EVALUATION OF SUBJECTIVE DISABILITY
California Labor Code & Regulations Code - 8 CCR 41,46, 9725 AND 9727

“The Schedule creates an arrangement of disabilities and values which stand in relationship to one another. It provides the structure necessary to assign a standard to a non-scheduled disability according to its seriousness.” - 97PDRS, page 1-13 - 8 CCR 10151, the 97PDRS

Disability Resulting From Pain Cannot Be Based Solely Upon Patient Reporting Or Behavior, But Must Be Related To Objective Clinical Factors and Underlying Pathological Processes."

- 8 CCR 10606 requires that the physician list the employee’s current subjective complaints at the time of examination. But foremost, it requires, under Subsections (f), (j) and (I), along with Labor Code Section § 4062.2 (d), 8 CCR 9725 & 9727 and 8 CCR IMC Guidelines, that the physicians describe all findings of disability and the reasons for their conclusions.

1. Therefore, a rating standard for subjective factors of disability cannot be based only on the injured worker's complaints, since at that point, those complaints are not yet considered disability.

2. A rating standard for subjective pain factors of disability must be based on the physician’s description of subjective disability after the completion of the medical examination.


Subjective Disability Evaluation

1. **LC§ 4620 & WCAB 10606** – The Medical Legal Report must be clear as to any loss of work capacity, be it (1) objective physical findings, (2) disabling effects of pain, (3) work restrictions or a percentage of pre-injury capacity functional loss.

2. **Labor Code Section § 139.2**: Disability Findings must be supported by clinical objective findings based on standardized examinations and testing techniques generally accepted by the medical community. Medical evaluation must include all findings and the reasons for the evaluating physician’s opinion. Physician must provide the reasoning for the assignment of subjective disability factors and describe how measurable physical elements of disability support disabling symptoms (subjective factors). The medical history, the objective examination & clinical findings must clearly support the reasons of the evaluating physician’s medical opinion for the imposition of any level of work capacity functional loss, including the subjective factors of disability.

- **California Code of Regulations 8 CCR 41, states that evaluating physicians shall:**
  1. Render expert opinions or conclusions only on issues, which the evaluator has adequate qualifications, education and training.
  2. Base their conclusions on the facts, on their training & specialty-based knowledge and shall be without bias either for or against the injured worker or the employer.
  3. Present a report that addresses all relevant issues, is ratable by the DEU, if applicable, and complies with all relevant evaluation guidelines of both the Labor Code and the California Code of Regulations.
“Pain is not always disabling. It becomes disabling when its degree affects function. Regulations [8 CCR 9727] define four degrees of subjective pain - minimal, slight, moderate and severe. Pain is characterized in terms of body part affected, intensity, frequency, and activity giving rise to the pain.” 97PDRS, pages 1-7 & 1-8

3. **Evaluation of Industrial Disability** (Packard Thurber, MD)- 8 CCR 46/9725: Physician must report measurable physical elements of disability in accordance with the standard method as described in the book.

4. **Subjective Disability Factors (8 CCR 9727):** Regulation states that subjective factors of disability should be identified by a description of the activity that produces the symptoms. Pain becomes disabling when its degree affects function. Minimal pain is not disabling. However, slight, moderate and severe reflect increasingly greater degrees of disability on work activity.

5. 8 CCR 46, 9725, 9727 state that the physician should describe any subjective complaints the patient may attribute to the injury and then give his opinion regarding validity and the reasons for his conclusions. The accurate description of current symptoms is very important, relevant to diagnosis, treatment and administrative matters, since the words “pain”, “location”, “severity” and “frequency” are words with specific implications. **When evaluating subjective pain factors the evaluating must address and state an opinion within the bounds of reasonable medical certainty, as to:**

   5.1. The diagnosis, causation and classification of pain,
   5.2. Whether the pain condition is permanent & stationary,
   5.3. Whether all appropriate medical treatment(s) have been exhausted,
   5.4. The relationship of the reported pain to the underlying pathological process,
   5.5. The credibility of the injured worker and weight of ancillary information,
   5.6. The assessment of the disability related to pain, not only on the intensity or frequency alone, but with consideration to the pain's impact on function,
   5.7. Demonstrate that he/she understands the magnitude criteria for pain, how the pain affects performance/ability to work rather than how severely the injured worker perceives the symptoms.

