WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIO ALMARAZ, ***Applicant,*** **vs.** **ENVIRONMENTAL RECOVERY SERVICES (a.k.a. ENVIROSERVE); and STATE COMPENSATION INSURANCE FUND,** ***Defendant(s).***	**Case No. ADJ1078163 (BAK 0145426)** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**
JOYCE GUZMAN, ***Applicant,*** **vs.** **MILPITAS UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured; and KEENAN & ASSOCIATES, Adjusting Agent,** ***Defendant(s).***	**Case No. ADJ3341185 (SJO 0254688)** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

In this joint en banc decision,[1] we clarify and modify our en banc decision of February 3, 2009.[2]

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[1] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation judges. (Lab. Code, § 115; Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5] (*Garcia*); *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

[2] When the Appeals Board grants reconsideration of an en banc decision, it has the power to alter or amend that decision. (Lab. Code, §§ 5906, 5907; *Pendergrass v. Duggan Plumbing* (2007) 72 Cal.Comp.Cases 456, 458-459 (Appeals Board en banc); *Baglione v. Hertz Car Sales* (2007) 72 Cal.Comp.Cases 444, 446-447 (Appeals Board en banc).)

In our February 3, 2009 decision, we held that: (1) the AMA Guides[3] portion of the 2005 Schedule for Rating Permanent Disabilities (2005 Schedule or Schedule)[4] is rebuttable; (2) the AMA Guides portion of the 2005 Schedule is rebutted by showing that an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability; and (3) when an impairment rating based on the AMA Guides has been rebutted, the Workers' Compensation Appeals Board (WCAB) may make an impairment determination that considers medical opinions that are not based or are only partially based on the AMA Guides.

In this decision, we hold that: (1) the language of Labor Code section 4660(c),[5] which provides that "the schedule … shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," unambiguously means that a permanent disability rating established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating; (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's whole person impairment (WPI) under the AMA Guides;[6] and (4) when determining an injured employee's WPI, it is not permissible to go outside the four corners of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment. In light of these holdings, we now specifically reject the "inequitable, disproportionate, and not a fair

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[3] All references to the "AMA Guides" or to the "Guides" are to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (5th Edition, 2001).

[4] The complete Schedule may be found at http://www.dir.ca.gov/dwc/PDR.pdf.

[5] All further statutory references are to the Labor Code, unless otherwise specified.

[6] Section 4660 does not refer to "whole person impairment." However, section 4660(a) refers to "the nature of the physical injury or disfigurement" and section 4660(b)(1) provides that "the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the [AMA Guides]." In turn, the AMA Guides assesses impairments in terms of the "whole person" and it assigns "whole person impairment ratings" that reflect the percentage to which the "whole person" has been impaired. (See, e.g., AMA Guides, §§ 1.3 and 1.4, at p. 9.) These "whole person impairment ratings" of the Guides have been adopted and incorporated into the Schedule. (Cal. Code Regs., tit. 8, § 9805; see also, 2005 Schedule, at pp. 1-2, 1-3, 1-4.)

and accurate measure of the employee's permanent disability" standard set forth in our February 3, 2009 opinion.

We emphasize that our decision does *not* permit a physician to utilize any chapter, table, or method in the AMA Guides simply to achieve a desired result, e.g., a WPI that would result in a permanent disability rating based directly or indirectly on any Schedule in effect prior to 2005. A physician's opinion regarding an injured employee's WPI under the Guides must constitute substantial evidence; therefore, the opinion must set forth the facts and reasoning which justify it. Moreover, a physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence.

I. BACKGROUND

In the *Almaraz* case, applicant sustained a November 5, 2004 back injury, while employed as a truck driver. He had back surgery and never returned to work. The agreed medical evaluator (AME), Bruce E. Fishman, M.D., concluded that applicant has 12% WPI under the AMA Guides. He also noted, however, that applicant is permanently limited to light duty work and permanently precluded from prolonged sitting. Dr. Fishman never reviewed a formal job analysis but, based on applicant's own description of his job duties, Dr. Fishman declared that applicant "clearly would be unable" to perform at least one aspect of his job.

