660(a), added by Stats. 1993, ch. 121, § 53.) The pre-SB 899 PDRS measured the "nature of the physical injury" by considering objective, observable physical outcomes (e.g., amputations), and subjective, unobservable outcomes (e.g., pain or vertigo). It measured the worker's diminished ability "to compete in an open labor

market" through non-empirical judgments about how an injury reduced work capacity (e.g., loss of 25% of the worker's pre-injury capacity for lifting). In addition, the pre-SB 899 PDRS considered occupation by increasing or decreasing the ratings if the worker's occupation required more or less than average use of the injured part of the worker. It considered age by increasing benefits if the worker was older than average, and decreasing benefits for younger workers. Finally, these factors were combined to produce a rating for conversion to a benefit amount.

C. RAND Recommends Reforming Ratings to Reduce Litigation, Return Workers to Work, and Consider Adequacy

14. The year before SB 899 was enacted, RAND conducted its fourth study of California's rating system. (RAND, Evaluation of California's Permanent Disability Rating Schedule: Interim Report (2003) ["RAND Interim Report"], Exh. A to Request for Judicial Notice in Support of Petition for Writ of Mandate ["RJN"].) RAND affirmed that California's benefits are low compared to workers in other states, while also concluding that employers' costs were high compared to other states. (*Id*. at 3-6.) The RAND Interim Report focused on how to reform the system to reduce costs for employers "while improving the long-term economic prospects of California's injured workers." (*Id*. at 6.)

15. RAND concluded that a crucial reason the system failed both workers and employers is that it encouraged too much litigation. (*Id*. at 7.) The system's critics doubted the accuracy of ratings that measure "the nature of the physical injury" in part through subjective, unobservable outcomes like pain, and the reduced ability "to compete in an open labor market" through non-empirical judgments about how injuries diminish workers' ability to work. (*Id*. at 8-9, 12-14.) Consequently, these factors

too often led to ratings that neither workers nor employers trusted. (*Id*. at 8-9.) This bred suspicion, which caused litigation and soured relations between workers and employers. RAND determined that this led to a second crucial reason that the system was failing: once worker-employer relations broke down, employers became less likely to return injured workers to their jobs, compounding the workers' wage losses. (*Id*. at 5-7.)

16. RAND suggested cures for these problems. First, it suggested that California adopt a more objective system for measuring injuries, such as the system of objective measurements developed by the American Medical Association ("AMA"). (*Id*. at 13, 45.)

17. Second, RAND concluded that ratings should measure workers' wage losses instead of their reduced ability to compete in the labor market. This would provide an empirical basis for the system by linking ratings to "something concrete and verifiable," and improve equity by ensuring that similarly injured workers receive similar benefits. (*Id*. at 24, 44-45.) RAND gathered ratings data from the pre-SB 899 system, and wage data from outside the workers' compensation system to determine how much injured workers lost in wages over the long-term compared to their non-injured counterparts. (*Id*. at 18.) RAND divided "average ratings" by average "proportional" lost wages in separate categories of injuries. The "average rating" considered ratings for all workers with a particular injury type. The average "proportional" wage losses compared average earnings of uninjured workers (e.g., $6,000) to an injured counterpart (e.g., $2,000) to determine proportional wage loss (e.g., the injured worker had 66% less wages than the uninjured worker). (*Id*. at 19, 23.)

Examples of RAND's data are reproduced in the chart below:[2]

Part of the Body	Average Rating	Proportional Wage Loss	Ratio of Rating Over Losses
Knee	14.65	9.31	1.57
Shoulder	9.73	13.08	.74

18. RAND's working premise was that an effective rating system should promote "equity" by assigning the same ratings to workers with the same earnings losses, regardless of the type of injury. (*Id.* at 23, 28; Depo. at 85-87, 113.) In other words, if one worker injures her knee so severely that she loses half her earning capacity, she should receive the same rating as a worker who injures his shoulder so severely that he loses half his earning capacity. If benefits were equitable, the resulting ratios would be constant across injury categories (e.g., all ratios would equal 1.0). Instead, RAND found a "wide disparity" between ratios (*id.* at 23-24, 28-31, 43), as shown in the following examples from RAND's data:[3]

[2] This data is described in pages 23-25 and 28-31 of the RAND Interim Report and set forth in greater detail in a subsequent study cited in the PDRS. (*See* RAND, Data for Adjusting Disability Ratings to Reflect Diminished Future Earnings and Capacity in Compliance with SB 899 (Dec. 2004) p. 13 ["RAND 2004 Working Paper"]; Depo. at 20-22, 141-144; PDRS at 1-6, Exh. C to RJN.)

[3] RAND 2004 Working Paper at 13.

Part of the Body	Ratio of Rating Over Losses
Knee	1.570
Loss of grasping power	1.280
Spine Thoracic	1.070
Shoulder	0.740

To correct these disparities, RAND recommended that policymakers select a baseline impairment category and then divide its ratio by all the other ratios for different injury categories. That would yield an adjustment factor for each injury category that could be applied to bring ratings in line with wage loss equally for all workers. (RAND Interim Report at 44; Depo. at 88-89, 92-93, 96.)

19. Third, RAND found that policymakers should consider the impact that changes in ratings would have on workers' already inadequate benefits. (RAND Interim Report at 46; Depo. at 83-84.) As Dr. Reville later explained, if policymakers were merely to reorder ratings to produce equitable benefit levels across injury categories, it would not necessarily produce adequate benefits. (Depo. at 111-112, 148-150; RAND 2004 Working Paper at 13.) "[W]hat the reordering does do," Dr. Reville testified, "is it gives everybody the same level of adequacy or inadequacy." (Depo. at 113.) Accordingly, policymakers should select a baseline injury category that would lead to equally adequate benefit levels.

D. The Governor and Legislature Agree to Reform Permanent Disability Ratings According to RAND's Recommendations

20. After Arnold Schwarzenegger was sworn in as Governor of California on November 17, 2003, he sought to build

momentum to reform the workers' compensation system. "California employers are bleeding red ink from the workers' comp system," he proclaimed on January 6, 2004 in his State of the State Address. (<www.governor.ca.gov/state/govsite/gov_homepage.jsp, "Speeches, 2004"> [as of May 26, 2005].) "Our high costs are driving away jobs and businesses." The Governor challenged the Legislature to deliver strong reforms to his desk. If they did not, he was "prepared to take my workers' comp solution directly to the people and I will put it on the ballot in November."

21. The workers' compensation initiative that was delivered to the Attorney General three days later did not utilize RAND's approach to reform. ("Workers' Compensation Reform and Accountability Act," Exh. B to RJN.) It would have changed permanent disability ratings by linking ratings to objective measures of physical injury, but it did not link ratings to diminished future earning capacity, or incorporate RAND's findings on the need to improve equity, encourage employers to return injured workers to work, or consider adequacy. (*Id*. at 31-32.) Advocates for injured workers feared the initiative's approach to permanent disability ratings would slash benefits for injured workers.