6. The description of symptoms shall then be “translated” by the evaluator into ratable language in the “Subjective Factors of Disability Section” of the medical report, as defined by 8 CCR 46/9725/9727 and Evaluation of Industrial Disability (Packard Thurber, MD).

- In cases in which a physician does not include the activities that produce the symptoms a supplemental report should be obtained to obtain a complete description of subjective disability as required by the evaluation guidelines and case law. Otherwise, it is to be assumed that the magnitude and frequency of pain occurs with all activities. Refer to 8 CCR 46, 9725 & 9727
Subjective factors of disability must be identified by a description of the activity that produces the symptoms (heavy work, repetitive use, heavy lifting, etc.), the duration or frequency of the symptoms (occasional, intermittent, frequent, constant), the intensity level of the symptoms (severe, moderate, slight, minimal/mild).

Physicians should also:
1. Compare the injured worker’s description of pain and pain-like symptoms to the recognized “magnitude / severity levels” as defined by 8 CCR 46, 9725 and 9727,
2. Demonstrate that they understand the magnitude criteria for pain, how the pain affects performance/ability to work, rather than how severely the injured worker perceives the symptoms,
3. Describe what type of activities are limited, altered or prevented by the symptoms, or which bring out the symptoms,
4. Describe collateral symptoms, such as itching, cramping, tingling, etc., in regards to location, severity, frequency and relation to motion, effort and activity,
5. Outline factors or treatments, which tend to relieve the pain or symptoms.

PAIN SEVERITY LEVELS

THE FOLLOWING TERMS ARE USED WHEN DESCRIBING SUBJECTIVE FACTORS

- **SEVERE**: Precludes the activity causing the pain.
- **MODERATE**: Pain that could be tolerated, but would cause a marked handicap in the performance of the activity precipitating the pain.
- **SLIGHT**: Pain that could be tolerated, but would cause some handicap in the performance of the activity precipitating the pain.
- **MINIMAL / MILD**: Pain that constitutes an annoyance, but causes no handicap in the performance of the particular activity causing the pain and would be considered a non-ratable permanent disability.

- Other types of subjective factors for which these terms apply:
  - (1) weakness, (2) fatigue, (3) tenderness, (4) neurogenic residuals and/or (5) sensory disturbances.

PAIN FREQUENCY LEVELS

TO DESCRIBE THE FREQUENCY WITH WHICH SYMPTOMS OCCUR, THE FOLLOWING WORDS ARE DEFINED AS HAVING THE FOLLOWING MEANINGS:

1. **RARE**: Approximately 20% (1/5 of the time)
2. **OCCASIONAL**: Approximately 25% or 1/4 of the time.
3. **INTERMITTENT**: A midpoint: approximately 50% or 1/2 of the time.
4. **FREQUENT**: Approximately 75% or 3/4 of the time.
5. **CONSTANT**: Approximately 90% to 100% of the time.
CREDIBILITY TESTING

- **WADDELL CREDIBILITY TESTING**: Grading system for evaluating/assessing non-objective findings on physical examination. Grading Scale 1 to 5, 5 points being maximum.

1. For overreaction to examination and active movement.
2. For overreaction and excessive pain to light palpation.
3. For low back pain with axial compression of the head.
4. For low back pain with rotation of pelvis under 30°.
5. For inconsistent straight leg rising in the sitting/supine position.

- Axial Loading, Passive Rotation, Distraction Test, Diffuse Tenderness, Non-Anatomic Nerve Dysfunction, Histrionic Movements, Non-Organic Physical Signs, etc.

Clinical Correlation of Subjective Disability

- What is relationship of the reported pain to the underlying pathological processes?

Although in most cases, when both subjective and objective factors are present they are added together, each may individually form the basis for the rating yielded by the ‘Objective/Subjective Index’. Subjective factors of disability may be used as a standard and adjusted for occupation and age. in those situations in which the subjective factors are not their own 'cause & effect'.