On April 23, 2008, the workers' compensation administrative law judge (WCJ) found that applicant's back injury caused 14% permanent disability under the 2005 Schedule, taking into consideration his 12% WPI under the AMA Guides. Applicant filed a timely petition for reconsideration, contending in substance that: (1) section 4660 merely requires that "account shall be taken" of the AMA Guides and that a WPI based on the Guides is not conclusive and unrebuttable; (2) the AMA Guides need not be blindly followed where the Guides does not completely and fairly describe and measure the injured employee's impairment; and (3) where the AMA Guides does not fairly and accurately reflect the injured employee's impairment, other measures of impairment should be used.

In the *Guzman* case, applicant sustained a cumulative injury to both upper extremities

(bilateral carpal tunnel syndrome) through April 11, 2005, while employed as a secretary. The AME, Steven D. Feinberg, M.D., found 3% WPI for each extremity based on the AMA Guides. However, Dr. Feinberg also stated:

> "You are aware by now that there is often a discrepancy between the disability and the impairment. The type of problem [applicant] has is legitimate but does not rate very much (if anything) under the AMA Guides. Based on her ADL [(i.e., activities of daily living)] losses, each upper extremity would have a 15% WPI … . This is not a method that is sanctioned by the AMA Guides."

On October 7, 2008, the WCJ found 12% permanent disability under the 2005 Schedule, based on 3% WPI for each upper extremity. The WCJ concluded that Dr. Feinberg's 15% WPI for each upper extremity did not successfully challenge the WPI under the AMA Guides. Applicant filed a timely petition for reconsideration, essentially arguing that Dr. Feinberg's 15% WPI should have been followed because: (1) the AMA Guides expressly estimates impairments "*excluding work*" (AMA Guides' own emphasis); (2) the AMA Guides consistently calls for an evaluating physician to use his or her education, training, and clinical judgment in determining impairment; and (3) the AMA Guides always defers to the evaluator's clinical judgment.

We granted reconsideration in both the *Almaraz* and *Guzman* cases and consolidated them for our February 3, 2009 en banc decision. There, we engaged in a lengthy legal analysis to reach a conclusion that the 2005 Schedule – and the AMA Guides portion of the Schedule – are rebuttable. Our February 3, 2009 opinion then remanded both matters to their respective assigned WCJs for further proceedings.

On February 27, 2009, defendant, State Compensation Insurance Fund (SCIF) filed a timely petition for reconsideration in *Almaraz*. In its petition, SCIF essentially contended that our conclusion that an AMA Guides impairment rating is rebuttable: (1) directly contravenes the language of sections 4660(b)(1) and 4660(d) that permanent disability determinations "shall incorporate" the AMA Guides and that the Schedule "shall promote consistency, uniformity, and objectivity"; (2) directly contravenes the Legislature's express intention, set forth in section 49 of SB 899, to reduce workers' compensation costs; (3) improperly relied on California appellate

cases on rebutting the Schedule that pre-dated the implementation of SB 899 and, therefore, that did not address the AMA Guides and their mandatory application; (4) improperly relied on statements contained in the AMA Guides that are not relevant because the Legislature did not adopt the full text of the AMA Guides, only its impairment ratings; and (5) improperly relied on out-of-state appellate cases regarding departures from the AMA Guides because those states do not mandate use of the Guides.

Applicant filed an answer, essentially contending that: (1) the "prima facie evidence" language of section 4660(c) is clear and unambiguous and, therefore, neither further interpretation nor examination of legislative history is required; (2) section 4660(a) requires only that "account shall be taken" of the AMA Guides; therefore, when the AMA Guides is silent on a medical condition or falls short in fairly describing impairment, then other evidence is necessary; (3) although section 4660(d) provides that "[t]he schedule shall promote consistency, uniformity, and objectivity," these factors are not more important than fairness to the injured worker; and (4) any contrary conclusion would be inconsistent with the provisions of Article XIV, section 4, of the California Constitution, mandating "adequate" workers' compensation benefits, and section 3202, mandating liberal construction of workers' compensation laws.