22. The Legislature approached reform of the permanent disability ratings differently. To craft new indemnity benefits that would reduce employers' costs while helping injured workers, the Legislature relied on RAND's recommendations. In amending Labor Code section 4660, the Legislature retained the factors relating to the worker's age and occupation, but it changed the other two factors to conform with RAND's suggested reforms. First, the Legislature defined the "nature of the physical injury" to incorporate the AMA's more objective

measurements of injuries rather than the objective and subjective measures used prior to SB 899. (Lab. Code, § 4660(b)(1).)

23. Second, the Legislature deleted the reference to the worker's ability "to compete in an open labor market," requiring instead the consideration of lost wages, i.e., "an employee's diminished future earning capacity." (*Id.* at § 4660(a).) The Legislature defined "diminished future earning capacity" as RAND had:

> For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that *aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees*.
>
> (*Id*. at § 4660(b)(2), emphasis added.)

It then required the Administrative Director to calculate diminished future earning capacity by incorporating the empirical data and findings from RAND's Interim Report and developing data from additional empirical studies:

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

24. Furthermore, the Legislature required that the revised schedule overall "shall promote consistency, uniformity, and objectivity." (*Id.* at § 4660(d).) It also called for the Administrative Director to complete its first revision to the PDRS "[o]n or before January 1, 2005," and to further revise the schedule at least once every five years. (*Id*. at § 4660(c)

& (e).) The subsequent revisions would provide incentives for employers to return injured workers to their jobs, because doing so would drive down workers' wage losses, which could translate into lower ratings in future revised schedules. (RAND Interim Report at 44-45.)

E. The Need to Use RAND's "Empirical Data and Findings" and "Additional Empirical Studies" to Produce Ratings Based on Wage Loss

25. The need to use RAND's "empirical data and findings" and "additional empirical studies" becomes clear when considering the challenge the Legislature presented the DWC by incorporating RAND's recommendations on AMA measurements and wage loss simultaneously. RAND's wage loss ratios from paragraph 18 are essential for creating the requisite link between the ratings and wage loss. RAND calculated these ratios to provide a mechanism to reduce inequities between injury categories, but the value of the ratios lies in their accurate relationship to each other. Those ratios, however, were created by dividing pre-SB 899 *disability* ratings – not AMA *impairment* ratings – by proportionate wage loss. Disability and impairment measure fundamentally different outcomes. *Disability* quantifies the extent to which an injury restricts the worker's ability to work, while *impairment* quantifies the extent to which a worker's injury limits his or her body's ability to function. (*See, e.g*., RAND Interim Report at 13; Depo. at 115-120.) To understand the 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. If this difference in ratings changes the relationships between RAND's ratios, then the ratios would have to be adjusted accordingly. For example, if the new shoulder impairment ratings change shoulder ratings differently than the new knee impairment ratings change knee ratings, then those ratios would no longer accurately compare the ability of the ratings to compensate for wage loss.

26. The problem is that Director Hoch did not know how disability and impairment ratings would compare because no empirical data existed to quantify those differences. (Respondent's Dec. 28 letter to OAL at 2, 6, Exh. 4 to Writ Exhibits.) As a practical matter, that meant Director Hoch could either develop data from additional empirical studies to determine the actual differences between the two systems, or they could rely on "an assumption" which "may or may not be true," that the comparisons between ratios in the old and new systems are the same. (Depo. at 168-169, CAAA's Nov. 29 letter to DWC at 8.) Calculating actual differences required a "crosswalk study,"[4] in which injuries are rated under both systems to calculate their differences. (Depo. at 166-167; CAAA's Nov. 29 letter to DWC at 9.) If Director Hoch relied on an assumption instead of gathering data from a crosswalk study, then applying the ratios from the old system to the new system may not reduce inequity in the new system; indeed, it may even worsen the inequities. (Depo. at 152-153, CAAA's Nov. 29 letter to DWC at 8.)

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[4] We use the term "crosswalk study" here, but the same study in other contexts is also referred to as a "dual doctors report," a "crossover" study or a study to determine the "scaling difference" between the two systems.

Accordingly, the "best way possible" to link that RAND data to the new system was through a crosswalk study. (Depo. at 166-167, 172-173.)

F. Director Hoch Produced a PDRS That Fails to Measure Wage Loss

27. Director Hoch did not conduct a crosswalk study. Nor did she conduct any other empirical studies to determine wage loss under the new impairment ratings. Instead, Director Hoch relied on the assumption that the comparisons between ratios for injury categories are the same in the two systems. By amending Labor Code section 4660(b)(2) to require ratings based on "empirical data" and "data from additional empirical studies," however, the Legislature required the Administrative Director to base the new ratings on a crosswalk study rather than an assumption that the two systems were comparable.

28. To devise a formula to translate RAND's ratios into adjustment factors for the impairment ratings, Director Hoch considered RAND's ratios in 22 separate injury categories. (Schedule for Rating Permanent Disabilities (Jan. 2005) ["PDRS"] pp. 1-6-1-8 & Table B, Exh. C to RJN.) As shown below in Table B, Director Hoch first compared the difference between the chart's highest ratio of 1.81 for hands and fingers and its lowest ratio of .45 for psychiatric injuries, which produces an overall ratio of 4:1 (i.e., 1.81:.45 = 4:1). Next, she made a policy decision to select 1.1 as an adjustment factor to which she applied the 4:1 ratio, producing adjustment factors that range from 1.1 to 1.4. (*Id*. at 1-6.) Third, as shown below in Table A, she distributed these adjustment factors among injury categories, so that hand and finger injuries receive a 1.1 adjustment; psychiatric injuries receive a 1.4 adjustment; and all other injuries receive an adjustment between these two numbers. (*Id*. at 1-7,

Tables A & B.) These distributions are reproduced in part below as illustration, and in full at pages 1-6 – 1-8 of the PDRS. (Exh. C to RJN.)

TABLE A	
FEC Rank	**Adjustment Factor**
One	1.1000
Two	1.1429
Three	1.1857
Four	1.2286
Five	1.2714
Six	1.3143
Seven	1.3571
Eight	1.4000

TABLE B		
Part of the Body	**Ratio of Rating Over Losses**	**FEC Rank**
Hand/fingers	1.810	One
Knee	1.570	Two
Ankle	1.520	Two
Loss of grasping power	1.280	Four
Spine Thoracic	1.100	Five
General Abdominal	0.950	Six
Shoulder	0.740	Seven
Psychiatric	0.450	Eight

Finally, Director Hoch combined these adjustment factors – which she called "Diminished Future Earning Capacity (DFEC) adjustment factors" – with the AMA impairment ratings and the age and occupational adjustments to yield the new post-SB 899 PDRS rating.

29. On November 17, 2004, the DWC posted its proposed PDRS as an emergency regulation for public comment. The formula set forth in that proposed PDRS for measuring diminished future earning capacity remained unchanged throughout the regulatory process and is the formula in place today.

30. On December 7, 2004, the Senate Committee on Labor and Industrial Relations convened an informational hearing on the Administrative Director's proposed PDRS.