**Evaluation**: The examiner should evaluate the patient’s threshold of pain, and express his opinion about how this pain affects the patient at his work. Is this pain consistent with the patient’s injury, and if not, why not? Are any pre-existing conditions contributory?

**Tenderness:**
Character - superficial or deep?
Degree - slight, moderate, severe?
Location - describe accurately.
Evaluation - is it consistent with the injury, in character, degree and location?

**Sensory Disturbance:**
Character:
- Hyperesthesia - Increased sensitivity to touch
- Hypesthesia: Decreased sensitivity to touch.
- Anesthesia: complete loss of sensation.
- Paresthesia: Abnormal sensation.

**Weakness & Fatigue:**
- Character - purely subjective, owing to instability, etc. ?
- Degree - how and when does it evidence itself; what is its relation to physical effort ?
- It is substantiated by the presence of atrophy, loss of muscle tone, or other objective findings?
The Schedule allows the use of “Multiple Interchangeable Indexes” to express permanent disability due to the impairment manifestations caused by an industrial injury. The fundamental ruling guide is that they are never aggregated or combined, and ultimately the index producing the greater rating is used.

- “Either or both Indexes [Objective/Subjective Index - Work Capacity Index] may be used to describe a particular condition and each, when used, yields its own disability rating. When both are used the index producing the higher rating is used. - 97PDRS, page 1-3

**ADDING SUBJECTIVES TO OBJECTIVE FACTORS RATING FORMULAS**

Within the Objective/Subjective Factors Index, The Schedule allows the consideration of other ratable factors with the proviso that the index producing the higher rating be used. *(The use of orthopedic appliances, when prescribed, may be given consideration.)*

Therefore:

1. **Subjective Factors are never added to the Work Capacity/Work Restrictions Index and/or ratings based on the need of splints and/or prescribed orthopedic appliances since these assertions of functional loss are based on both components of the Objective/Subjective Index of Disability.**

2. In most cases, when both objective & subjective factors are present, they are added together. However, subjective factors are never added to a disability formula for objective factors when one is the “cause & effect” of the other.

3. The addition of subjective factors to an objective factors disability rating formula, for which the only causation for the objective factors is the subjective factors, would be a complete duplication of factors. 97 PDRS, page 1-8 to 1-10.

- **“In most cases when both objectives and subjectives are present, they are added together. However, in some situations, the value for subjective disability would be scaled down when warranted by the nature and magnitude of the overall disability.”** 97PDRS, page 1-4

- An “add-on” for subjective pain factors can not be made to an objective factors formula representing loss of motion or reduction of grasping power, when the only cause for the limitation of motion is the pain itself, since there is complete overlap (duplication) between the two indexes of disability.

- Due to their interdependence, the sum of objective/subjective factors can never exceed the modified rating standard for the complete loss of function adjusted for the injured worker's age and occupation. This rationale is established in the Schedule from the addition of an “add-on” for the loss of the head of the radius of the elbow joint. We must take into account the overlap and/or duplication between the objective factors and subjective factors of disability.

- **“DUPLICATION”**: Takes into account that ‘multiple factors of disability’ will have some redundancy in how the elements of disability affect specific abilities or overall function. If these were to be added together, they would create a greater amount of Permanent Disability than actually exists.
Subjectives are not initially “absolute” and must be adjusted to reflect the provisos under 8 CCR AD 9727 when they are added to an overall rating for partial limitation of motion for the “nature of disability” being rated. They become “absolute” once their value has been determined since they are not modified by the injured worker’s age and occupation.

**Einstein-Horner Formula**

**Calculating The Value Of Multiple Overlapping Levels Of Subjective Disability**

- 97PDRS, page 1-7.

When calculating multiple levels of subjective disability, the following calculation process (referred to as the “Einstein-Horner Formula”) is a standardized mathematical process, which takes into consideration the overlapping of subjective disability between different severity levels of pain. This systematic mathematical technique helps us approximate what the value of subjective disability should be and helps us maintain consistency in the determination of subjective disability.

The “Einstein-Horner Formula” is a valid mathematical process, but must only be used when subjective disability has been properly described under the qualifying factors of 8 CCR AD 9727.