On April 6, 2009, we granted SCIF's petition for reconsideration in *Almaraz*.[7] Concurrently, we granted reconsideration on our own motion in *Guzman*. (Lab. Code, § 5911; see also §§ 5900(b), 5315.) We gave the parties in *Guzman* until May 1, 2009 to file and serve briefs on the merits. In both *Almaraz* and *Guzman*, we invited any interested person or entity to file and serve an amicus curiae brief by May 1. Finally, we gave each party in the *Almaraz* and *Guzman* cases until May 21 to file a single consolidated brief in reply to the amicus briefs.

On May 1, 2009, the applicant in *Guzman* filed his brief on the merits, essentially contending: (1) because section 4660(c) provides that the Schedule is "prima facie evidence" of an

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[7] We concluded that our February 3, 2009 opinion was a "final" order because the question of whether the AMA Guides portion of the 2005 Schedule may be rebutted is a "threshold" issue that is "fundamental," "critical," and "basic" to the issue of permanent disability benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1073-1081 [65 Cal.Comp.Cases 650, 653-660]; *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784 (Appeals Board en banc).)

injured employee's percentage of permanent disability, the 2005 Schedule is rebuttable and not conclusive; (2) because the Administrative Director (AD) "adopt[ed] and incorporate[ed]" the AMA Guides in its entirety into the 2005 Schedule, the AMA Guides itself is also prima facie evidence that may be rebutted; (3) the language of section 4660(b)(1) mandating that the AMA Guides "shall" be incorporated is not sufficient to create a conclusive presumption regarding the level of impairment; (4) if the Legislature had intended to create a conclusive presumption, it could have expressly said so; (6) the AMA Guides allows a physician to exercise his or her clinical judgment in determining impairment; (7) there is no inherent conflict between the provision of section 4660(d) that the Schedule "shall promote consistency, uniformity, and objectivity" and the provision of section 4660(c) that the scheduled permanent disability rating is "prima facie evidence"; (8) neither the language nor legislative history of section 4660 reflects an intent that injured employees should receive permanent disability awards that are inequitable, disproportionate, and not a fair and accurate measure of their true disability; and (9) alleged increases in litigation and medical-legal costs are not a reason to blindly follow the AMA Guides, especially where the Guides would cause an unjust result.

On May 1, 2009, the defendant in *Guzman*, the Milpitas Unified School District (MUSD), also filed its brief on the merits,[8] essentially contending: (1) although the 2005 Schedule may be rebuttable as to an injured employee's percentage of permanent disability, there is no AMA Guides "portion" of the Schedule and, therefore, the "prima facie evidence" language of section 4660(c) does not apply to the AMA Guides; (2) sections 4660(b)(1) and 4660(d) mandate that permanent disability determinations "shall incorporate" the AMA Guides and that the Schedule "shall promote consistency, uniformity and objectivity"; (3) our decision conflicts with the legislative intent of SB 899 to alleviate skyrocketing workers' compensation costs; (4) our decision leaves California without a workable standard for converting impairment into permanent disability; (5) pre-SB 899 case law on rebutting scheduled permanent disability ratings fails to give due

[8] MUSD captioned its brief as a "petition for reconsideration." However, it is clearly untimely and subject to dismissal as such. (Lab. Code, §§ 5900(a), 5903, 5316; Code Civ. Proc., § 1013; Cal. Code Regs., tit. 8, § 10507.) Therefore, we will treat it as MUSD's brief on the merits, as invited by our April 6, 2009 order.

consideration to changes wrought by SB 899; (6) any reliance on case law from other jurisdictions is misplaced, inappropriate, and inapposite; and (7) our decision amounts to an illegal regulation in violation of the Administrative Procedures Act and usurps the AD's regulatory authority to create a Schedule.