31. Director Hoch testified that she did not rely on data from additional empirical studies because she could not locate existing empirical data relating the disability and impairment ratings. (Sen. Com. on Labor and Industrial Relations, Official Transcript of Informational Hearing on Workers' Compensation: Proposed Disability Schedule (Dec. 7, 2004) pp. 16-20 ["Sen. Hearing Transcript"] Exh. D to RJN]; Respondent's Dec. 28 letter to OAL at 6, 8, Exh. 4 to Writ Exhibits.) She chose not to conduct her own crosswalk study because she decided there was not sufficient time to do so before January 1, 2005, and because she believed the pre-SB 899 disability ratings were too unreliable to consider in formulating the new PDRS. (*Id*. at 53-54, 60, Respondent's Dec. 28 letter to OAL at 6, 8.) Labor Code section 4660, however, does not permit the Administrative Director to reject data based on pre-SB 899 ratings. Indeed, the Legislature required her to base ratings on empirical data from the RAND Interim Report, which were based on pre-SB 899 ratings.

32. Dr. Reville testified that he believed it may have been possible to complete a crosswalk study before the January 1, 2005 deadline, and that it would have been possible to complete the study by June 30, 2005. (Depo. at 163-164.)

33. On December 7, 2004, economist J. Paul Leigh, Ph.D. of the University of California, Davis, released an independent crosswalk study in which 218 workers were rated under both the impairment and disability systems. (Leigh Study at 2, 5-8.) He concluded that the disability and impairment ratings were significantly different – disability ratings exceeded impairment ratings by as much as 87 rating points, and on average, by 28 rating points which would reduce ratings by an average of 67%. (*Id*. at 2, 10.)

34. In May 2005, the Workers' Compensation Insurance Rating Bureau of California released a crosswalk study that rated 250 cases under the old and new systems. (Brigham Study at A-12.) That study also concluded that the disability and impairment ratings were significantly different. The mean disability rating was 15.6 rating points higher than the mean impairment rating, which would reduce ratings by an average of 71%. (*Id*. at A-15.)

35. These studies undermine Director Hoch's assumption that the comparisons between ratios for injury categories are the same in the old and new system.

36. Director Hoch agreed in her testimony before the Senate Committee on Labor and Industrial Relations that Labor Code section 4660 requires her to base the diminished future earning capacity "formulation only on RAND and other additional empirical studies." (Sen. Hearing Transcript at 6, 22.) Yet Director Hoch also testified that a critical aspect of her formula – the selection of 1.1 as the base adjustment factor – was based on nothing more than her "policy" judgment that more serious injuries should be compensated "at a higher level" while less serious injuries should not "be bumped up as much." (*Id*.

at 7, 9-10.) Dr. Reville has confirmed that he is not aware of any empirical data which would support the selection of 1.1 as a base adjustment factor. (Depo. at 184-185; Sen. Hearing Transcript at 31.) Labor Code section 4660 does not permit Director Hoch to substitute a "policy" judgment for empirical data.

37. In the absence of a crosswalk study, it is impossible to determine whether the adjustment factors created by Director Hoch, which are based on an assumption and a policy judgment, measure diminished future earning capacity. (Depo. at 195-197, 169-170, CAAA's Nov. 29 letter to DWC at 8.) In fact, Dr. Reville testified that without the data from a crosswalk study, his degree of confidence that the new ratings will predict workers' diminished future earning capacity is "relatively low." (*Id.* at 202-203.)

38. Before the regulations became permanent, the DWC added a new section to the regulations accompanying the new PDRS that makes clear the DWC will not conduct a crosswalk study. Instead, in the years to come, the DWC intends to conduct a wage loss study of the new impairment ratings only, which might be used to revise the new PDRS. The new regulation requires the Administrative Director to (1) collect ratings and wage loss data under the new PDRS for 18 months, and:

> (2) evaluate the data to determine the aggregate effect of the diminished future earning capacity adjustment on the permanent partial disability ratings under the 2005 PDRS; and (3) revise, if necessary, the diminished future earning capacity adjustment to reflect consideration of

an employee's diminished future earning
capacity for injuries based on the data collected.

(Proposed Cal. Code Reg., tit. 8, § 9805.1, filed with OAL on April 29, 2005.)

If the 18-month data collection effort does not yield sufficient data for a statistically valid evaluation, the Administrative Director has discretion to collect data over a longer period of time. (*Id.*) If a statistically valid sample of data supports a revision to the PDRS before the statutory 5-year deadline for promulgating a new schedule, the Administrative Director is required to promulgate the new schedule before five years elapse. (*Id.*)

39. Collecting 18 months of wage loss data, however, will not yield data on "long-term loss of income." RAND defined "long-term" as three years, and Dr. Reville has testified that wage losses tend to increase over time so that wage losses over 18 months may be far lower than wage losses over three years. Labor Code section 4660 does not permit the Administrative Director to implement ratings that are not linked to wage loss on an interim basis while the DWC takes years to gather new data and promulgate a new PDRS.

G. Director Hoch Produced a PDRS That Fails to Ensure Adequate Benefits

40. The California Constitution requires the Legislature to provide injured workers and their dependents with "adequate" provisions for their comfort, health, safety and general welfare. (Cal. Const., art. XIV, § 4.) RAND found that the standard for adequate indemnity benefits was replacement of two-thirds of the worker's pre-injury wage, and that California workers received inadequate benefits prior to SB 899. (¶ 11.) RAND also found that any changes to the permanent disability ratings

should consider adequacy. (RAND Interim Report at 46, 5; Depo. at 84.) The Legislature required the Administrative Director to base her diminished future earning capacity adjustments in part on these findings. (Lab. Code, § 4660(b)(2).)

41. Nevertheless, on December 7, 2004, Director Hoch testified before the Senate Committee on Labor and Industrial Relations that she had not done a calculation to determine the effect of the proposed PDRS on disability benefit levels. (Sen. Hearing Transcript at 23-25.) She simply did not know whether the new ratings would result in lower benefits. (*Id*. at 23-24, 51.) She conceded that a reason she had failed to calculate the results of her ratings was that she lacked the data to do so in the absence of a crosswalk or other wage loss study. (Sen. Hearing Transcript at 23-24, 35.) Labor Code section 4660 does not permit Director Hoch to promulgate ratings that do not consider the impact of the ratings on adequacy.

42. The available evidence indicates that the new ratings will dramatically reduce already-inadequate benefits. Dr. Leigh's study, sponsored by petitioners CAAA, predicts ratings reductions of approximately 67%. (Leigh Study at 2.) WCIRB's study, sponsored by the insurance industry, predicts average ratings reductions of approximately 71%. (Brigham Study at p. A-15.) Dr. Reville made preliminary calculations that he shared with Director Hoch predicting that her new PDRS may reduce ratings by 25-30%, which "would certainly lead" to lower benefits. (Depo. at 50-53, 55-56, 59-62, 64-67.)

43. Because benefit levels were already inadequate prior to SB 899, reductions of this magnitude will plunge benefit levels far below

the two-thirds replacement of pre-injury wages considered to be the standard for "adequacy."

H. Taxpayer Funds Are Now Being Spent to Enforce the Illegal PDRS

44. On December 23, 2004, the DWC sent its proposed PDRS and accompanying regulations to the Office of Administrative Law ("OAL") without any change to the diminished future earning capacity factors included in the November 17 version. On December 31, OAL approved the new PDRS. Approximately 120 days later, on April 29, 2005, the DWC filed its certificate of compliance with respect to the permanent version of the new PDRS with the Office of Administrative Law. Again, no changes were made to the diminished future earning capacity factors. Because the OAL has already approved these factors as emergency regulations, the OAL will likely approve them as permanent regulations by June 13, 2005, its statutory deadline for considering the permanent regulations.