“Pain is characterized in terms of body part affected, intensity, frequency and activity giving rise to the pain. Typical examples are constant slight back pain [10% standard] or moderate pain in the elbow on heavy lifting [05% standard].” 97PDRS, page 1-3

**Einstein-Horner Formula Example**

- Evaluating physician describes the subjective factors of disability as follows:

  - **Lower back pain that is constant slight at rest and increases to moderate-to-severe with Substantial Work.**

<table>
<thead>
<tr>
<th>Calculation Method for Overlapping Subjective Factors of Disability</th>
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<tbody>
<tr>
<td>1. <strong>Basic Level of Pain: Constant Slight at Rest</strong></td>
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<td>2. <strong>Value for the described highest pain level: moderate-to-severe</strong></td>
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<td>3. <strong>Subtract the value of (1) from number (2): highest pain level</strong></td>
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<td>4. <strong>SUBTRACTION RESULT:</strong></td>
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<td>5. <strong>Modify (4) by the rating value assigned for the activities which precipitate the pain – Substantial Work 40%</strong></td>
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<td>6. <strong>Add result (5) to the value for the basic level of pain (1). The sum becomes the subjective factors rating standard before modification.</strong></td>
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<td>7. <strong>Round Result to the nearest Rating Standard as per page 1-13 of the 97PDRS</strong></td>
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*When mathematically calculating a rating standard, it should be expressed as one of the following values: 1,2,3,5,8,10,13,15 & multiples of 5% thereafter, before modification for age and occupation. [97PDRS, page 1-13]*
ABDOMEN/CARDIOVASCULAR/LUNGS/RIB CAGE/NECK/SPINE/PELVIS
FUNCTIONAL LOSS BY THE DISABLING EFFECTS OF PAIN

- To help us maintain the scheme of relative severity of disabilities established by The Schedule, if multiple joints are injured, pertinent 'rating principles' are applied to avoid duplication and pyramiding. Multiple disability factors will have some redundancy in how they affect specific abilities or overall function, and an unrealistic result will be achieved by simply adding factors together. Multiple factors are compacted (scaled down) to avoid duplication and pyramiding.
- Pain subjective factors of disability should be identified by a description of the activity that produces the symptoms. Pain becomes disabling when its degree affects function. Minimal pain is not disabling. However, slight, moderate and severe reflect increasingly greater degrees of disability on work activity.
- Evaluation Protocols: 8 CCR 46, 9725 & 9727.

| Percentage | 00 | 01 | 02 | 03 | 05 | 08 | 10 | 13 | 15 | 20 | 25 | 30 | 35 | 40 | 45 | 50 | 55 | 60 | 65 | 75 | 95 | 100 |
|------------|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|
| Constant Level: | Slight | Slight-to-Moderate | Moderate | Severe |
| Slight Pain with Clumsy | | | | |
| Severe with Prolonged | | | | |
| Severe Pain with Heavy | | | | |
| Pain with Power | | | | |
| Grasping | | | | |
| Severe Pain with Sustained | | | | |
| Placement/Strenuous/Dexterous | | | | |
| Activities | | | | |
| (Severe Major Hand) | | | | |
| Pain with Any | | | | |
| Manipulation | | | | |
| Severe Pain with Minimal | | | | |
| Finger Motion | | | | |
| Severe Pain with Any | | | | |
| Work at Shoulder Level | | | | |
| 90° | | | | |
| Neurological Components/Tactile Sensibility Impairment: | | | | |
| (01%-05%) Separate from strength/manipulation/placement | | | | |
| functions. | | | | |

SINGLE LOWER EXTREMITY - FUNCTIONAL LOSS FOR THE DISABLING EFFECTS OF PAIN.

- "In most cases when both objectives and subjectives are present, they are added together. However, in some situations, the value for subjective disability would be scaled down when warranted by the nature and magnitude of the overall disability." 97PRS page 1-4.
- Evaluation Protocols: 8 CCR 46, 9725 & 9727.

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<tr>
<td>Functional Loss:</td>
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<td>Slight Pain with Kneeling</td>
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Key: Occasional (1/4) Intermittent (1/2) Frequent (3/4) Slight (10%) Slight-To-Moderate (30%) Moderate (50%)