Pursuant to our invitation, we also received a number of amicus curiae briefs.[9] Each party in the *Almaraz* and *Guzman* cases filed a reply to the amicus briefs.[10]

II. DISCUSSION

For the reasons that follow, we clarify our February 3, 2009 opinion to hold that it is the permanent disability rating resulting from the application of the Schedule that is rebuttable; that the party disputing a scheduled permanent disability rating has the burden of rebutting it; and that one method of rebutting a scheduled permanent disability rating is to successfully challenge one or more of the component elements of the rating, such as the WPI under the AMA Guides. We also modify our prior opinion to hold that *all* WPI evidence – including but not limited to rebuttal evidence – must be within the four corners of the AMA Guides, although a physician may utilize any chapter, table, or method in the Guides to assess WPI, provided that his or her opinion constitutes substantial evidence.

A. A Brief History of Section 4660, SB 899 and the Adoption of the 2005 Schedule.

Beginning when the first mandatory Workers' Compensation Act was enacted in 1917, through the Act's first codification in 1937, and on into 2004, section 4660(a) and its predecessors provided: "In determining the percentages of permanent disability, account shall be taken of the

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[9] We have received and considered amicus curiae briefs from: the California Applicants' Attorneys Association; the California Chamber of Commerce & the California State Association of Counties Excess Insurance Authority (joint brief); the California Self-Insurers Association; the California Society of Industrial Medicine and Surgery, Inc.; the California Workers' Compensation Institute (CWCI); the County of Los Angeles; Employers Direct Insurance Co.; the International Association of Rehabilitation Professionals; The Director of Industrial Relations, John C. Duncan, as Administrator of the Uninsured Employers Benefits Trust Fund and the Subsequent Injuries Benefits Trust Fund; Morrow & Morrow; the National Federation of Independent Business, Small Business Legal Center; Phil Neal Walker Law Corp. (Walker); the Protected Insurance Program for Schools; Steve Poizner, Insurance Commissioner of the State of California; the San Diego and Imperial County Schools Joint Powers Authority; Safeway, Inc.; and The Travelers Companies, Inc.

[10] Given our disposition, we deny the requests of SCIF, MUSD, and various amicus that we stay our February 3, 2009 opinion. We also decline MUSD's request that we rescind our April 6, 2009 order granting reconsideration.

nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market."[11] From 1937, when section 4660 first mandated the adoption of a permanent disability Schedule, and until 2004, section 4660 set forth no guiding principles regarding the formulation of the Schedule beyond the language of section 4660(a); however, section 4660 consistently provided that "the schedule … shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule."

In 2004, SB 899 substantially amended section 4660.[12] These changes included: (1) amending section 4660(a) to read, "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" (i.e., replacing the phrase, "consideration being given to the diminished ability of such injured employee to compete in an open labor market," which had been present since the Workers' Compensation Act of 1917)[13]; (2) adding new section 4660(b)(1), which provides, "For purposes of this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the [AMA Guides]"; and (3) amending section 4660(d), which now provides, in relevant part, "The schedule shall promote consistency, uniformity, and objectivity."

The amendments to section 4660 also directed that "[o]n or before January 1, 2005, the administrative director shall adopt regulations to implement the changes made to this section by th[is] act … ." (Lab. Code, § 4660(e).) Accordingly, by regulation, the AD adopted the new

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[11] Stats. 1917, ch. 586, § 9(b)(7), p. 838; Stats. 1919, ch. 471, § 4, p. 915; Stats. 1925, ch. 354, § 1, p. 642; Stats. 1929, ch. 222, § 1, pp. 422-423; Stats. 1937, ch. 90, § 4660, p. 283; Stats. 1951, ch. 1683, § 1, p. 3880; Stats. 1965, ch. 1513, § 91, p. 3579; Stats. 1993, ch. 121, § 53.

[12] Stats. 2004, ch. 34, § 32.