45. At every available stage of the regulatory process, CAAA submitted written comments to the DWC and the OAL objecting to the adoption of the new PDRS as contrary to the underlying statute and the California Constitution. (¶ 3 of the Declaration of Margaret R. Prinzing in Support of Petition for Writ of Mandate ["Prinzing Decl."], Exh. 1 to Writ Exhibits.)

46. Petitioners allege that Labor Code section 4660 is void and ineffective because it is inconsistent with its authorizing statute. As a result, Director Hoch and the DWC have and will continue to expend public funds in an illegal and wasteful fashion to promulgate and enforce the new PDRS.

FIRST CAUSE OF ACTION

Regulation Inconsistent With Authorizing Statute

The New PDRS is Invalid and Ineffective Because it Fails to Measure Wage Loss

47. Petitioners incorporate the allegations contained in paragraphs 1 through 46, inclusive, as if fully set forth herein.

48. Director Hoch based her DFEC adjustment factors in part on a "policy" judgment that 1.1 should serve as the base adjustment factor. Because a policy judgment does not qualify as empirical data, the DFEC adjustment factors are not based on empirical data.

49. Director Hoch's DFEC adjustment factors rely on an assumption that the relativities between the old disability ratings and the new impairment ratings are the same. There are no empirical studies to support that conclusion. Because an assumption does not qualify as an empirical study, the DFEC adjustment factors are not based on additional empirical studies.

50. Accordingly, the DFEC adjustment factors chosen by Director Hoch and the DWC do not relate the new impairment ratings to "diminished future earning capacity" and so the new PDRS violates Labor Code section 4660.

SECOND CAUSE OF ACTION

Regulation Inconsistent With Authorizing Statute

The New PDRS is Invalid Because it is Inconsistent with RAND's Findings on Adequacy Incorporated into the Labor Code

51. Petitioners incorporate the allegations contained in paragraphs 1 through 50, inclusive, as if fully set forth herein.

52. The Legislature incorporated the findings on adequacy included in the RAND Interim Report and required the Administrative Director to promulgate the PDRS according to the standards set forth in those findings.

53. Available evidence raises serious questions that the new PDRS will not result in "adequate" benefits within the meaning of RAND's findings.

54. Nevertheless, because Director Hoch and the DWC did not consider whether the new PDRS produces adequate benefits consistent with the findings in RAND's Interim Report, the new PDRS violates Labor Code section 4660(b)(2).

PRAYER FOR RELIEF

WHEREFORE, petitioners pray:

1. That this Court issue an alternative writ or peremptory writ of mandate commanding Director Hoch and the DWC to set aside the new PDRS that was submitted as a permanent regulation on April 30, 2005; and to promulgate a PDRS based on the empirical data and findings in the RAND Interim Report, including the finding that changes in ratings should consider adequacy according to RAND's findings, and upon data from additional empirical studies;

2. For temporary, preliminary and permanent injunctive relief according to verified application and proof;

3. For attorneys' fees and costs of suit; and

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

Dated: May 27, 2005

Respectfully submitted,

JAMES C. HARRISON
MARGARET R. PRINZING
REMCHO, JOHANSEN & PURCELL

By: ______________________________
Margaret R. Prinzing

Attorneys for All Petitioners

VERIFICATION

I, Margaret R. Prinzing, declare:

I am one of the attorneys for petitioners. I make this verification for the reason that petitioners are absent from the county where I have my office. I have read the foregoing Petition for Writ of Mandate and am informed and believe that the matters therein are true and on that ground allege that the matters stated therein are true.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 27th day of May, 2005, at San Leandro, California.

____
Margaret R. Prinzing

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The new PDRS became effective as an emergency regulation on January 1, 2005, and on January 19, petitioners filed a Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief in Sacramento County Superior Court challenging those regulations as inconsistent with their authorizing legislation. (*VotersInjuredatWork.org v. Hoch*, No. 5CS00061.) On April 29, 2005, the DWC filed its certificate of compliance with the Office of Administrative Law to make the new PDRS permanent. On May 6, 2005, the Honorable Raymond M. Cadei entered judgment of dismissal in petitioners' superior court action on the ground that the superior court lacked subject matter jurisdiction over a matter that would affect the proceedings of the Workers' Compensation Appeals Board. (Order, Exh. E to RJN.) According to the Court's interpretation of Labor Code section 5955 and *Greener v. Workers' Compensation Appeals Board* (1993) 6 Cal.4th 1028, "the proper forum for any challenge to statutes or regulations that will be applied by the Board . . . is the Supreme Court or the Courts of Appeal." (Order at 2.)

On May 3, 2005, Art Pulaski and the California Labor Federation, AFL-CIO filed a Petition for Peremptory Writ of Mandate against Director Hoch and the DWC in this Court. (*Pulaski v. Hoch*, No. S133562.) That Petition also challenges the new PDRS on the grounds that it is inconsistent with its authorizing legislation, but on the narrower basis of the DWC's failure to conduct additional empirical studies. In other words, while both *Pulaski v. Hoch* and this Petition address the failure to conduct additional empirical studies, *Pulaski v. Hoch* does not address, as this Petition does, respondents' failure to rely on empirical data and

produce ratings that reflect wage loss, and failure to consider adequacy within the meaning of the findings in RAND's Interim Report. Because the related case of *Pulaski v. Hoch* was pending before this Court at the time of petitioners' filing, petitioners bring this Petition in this Court. Original jurisdiction in this Court is additionally appropriate for the reasons described below.

MANDAMUS IS THE APPROPRIATE REMEDY

This Petition presents appropriate issues for a writ of mandamus. Mandamus may issue when citizens seek the protection of a public right through the enforcement of a public duty. (Code Civ. Proc., § 1085(a); *Green v. Obledo* (1981) 29 Cal.3d 126, 144-145.) Workers have a public right to compensation for their industrial injuries under article XIV, section 4 of the Constitution and the Labor Code, and taxpayers have a right to the lawful expenditure of their taxes. Petitioners here seek the protection of those rights through the enforcement of Director Hoch's duty to promulgate lawful regulations. A writ may issue to stop an agency that has exceeded its statutory authority. (*Clean Air Constituency v. California State Air Resources Bd*. (1974) 11 Cal.3d 801, 809.)

A writ must issue when there is no "plain, speedy, and adequate remedy, in the ordinary course of the law." (Code Civ. Proc., § 1086.) This Petition is the last chance to secure a timely and valid regulation that implements the Legislature's balanced approach to reform, and guarantees workers their constitutional right to adequate benefits. The Administrative Director has rejected petitioner CAAA's comments throughout the regulatory process. The Superior Court has denied jurisdiction to entertain petitioners' regulatory challenge, and petitioners

lack standing to raise these issues before the Workers' Compensation Appeals Board. (Lab. Code, §§ 5501, 5507.)

THE CALIFORNIA SUPREME COURT IS THE APPROPRIATE COURT

This Petition presents issues appropriate for this Court's original jurisdiction. The Legislature has vested the Supreme Court with original jurisdiction over petitions for writ of mandamus involving workers' compensation matters in cases where mandamus would otherwise be proper under Code of Civil Procedure section 1085. (Lab. Code, § 5955; *Greener v. Workers' Comp. Appeals Bd.*, 6 Cal.4th at 1046.) The superior court has held that this is such a matter. (Order at 2, *Greener* at 1045.)

Appellate courts have original jurisdiction to issue writs of mandate if important public issues are at stake that must be resolved promptly. (Cal. Const., art. VI, § 10; Code Civ. Proc., § 1085(a); Cal. Rules of Court 56; *see also Corbett v. Superior Court* (2002) 101 Cal.App.4th 649, 657 [writ of mandate "*should* not be denied when the issues presented are of great public importance and must be resolved promptly," internal quotation marks omitted, emphasis in original]; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 731.) Thus, this Court exercised original jurisdiction to review county eligibility requirements for general assistance benefits where "[a] prompt resolution of this controversy is essential to avoid extreme hardship to petitioner, and others like him, who have no other means by which to live." (*Mooney v. Pickett* (1971) 4 Cal.3d 669, 674-675; *California Labor Federation, AFL-CIO v. California Occupational Safety & Health Stds. Bd.* (1990) 221 Cal.App.3d 1547, 1555 [exercising original jurisdiction to determine whether the

California Occupational Safety and Health Standards Board had a duty to include Proposition 65 warning and enforcement information in its state plan for workplace health and safety]; *Department of Personnel Admin. v. Superior Court* (1992) 5 Cal.App.4th 155, 162, 166 [exercising original jurisdiction to consider whether the state had authority to impose upon state employee unions the state's last, best offer on wages and health care after bargaining to impasse].)

Original jurisdiction in this Court is particularly appropriate when necessary to bring early certainty to the administration of law. For example, this Court exercised original jurisdiction over a petition challenging a new law reducing benefits for welfare recipients, because the recipients "would be affected drastically by the delays of protracted litigation." (*Villa v. Hall* (1971) 6 Cal.3d 227, 229, judg. vacated and cause remanded on other grounds (1972) 406 U.S. 965; *see also California Labor Federation, AFL-CIO v. California Occupational Safety & Health Stds. Bd.*, 221 Cal.App.3d at 1555 [citing the need to avoid prolonging uncertainty over Proposition 65's application to California's workers].) As described above (pp. 2-4), this case presents issues of great public importance to the workers' compensation community and requires early clarification of the state of the law. Furthermore, because the related case of *Pulaski v. Hoch* is already pending before this Court, this Court's exercise of original jurisdiction will further promote early certainty to the administration of law.

When respondents filed their opposition last week in *Pulaski v. Hoch*, No. S133562, they urged this Court to deny review on the grounds that these issues should be brought before the Workers' Compensation Appeals Board. (Resps. Prelim. Opp. to Pet. at 3.) This

alternative is thoroughly inadequate in a case of great public importance in need of prompt resolution. Petitioners do not have standing to raise these issues before the WCAB. (Lab. Code, §§ 5501, 5507.) Any challenge to the PDRS before the WCAB would therefore have to be brought by an individual worker. That worker would have to pursue his or her administrative remedies before a workers' compensation administrative law judge and the WCAB, meaning that it would be at least a year, and likely far longer, before such a case could arrive before this Court in that posture. Such a prolonged wait is not justified because this Petition presents a facial challenge that is ripe for this Court' review. Furthermore, delay will undermine the Legislature's reforms and deny thousands of workers their constitutional right to adequate benefits. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 106 [facial challenges to administrative guidelines as inconsistent with statutory authority "present[] a concrete legal dispute ripe for" consideration].)

If this Court declines jurisdiction, petitioners request in the alternative that their Petition be transferred to the Court of Appeal with direction to consider the Petition. This Court often grants writs (often reversing an appellate denial) and transfers them to Courts of Appeal for determination, especially in the context of workers' compensation. (*See, e.g., Andre v. Superior Court* (1991) 2 Cal.App.4th 11, 14; *Bundsen v. Workers' Comp. Appeals Bd.* (1983) 147 Cal.App.3d 106, 108; *see also King v. Superior Court* (2003) 107 Cal.App.4th 929, 937 [Supreme Court ordered petition transferred to appellate court with directions to treat it "as a petition for a writ of mandate and to issue an alternative writ addressing the issue of whether the trial court erred"]; *White v. Davis* (2003) 30 Cal.4th

528, 537, fn. 3 [in addition to appeals, party and interveners filed petitions for writ of mandate in Supreme Court, which transferred the petitions to the Court of Appeal, which then consolidated them with the appeals].) Such a transfer would ensure that petitioners and the workers' compensation community may obtain an early decision on this urgent matter.

PETITIONERS HAVE STANDING TO RAISE THESE ISSUES

Petitioners may seek a writ of mandate "where a public right is at stake" and the petitioners seek to enforce a public duty. (*Timmons v. McHahon* (1991) 235 Cal.App.3d 512, 518.) Petitioners need not show that they have "any legal or special interest in the result, since it is sufficient that [they are] interested as a citizen in having the laws executed and the duty in question enforced." (*Id.*, quoting *Green v. Obledo*, 29 Cal.3d at 144.) Furthermore, petitioners have standing as taxpayers pursuant to Code of Civil Procedure section 526a.

ARGUMENT

I.

DIRECTOR HOCH HAS NO AUTHORITY TO ENACT REGULATIONS THAT CONFLICT WITH THE LABOR CODE

The DWC's authority to issue regulations extends no further than the Legislature's authorization. (Gov. Code, §§ 11342.1, 11342.2 ["[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute . . ."]; *Association for Retarded Citizens v. Department of Development Services* (1985) 38 Cal.3d 384, 391.) Whether the DWC can promulgate a given regulation, then, is a question of statutory interpretation. Although the agency's "reasonable actions" merit "substantial deference . . . final responsibility for the interpretation of the

law rests with the courts.' [Citation]." (*Grimes v. State Dept. of Social Services* (1999) 70 Cal.App.4th 1065, 1073.)

If a "court determines that the administrative action under attack has, in effect, 'alter[ed] or amend[ed] the statute or enlarge[d] or impair[ed] its scope,' it must be declared void. [Citation.]" (*Association for Retarded Citizens v. Department of Development Services*, 38 Cal.3d at 391. Thus, where a regulation conflicts with a statutory provision, courts do not hesitate to strike the regulation down:

> We have no doubt that when statutes affecting the well-being – perhaps the very survival – of citizens of this state are being violated with impunity by . . . an agent of the state, the courts, as final interpreters of the law, must intervene to enforce compliance.
>
> (*City and County of San Francisco v. Superior Court* (1976) 57 Cal.App.3d 44, 50, citing *Mooney v. Pickett*, 4 Cal.3d at 679-681.)

(*See also Boehm & Associates v. Workers' Comp. Appeals Bd.*, 76 Cal.App.4th at 519 [striking down workers' compensation regulation; regulation relieved employers from paying interest on benefits that Labor Code required].)

II.