[13] Stats. 1917, ch. 586, § 9(b)(7), p. 838; Stats. 1919, ch. 471, § 4, p. 915; Stats. 1925, ch. 354, § 1, p. 642; Stats. 1929, ch. 222, § 1, pp. 422-423; Stats. 1937, ch. 90, § 4660, p. 283; Stats. 1951, ch. 1683, § 1, p. 3880; Stats. 1965, ch. 1513, § 91, p. 3579; Stats. 1993, ch. 121, § 53.

Schedule, which became effective on January 1, 2005. (See Cal. Code Regs., tit. 8, § 9805 (AD Rule 9805).) In creating the new Schedule, the AD specifically "adopt[ed] and incorporate[d]" the AMA Guides. (*Id*.)

There are four component elements to the new Schedule's formula for rating an injured employee's percentage of disability. The first component is the injured employee's WPI, expressed as a percentage, based on the AMA Guides. (2005 Schedule, at pp. 1-2, 1-3, & 1-4 – 1-5.)[14] The second component involves multiplying this WPI percentage by a factor from 1.1 to 1.4 to adjust it for the injured employee's diminished future earning capacity (DFEC). (*Id*., at pp. 1-2, 1-5 – 1-8, & 2-6 – 2-7.) The third and fourth components further adjust the WPI percentage based, respectively, on the injured employee's occupation and age at the time of injury, leading to the final percentage permanent disability rating. (*Id*., at pp. 1-2, 1-8 – 1-9, & 3-1 – 6-5.)

B. The Language of Section 4660(c), Providing that "the Schedule … Shall Be Prima Facie Evidence of the Percentage of Permanent Disability to Be Attributed to Each Injury Covered by the Schedule," Unambiguously Means that any Permanent Disability Rating Established by the Schedule Is Rebuttable

The foundation of our February 3, 2009 opinion is the language of section 4660(c), which provides that "the schedule … shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." Our prior opinion concluded that this language means that the Schedule and its component elements, including its AMA Guides portion, are rebuttable.

For the reasons that follow, we largely adhere to this element of our February 3, 2009 opinion. We depart from it only to clarify that it is the permanent disability *rating* resulting from the application of the Schedule that is rebuttable. Moreover, as we will discuss later, one way an injured employee or a defendant may rebut a scheduled permanent disability rating is to successfully challenge one or more of the component elements of the rating, such as by

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[14] The Schedule also assigns eight-digit "impairment numbers" that identify each injured body part or organ system. The first two digits correspond to the chapter of the AMA Guides relating to the particular body part or organ system. (2005 Schedule, at pp. 1-4 & 2-1 – 2-5.)

establishing a WPI under the AMA Guides that most accurately reflects the injured employee's impairment.

The fundamental rule of statutory construction is to effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289] (*DuBois*); *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476, 480] (*Nickelsberg*); *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652, 657].) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois*, *supra*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289].) When the statutory language is clear and unambiguous, there is no room for interpretation and the WCAB must enforce the statute according to its plain terms. (*DuBois*, *supra*, 5 Cal.4th at p. 387 [58 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (*Arvizu*) (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508].) It is only when statutory language is ambiguous and susceptible of more than one reasonable interpretation that the WCAB may look to other maxims of statutory construction, to legislative history, or to other evidence of the Legislature's intent. (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1190; *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1543 [74 Cal.Comp.Cases 113, 117] (*Benson*).)

Here, the language of section 4660(c) that "the schedule … shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule" clearly and unambiguously establishes that an injured employee's scheduled percentage permanent disability rating is rebuttable.

The very nature of "prima facie evidence" is that it is rebuttable: "[P]rima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. It may, however, be contradicted, and other evidence is always admissible for that purpose." (*Vaca Valley & Clear Lake Railroad v. Mansfield* (1890) 84 Cal. 560, 566; accord: *In re Raymond G.* (1991) 230 Cal.App.3d 964, 972.) This comports with standard legal dictionary

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definitions of "prima facie evidence."[15] It also comports with Evidence Code section 602: "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." Therefore, we must apply section 4660(c) according to its plain terms.