THE NEW PDRS IS UNLAWFUL BECAUSE IT FAILS TO MEASURE WAGE LOSS

Determining whether the new PDRS is valid turns on whether it complies with Labor Code section 4660. "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) In determining the meaning of a statute,

courts look first to its words, giving the language its usual and ordinary meaning. (*Dyna-Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1386-1387.)

The key language from Labor Code section 4660 provides that:

> (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, *consideration being given to an employee's diminished future earning capacity*.
>
> * * *
>
> (b)(2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on *empirical data and findings* from the [RAND Interim Report], and upon *data from additional empirical studies*.

(Emphasis added.)

If statutory language is "clear and unambiguous," its plain meaning governs. (*Maldonado v. Superior Court* (1984) 162 Cal.App.3d 1259, 1268.) The clear and unambiguous meaning of the relevant provisions of section 4660 is that the new PDRS must link ratings to wage loss through a formula based on RAND's empirical data and findings, and data from additional empirical studies. Director Hoch, in fact, agrees. She testified before the Senate Committee on Labor and Industrial Relations

that Labor Code section 4660 requires her to base the diminished future earning capacity "formulation only on RAND and other additional empirical studies." (¶ 36.)

Nevertheless, Director Hoch violated the statute by basing her diminished future earning capacity formulation in part on her "policy" judgment rather than the empirical data the Legislature required. The statute does not grant such flexibility.

"Empirical" means "derived from or depending upon experience or experiment alone." (Webster's Desk Dict. (1990) p. 294.) Director Hoch's judgment that more serious injuries should be compensated at higher levels, and less serious injuries should not "be bumped up as much" is based on a policy preference, not experience or experiment. (¶ 36.) The consequence that flowed from this policy judgment – the selection of 1.1 as a base adjustment factor – was so arbitrary that Dr. Reville, an author of the RAND Interim Report, testified that the selection of any range of numbers with a 4:1 ratio would have been "as logical." Director Hoch could have as easily chosen 2 to 8 rather than 1.1 to 1.4. Both would have fit within her policy framework, but neither would have any empirical justification. (*Id.*)

In addition, Director Hoch ignored her duty to use data from additional empirical studies, in part because, she alleges, she did not have time to complete a study before January 1, 2005, the time limit provided by the Legislature for completing the revised PDRS. (¶ 31.) Agencies cannot, however, simply ignore a duty made mandatory by statute. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 101.) Thus, this Court has held that where the Legislature imposed a duty on counties to provide support for indigent residents, the county may not avoid its duty by crafting

eligibility standards that would deny such aid to all single, employable men. (*Mooney v. Pickett*, 4 Cal.3d at 681.) Administrative standards that fail to carry out statutory duties "are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." [Citation.] (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 991.)

Director Hoch may not avoid statutory duties by complaining that compliance would be difficult given the pressures of promulgating timely regulations. Difficulties do not relieve state agencies of statutorily-imposed duties. Courts have acknowledged, for example, that the legislative requirement to support indigent persons imposes fiscal burdens on counties. (*Boehm v. Superior Court* (1986) 178 Cal.App.3d 494, 503, abrogated on other grounds, *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1512; *Mooney v. Pickett*, 4 Cal.3d at 680.) That promulgating a lawful regulation would be difficult does not permit courts or agencies "to write a new" law that avoids the difficulty. (*Mooney v. Pickett*, 4 Cal.3d at 680.) To the contrary, agencies must implement the laws created by the Legislature and courts must enforce them. (*Id*.)

Regardless, the January 1, 2005 deadline contained in Labor Code section 4660(e) does not conflict with the requirement to base diminished future earning capacity upon data from additional empirical studies. Statutory time limits are generally considered directory, not mandatory. (*California Correctional Peace Officers Assn. v. State Personnel Bd*. (1995) 10 Cal.4th 1133, 1145; *Plastic Pipe and Fittings Assn. v. California Building Standards Comm*. (2004) 124 Cal.App.4th 1390, 1411.) A time limit may be considered mandatory if it was meant to serve the purpose of the enactment (*Id*.) For example, the Court in *Pulcifer v. Alameda County* (1946) 29 Cal.2d 258, 262, interpreted a

requirement to fix the compensation of elective officers six months before an election as mandatory because the purpose of diminishing bias and influence in salary-setting would otherwise be defeated.

By contrast, where there is no sanction, penalty or invalidation for failure to meet a time limit (*California Correctional Peace Officers Assn. v. State Personnel Bd*. (1995) 10 Cal.4th 1133, 1145), and where the time limit would undermine the statute's purpose, substantive requirements trump time limits. For example, in *Plastic Pipe and Fittings Association v. California Building Standards Commission*, 124 Cal.App.4th 1390, the California Building Standards Commission failed to meet a statutory requirement to adopt a model plumbing code within one year of the model code's publication. (*Id*. at 1411.) The Commission argued that it needed more time to study the environmental effects of a substance required by the code. (*Id*. at 1401.) After considering the statute's language and purpose, the Court concluded that the statutory deadline was directory only. "[T]o deprive an agency of the power to adopt a model code more than one year after its publication would deprive the Commission of the agency's considered opinion and application of the agency's expertise, and would defeat the purpose of the statute." (*Id*. at 1411.) In essence, the Court found that meeting the time limit was not as important as the agency doing a good and thorough job.

Even if the time limit were interpreted as mandatory, it should be read together with the substantive requirement that ratings predict wage loss "with a view to promoting rather than defeating its general purpose. [Citation.]" (*American Friends Service Comm. v. Procunier* (1973) 33 Cal.App.3d 252, 261, disapproved on other grounds, *Engelmann v. State Bd. of Education* (1992) 2 Cal.App.4th 47, 59; *see also Cox v. California*

Highway Patrol (1997) 51 Cal.App.4th 1580, 1587 [courts "must consider the importance of the literal observance of the provision in question to the object of the legislation," quoting 3 Sutherland, Statutory Construction (5th ed. 1992) § 57.01, p. 2, footnotes omitted.].)

Plainly, section 4660's purpose was to link ratings to lost wages. (Lab. Code, § 4660(a).) In addition, the Legislature declared that the schedule "shall promote consistency, uniformity, and objectivity." (*Id*. at 4660(d).) The question, then, is whether Director Hoch's decision to prioritize time over substance defeats or promotes these purposes. The answer is that there are no shortcuts around the Legislature's considered directions about how to link ratings to wage loss.

Two months after SB 899 went into effect, the DWC entered into a contract with RAND and Dr. Robert Reville, RAND's Director and a principal author of the RAND Interim Report. The contract anticipated either locating pre-existing data on the AMA impairment ratings from other states that use the system, or completing a crosswalk study. RAND soon discovered that no such preexisting data existed, so a crosswalk study was necessary. (Depo. at 126-130, 154-160, CAAA Letter to Resps. at 6, 8.) But Director Hoch decided not to proceed with a study. (Depo. at 154-160.)

Dr. Reville disagreed with Director Hoch, and repeatedly explained to her that the "correct way" to link ratings to diminished future earning capacity was "to do the crosswalk . . . [b]ecause the crosswalk would provide the empirical data to allow you to say whether or not the [future earning capacity] adjustments were going to be adjusting the benefits . . . to improve equity." (*Id*. at 172-173, 162.) Without the crosswalk, it was not possible "to assess whether or not [a future earning

capacity adjustment] was valid or not." (*Id*. at 178-179, 186-188, 204-208.) Specifically:

- it is impossible to know whether applying the wage loss ratios from the old system to the new system "will improve equity, worsen it, [or] keep it the same." (*Id*. at 152-153.)
- it is possible to predict that Director Hoch's new ratings likely will not reflect injured workers' lost wages. (*Id*. at 195-197, 169-170, 202-203, CAAA letter to Resps. Exh. 3 to Writ Exhibits at 8.)

The empirical data that has since been developed through studies by Dr. Leigh and the Workers' Compensation Insurance Ratings Bureau powerfully undermine Director Hoch's approach. (¶¶ 33-34.) Her method relies on the assumption that ratings under the old and new system would be comparable, thus maintaining the validity of RAND's original wage loss ratios. These studies actually compared ratings between the two systems and determined that they will be very different, thereby undermining Director Hoch's assumption. (*Id*.)

Thus, both rational consideration of the facts and preliminary evidence lead to the conclusion that Director Hoch's approach was fast but utterly ineffective. By rejecting the empirical approach mandated by the Legislature, Director Hoch failed to link ratings with wage loss, and failed to produce an objective, empirically-based schedule that ensures similarly injured workers will receive consistent and uniform ratings.

It is no answer for Director Hoch to argue that she has the discretion to implement this approach now as long as the DWC conducts a new wage loss study later, as required by section 9805.1 of the regulations.

(¶ 39.) Without question, an agency has the regulatory "power to fill up the details" of the policy set by the Legislature. (*First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 549, citations omitted.) But an agency may not use its discretion to defeat the purpose of the statute, as this Court held in *Clean Air Constituency v. California State Air Resources Bd*. (1974) 11 Cal.3d 801. There, the Legislature had required the Air Resources Board to implement a program requiring the installation of pollution control devices on certain cars. The Legislature also empowered the Board to suspend the program for "extraordinary and compelling" reasons. (*Id*. at 806.) Two years later, the Board suspended the program on the grounds that the country was in the midst of an energy crisis, and the devices burned extra fuel. (*Id*. at 807-808.) The Court held that the Board's discretion to define "extraordinary and compelling" reasons for suspending the program was limited to reasons that would further the purposes of the statute. (*Id*. at 813.) Because the Legislature's goals included prompt installation of the devices to reduce pollution, the Board could not act to reduce gasoline consumption in ways that would frustrate the Legislature's pollution-reduction goals. (*Id*. at 815.) The same is true here. Director Hoch's decisions have undermined the legislative goals of linking ratings to wage loss, and promoting consistency, uniformity and objectivity.

Director Hoch's exercise of discretion is unlawful for the additional reason that her decisions have led to such an arbitrary outcome. Director Hoch has decided in effect that she could not complete a crosswalk by the January 1, 2005 time limit. (¶ 31.) Dr. Reville told Dr. Hoch that it would have been possible to complete a crosswalk study shortly after the January 1, 2005 time limit, probably by June 2005. Director Hoch, however, still declined to proceed because doing so would have delayed the

PDRS for months past the time limit. (¶ 32, p. 41.) Yet she instead chose to start from scratch with a new wage loss study that will not produce ratings that reflect wage loss for years after the time limit. Even if section 4660 affords some degree of discretion, its proper exercise cannot be to choose a course that as a practical matter produces such an absurd result.

But the statute does not in fact grant her this discretion. The Legislature chose to rely on RAND's wage loss study, which was based on pre-SB 899 disability ratings. Director Hoch has testified that she mistrusts pre-SB 899 disability ratings because they were based in part on subjective measures. (¶ 31.) This may be a perfectly sound position to take in another context, but it is not a position that she is entitled to take as the Administrative Director charged with implementing the Legislature's will. The Legislature determined that she must base the schedule in part on wage loss data measuring pre-SB 899 ratings, and it is her duty to comply.

III.

THE NEW PDRS IS UNLAWFUL BECAUSE IT FAILS TO ENSURE ADEQUATE BENEFITS

The California Constitution guarantees a system of workers' compensation that will make "adequate" provision for the comfort, health, safety and general welfare of injured workers and their dependents. (Cal. Const., art. XIV, § 4.) This requirement, among others, is declared to be "the social public policy of this State, binding upon all departments of the State government." (*Id.*) The Constitution does not define adequacy expressly, but instead vests the Legislature with plenary power to create a workers' compensation system by appropriate legislation.

The Legislature, through Labor Code section 4660(b)(2), defined adequacy by incorporating the findings of the RAND Interim Report:

> The administrative director shall formulate the adjusted rating schedule based on empirical data *and findings* from the [RAND Interim Report] and upon data from additional empirical studies.

(Emphasis added.)

RAND found that indemnity benefits in California were inadequate prior to SB 899, and that any changes to the permanent disability ratings should consider adequacy. (¶¶ 11, 19.)

Accordingly, the Legislature's intent to incorporate RAND's finding on adequacy is clear. Labor Code section 4660(b)(2) incorporates the "findings" from RAND's Interim Report without exception or qualification. The fourth page of the six-page section in the Interim Report entitled "Conclusions" includes a chart demonstrating that over a ten-year period, indemnity benefits in California replace only 37% of the wages lost by injured workers, which is low compared to workers in some other states. (RAND Interim Report at 46.) Over the chart, at the center and top of the page, RAND included an 18-point headline stating that "Changes in Ratings Should Consider Impact on Adequacy."

The meaning of adequacy is also clear. The replacement of two-thirds of a worker's pre-injury wage is the national standard for adequacy, which has been in place for decades and is the "most commonly cited standard for adequacy" by experts in the field. (¶ 11.) That is the standard that RAND used in its many studies of California's indemnity benefits. (¶¶ 11, 14.) By incorporating RAND's findings, that is the

standard the Legislature used to define the Constitution's adequacy requirement.

Director Hoch has, in short, interpreted the standard for adequacy out of Labor Code section 4660 and the requirement for adequate benefits out of the Constitution. In her testimony before the Senate Committee on Labor and Industrial Relations, she explained that her focus was deliberately elsewhere:

> SENATOR DUNN: Have you made a calculation, based upon your proposal, on how that will affect the permanent disability benefits injured workers will receive?
>
> * * *
>
> MS. HOCH: No, I have not done that. . . . What is difficult to do at this point is to run, to come up with what that end result will be. What I'm trying to do is make the PD system consistent, objective, predictable; and based on objective medical conditions and real wage-loss information, and we'll do that and continue to do that. *But as far as what that result is on the PD ratings, we have not run the numbers* because we don't have . . . the information to do the ratings . . .
>
> (Sen. Hearing Transcript at 23-24, emphasis added; *see also* p. 51.)

Section 4660(b)(2) does not support this interpretation because it clearly and unambiguously incorporates RAND's finding requiring Director to Hoch to consider adequacy, and it defines adequacy in light of RAND's findings.

Yet even if the statute was ambiguous with respect to adequacy, Director Hoch's interpretation could not stand without rendering either section 4660 or her PDRS unconstitutional.