Moreover, the language of section 4660 that "the schedule … shall be prima facie evidence of the [injured employee's] percentage of permanent disability" has long been interpreted to mean that a permanent disability rating based on the Schedule is rebuttable. In some instances, the appellate courts have explicitly pronounced that a scheduled permanent disability rating is rebuttable.[16] In other instances, this conclusion, though not expressly declared, has been an indispensable underpinning of the court's decision.[17]

Further, had the Legislature intended that a permanent disability rating established by the Schedule was to be conclusive and unrebuttable, it could have expressly so stated. It did not. To quote our Supreme Court, "As A. P. Herbert so unforgettably quipped: 'If Parliament does not mean what it says it must say so.' " (*Flores v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 171, 177 [39 Cal.Comp.Cases 289, 293].) Certainly, the Legislature knew how to establish a

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[15] See, e.g., Black's Law Dictionary (6th ed. 1990), at p. 1190, which among other things defines "prima facie evidence" as: (1) "Evidence good and sufficient on its face. Such evidence as … is sufficient to establish a given fact … and which if not rebutted or contradicted, will remain sufficient. Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which supports, but which may be contradicted by other evidence."; (2) "That quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence; once a trier of fact is faced with conflicting evidence, it must weigh the prima facie evidence with all of the other probative evidence presented."; (3) "An inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference."

[16] See *Glass v. Workers' Comp. Appeals Bd*. (1980) 105 Cal.App.3d 297, 307 [45 Cal.Comp.Cases 441, 449] (*Glass*) ("While the Rating Schedule is prima facie evidence of the proper disability rating, it may be controverted and overcome."); *Universal Studios, Inc. v. Workers' Comp. Appeals Bd*. (*Lewis*) (1979) 99 Cal.App.3d 647, 662-663 [44 Cal.Comp.Cases 1133, 1143] (*Lewis*) ("[T]he rating schedule … is not absolute, binding and final. … It is therefore not to be considered all of the evidence on the degree or percentage of disability.").

[17] See *Abril v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 480, 486 [40 Cal.Comp.Cases 804, 808] (*Abril*) (a rating must be "rationally related" to the employee's disability; therefore, although the WCAB properly awarded an employee the scheduled rating for legal blindness of the left eye due to loss of the lens, the employee also should have been rated for work restrictions imposed to avoid the risk of retinal detachment and other eye problems); *Luchini v. Workmen's Comp. Appeals Bd.* (1970) 7 Cal.App.3d 141, 146 [35 Cal.Comp.Cases 205, 209] (*Luchini*) (WCAB erred in concluding that prophylactic working restrictions are not ratable factors of permanent disability under the Schedule; "the [WCAB] cannot rely on some administrative procedure [(i.e., the Schedule)] to deny to petitioner a disability award commensurate with the disability that he has suffered."); *Young v. Industrial Acc. Com*. (1940) 38 Cal.App.2d 250, 255 [5 Cal.Comp.Cases 67, 70] ("[i]t is apparent … from the … provisions of the Labor Code and the schedule itself, that it was not intended that [the schedule] should be applied in a case … where it did not even approximately cover the disability involved").

conclusive presumption if that was its intent.[18] Indeed, it has done so many times, including in two instances in SB 899. (See Lab. Code, §§ 4664(b), 5814(c).)[19]

Our conclusion that the "prima facie evidence" language of section 4660(c) is *not* ambiguous obviates the need to address any of the arguments regarding the interpretation of ambiguous language.

C. The Provisions of Section 4660(d) and Section 49 of SB 899 Are Not So Clearly Repugnant and Utterly Irreconcilable with the "Prima Facie Evidence" Provision of Section 4660(c) that They Compel the Conclusion that this Provision Was Impliedly Repealed

Although the "prima facie evidence" provision of section 4660(c) unambiguously means that a scheduled permanent disability rating is rebuttable, even a plain and clear statutory provision may not stand if it has been impliedly repealed. Here, SCIF and some amicus curiae essentially contend that the "prima facie evidence" provision of section 4660(c) was impliedly repealed by the provision of section 4660(d) that the Schedule "shall promote consistency, uniformity, and objectivity" and/or by the language of section 49 of SB 899 stating that the act was intended to "provide relief to the state from the effects of the current workers' compensation crisis."