Under the unlawful delegation doctrine, the Legislature "cannot escape responsibility" for resolving the truly fundamental issues vested in it by the Constitution. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 376.) Fundamental issues range from setting wage levels for fire fighters, (*id*. at 377), to determining the circumstances under which a pollution control program may be suspended. (*Clean Air Constituency v. California State Air Resources Bd*., 11 Cal.3d at 813.) If the Legislature fails to determine a fundamental issue and delegates that determination instead to an administrative agency, the statute is unconstitutional and void. (*Id.* at 816.) However, once the Legislature declares the policy that will govern the fundamental issue and sets a standard, it may empower agencies to fill in the details of the policy through regulations. (*Kugler v. Yocum*, 69 Cal.2d at 376.) This grant of authority must be "accompanied by safeguards adequate to prevent its abuse," and a sufficient "degree of protection" against arbitrary action by the agency. (*Kugler v. Yocum*, 69 Cal.2d at 376, 381, quoting *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 369 and 1 Davis Admin. Law Treatise (1958) § 2.15.)

For example, the Legislature may not provide unfettered discretion to a commissioner to determine the size of tax deductions based on the rates paid in any locality in the state of California that the commissioner deems to select. (*People's Federal Savings & Loan Assn. v. State Franchise Tax Bd.* (1952) 110 Cal.App.2d 696, 700.) By contrast, legislation may determine that fire fighters in the city of Alhambra must be

paid at least as much as fire fighters in Los Angeles. (*Kugler v. Yocum*, 69 Cal.2d at 377.) The legislation set forth the policy that resolved the fundamental issue: wages for fire fighters should be on par with Los Angeles. That individuals in Los Angeles would then have the power to "fill[] in" the details of the policy did not render the statute an unlawful delegation. (*Id.*) This was particularly so because the policy decision carried sufficient "safeguards against exploitative consequences." The Court found that the City of Los Angeles would have the same motivation and ability as Alhambra to use competition and bargaining power to ensure salaries were reasonable in both cities. (*Id.* at 382.)

"Fundamental issues" necessarily include determining what level of benefits makes adequate provision for injured workers and their dependents. The U.S. Supreme Court has questioned whether a state legislature could create a system of workers' compensation that abolishes a workers' common law rights in exchange for nothing more than "insignificant" benefits. (*See* ¶ 9 above [citing *New York Central Railroad Co. v. White*, 243 U.S. at 201-202]; *cf. Yoshioka v. Superior Court* (1997) 58 Cal.App.4th 972, 982 [noting that Legislature may not constitutionally enact legislation under which an individual "is deprived of *every reasonable method of securing just compensation*," emphasis in original].) Any issue that raises questions about the constitutionality of the workers' compensation system as a whole must be sufficiently "fundamental" to require the Legislature's determination.

Accordingly, section 4660 must include either or both a standard for defining adequacy and a sufficient "degree of protection" against arbitrary action by the agency. (*Kugler v. Yocum*, 69 Cal.2d at 376, 381.) Section 4660 plainly does not include safeguards against arbitrary

action by the DWC. When the Legislature learned in December 2004 that the studies by Dr. Leigh and CHSWC predicted that the Director's PDRS would result in devastating reductions in benefits, members of the Senate Committee on Labor and Industrial Relations explicitly told Director Hoch that her methodology was arbitrary, and that benefit reductions violated the intent behind SB 899. (Sen. Hearing Transcript at pp. 11-12, 31-34, 38-39; Letter from Sen. Alarcón to Resps., Exh. 5 to Writ Exhibits.) They urged her to revisit her formula in light of the requirement to produce adequate benefits, but she did not do so.

Director Hoch cannot interpret Labor Code section 4660 to ignore adequacy because a statute without standards and without safeguards cannot withstand constitutional scrutiny. Such interpretations are greatly disfavored by courts, which seek to infer standards from statutes if standards are not readily apparent. In *Clean Air Constituency v. California State Air Resources Bd.*, 11 Cal.3d at 816-819, for example, rather than declare a statute unconstitutional as an unlawful delegation of authority, the Court looked to the purposes of the Legislature's pollution control program to infer legislative constraints on an agency's nearly unlimited discretion to suspend the program. Here, neither the agency nor this Court need search for the Legislature's standards, as they are expressly incorporated through the findings in RAND's Interim Report. The Administrative Director's interpretation must be rejected. (*See, e.g., Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 373 [courts should avoid "constitutionally suspect" interpretations of statutes when interpretations are available that "are subject to no such potential infirmity."].)

The Legislature incorporated RAND's findings that indemnity benefits were inadequate prior to SB 899, and that any changes to those benefits must therefore consider the need to produce ratings that replace two-thirds of workers' pre-injury wages. The law does not permit Director Hoch to avoid her legislative duty to incorporate RAND's "findings" any more than it permits her to avoid her legislative duty to rely on data from additional empirical studies.

IV.

REMEDY

For these reasons, petitioners respectfully request that this court strike down Director Hoch's new PDRS as inconsistent with its authorizing legislation, and order respondents to promulgate a regulation that complies with Labor Code section 4660. (*See, e.g., Clean Air Constituency v. California State Air Resources Bd.*, 11 Cal.3d at 819-820 [striking down regulation as inconsistent with its statutory authority and ordering agency to implement program "in the manner set forth in" the statute].)

Specifically, petitioners request that this Court order respondents to promulgate a PDRS based on the empirical data and findings in the RAND Interim Report, including the finding that changes in ratings should consider the impact on adequacy, as required by the Constitution and defined by the Legislature's incorporation of RAND's definition. In addition, petitioners request that this Court order respondents to promulgate a PDRS based upon data from an additional empirical crosswalk study or studies, such that the resulting ratings in fact consider a worker's diminished future earning capacity.

CONCLUSION

Director Hoch's interpretation of Labor Code section 4660 is unsustainable. She may not ignore mandatory duties to rely on empirical data and additional empirical studies, particularly where, as here, doing so thoroughly undermines the statute's purposes. Nor can she interpret the standard for adequacy out of section 4660 and the requirement for adequate benefits out of the Constitution. By doing so, she has rejected the Legislature's balanced plan for reform, and placed thousands of workers at risk of being relegated to a substandard means of living with their permanent industrial injuries. Prompt intervention is necessary to preserve workers' compensation reform and the well-being of the injured workers of this state.

Dated: May 27, 2005

Respectfully submitted,

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By: ______________________________
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BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 14(c)(1) OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 14(c)(1) of the California Rules of Court I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 12,518 words as counted by the Microsoft Word 2002 word processing program used to generate the brief.

____
Margaret R. Prinzing

<u>**PROOF OF SERVICE**</u>

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On May 27, 2005, I served a true copy of the following document(s):

Petition for Writ of Mandate;
Memorandum of Points and Authorities
in Support Thereof

on the following party(ies) in said action:

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☒ **BY MAIL:** By placing a true copy of said document(s), enclosed in a sealed envelope, and by serving said envelope, with postage thereon fully prepaid, in the United States mail in San Leandro, California, addressed to said party(ies).

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☐ **BY FACSIMILE:** By causing said document(s) to be faxed to said party(ies) at the fax number(s) listed.

☐ **BY E-MAIL**: By causing said document(s) to be faxed to said party(ies) at the e-mail address(es) listed.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on May 27, 2005, in San Leandro, California.

____
Nina Leathley