Repeals by implication are not favored. (*Nickelsberg*, *supra*, 5 Cal.4th at p. 298 [56 Cal.Comp.Cases at p. 483]; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [41 Cal.Comp.Cases 42, 46].) An implied repeal will be found "only when there is no rational basis for harmonizing the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573-574 [internal citations and quotation marks omitted]; see also *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420.)

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[18] Cf. *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1107 ("the Legislature certainly knows how to impose a penalty when it wants to, having established penalties in many Labor Code statutes by using the word 'penalty.' "); *Bryant v. Industrial Acc. Com.* (1951) 37 Cal.2d 215, 223 [16 Cal.Comp.Cases 121, 126] ("If the Legislature had intended that the lien provided for in paragraph (f) [of Labor Code section 4903] should be against temporary disability compensation only[,] it could have said so; that it knew how to write an amendment with such an effect is demonstrable, for in 1949 it adopted paragraph (g) which expressly so provides as to unemployment compensation benefits.")

[19] See also, e.g., Ins. Code, § 11650; Lab. Code, §§ 3501(a)&(b), 4155. 4662.

1. There Is a Rational Basis for Harmonizing the Provision of Section 4660(d) that "[t]he Schedule Shall Promote Consistency, Uniformity, and Objectivity" and the Provision of Section 4660(c) that the Schedule "Shall Be Prima Facie Evidence of the Percentage of Permanent Disability"

The language of section 4660(d), which provides "[t]he schedule shall promote consistency, uniformity, and objectivity," is not so clearly repugnant and so inconsistent with the language of section 4660(c), which provides that the Schedule "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," that there is no way the two provisions could have concurrent operation.

Although section 4660(d) provides that the Schedule "shall promote consistency, uniformity, and objectivity," this does not necessarily mean that a scheduled permanent disability rating cannot be "prima facie evidence" that may be rebutted. For example, in the context of the cases before us and as we will discuss in greater detail below, these two provisions may be rationally interpreted and harmonized to mean that a scheduled permanent disability rating may be rebutted by successfully challenging the component element of that rating relating to the employee's WPI under the AMA Guides. This may be done by establishing that another chapter, table, or method within the four corners of the Guides most accurately reflects the injured employee's impairment. This interpretation gives effect to the "prima facie evidence" language of section 4660(c) because it allows rebuttal evidence, but it also gives effect to the "shall promote consistency, uniformity, and objectivity" language of 4660(d) because it requires that the rebuttal evidence be rooted in the AMA Guides.

2. The Declared Intention of Section 49 of SB 899, to "Provide Relief to the State from the Effects of the Current Workers' Compensation Crisis," Does Not Provide Undebatable Evidence of a Legislative Intent that the 2005 Schedule and Its Component Elements Cannot Be Rebutted

When SB 899 was enacted, the Legislature included section 49, which expressly declared that "[t]his act is an urgency statute" and that "it is necessary for this act to take effect immediately" to "provide relief to the state from the effects of the current workers' compensation crisis." (Stats. 2004, ch. 34, § 49.) As the appellate courts have repeatedly made clear, this

statement means that, overall, SB 899 was intended to reduce the costs of the workers' compensation system.[20]

Nevertheless, while section 49 declared SB 899's intent to reduce the *overall* costs of workers' compensation, section 49 does not reflect an intent to reduce the cost of each and every workers' compensation benefit in each and every possible way. To the contrary, "both workers and employers were to benefit from Senate Bill No. 899 as a whole." (*Benson*, *supra*, 170 Cal.App.4th at p. 1557 [74 Cal.Comp.Cases at p. 130]).) Certainly, some elements of SB 899 were aimed at reducing the cost of permanent disability and the courts have so interpreted these provisions.[21] However, there also was some legislative concern about "diminishing the arguably meager benefits injured workers received in this state." (*Benson*, *supra*, 170 Cal.App.4th at p. 1557 [74 Cal.Comp.Cases at p. 131] (quoting from Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 899 (2003–2004 Reg. Sess.) as amended July 14, 2003, pp. 1–2).) Consistent with this concern, SB 899 *increased* permanent disability benefits for those employees who were the most disabled or who could not return to their work. (Lab. Code, § 4658(d)(1) (increasing the number of weeks of benefits for permanently disabled employees with disability from 70% to 99.75%); § 4658(d)(2) (increasing by 15% benefits for permanently disabled employees who were not promptly offered regular, modified or alternative work with the same employer).)

Therefore, the fact that SB 899 left the "prima facie evidence" provision of section 4660(c)

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[20] See *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 [72 Cal.Comp.Cases 565, 578] (SB 899 was adopted as "an urgency measure designed to alleviate a perceived crisis in skyrocketing workers' compensation costs"); *Benson*, *supra*, 170 Cal.App.4th at p. 1555 [74 Cal.Comp.Cases at p. 128] (the legislative history of SB 899 reflects that "the Legislature repeatedly indicated its specific intent to reform apportionment rules to meet the overarching legislative goal of cost reduction"); *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640, 655 [73 Cal.Comp.Cases 785, 796] (SB 899 represented "a major reform of the state's workers' compensation system, a system perceived to be in dire financial straits at the time"); *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.* (*Chavez*) (2007) 151 Cal.App.4th 148, 155 [72 Cal.Comp.Cases 582, 587 ("the workers' compensation … reforms [of SB 899] were enacted as urgency legislation to drastically reduce the cost of workers' compensation insurance").

[21] E.g., *Brodie*, *supra*, 40 Cal.4th at pp. 1327, 1332 [72 Cal.Comp.Cases at pp. 576, 581] (SB 899's changes to the statutory scheme governing the apportionment of permanent disability created a "new regime of apportionment based on causation" that "reflect[ed] a clear intent to charge employers only with that percentage of permanent disability directly caused by the current industrial injury").

fully intact is not inconsistent with section 49. That is, it appears the Legislature concluded that a system-wide reduction in the total costs of permanent disability benefits could be accomplished by making some changes to section 4660 – as well as making other changes to other statutes affecting permanent disability, such as the apportionment to causation provisions of section 4663 and 4664 – without eliminating the right to rebut a scheduled permanent disability rating (or, as discussed below, challenging the component of a scheduled permanent disability rating relating to WPI under the AMA Guides) in any particular case.

Furthermore, in the context of challenging the component of a scheduled permanent disability rating relating to WPI under the AMA Guides (see discussion below), we are not persuaded that the continued existence of the "prima facie evidence" language of section 4660(c), as we have interpreted it, will have any particular effect on the overall costs of permanent disability indemnity. First, nothing in either this opinion or our February 3, 2009 opinion *requires* a party to challenge the component of a scheduled permanent disability rating relating to WPI under the AMA Guides or *requires* any WCJ or Appeals Board panel to follow the proposed rebuttal evidence if it is introduced. Second, our interpretation of the "prima facie evidence" language of section 4660(c) allows *either* party to challenge the component of a scheduled permanent disability rating relating to WPI under the AMA Guides. Thus, in some cases, an injured employee may succeed in increasing the permanent disability rating, but in other cases a defendant may succeed in decreasing it.

D. The Burden of Rebutting a Scheduled Permanent Disability Rating Rests with the Party Disputing that Rating

Section 4660(c) provides, in relevant part, "[the] schedule … shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." We construe this language to mean that the burden of rebutting or contradicting the scheduled percentage permanent disability rating is on the party disputing that rating.

As stated above, Evidence Code section 602 provides: "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption."

Therefore, the "prima facie evidence" provision of section 4660(c) establishes a rebuttable presumption.

According to Evidence Code section 601: "Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." Per Evidence Code section 603: "A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." Per Evidence Code section 605: "A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied … ."

We conclude that the "prima facie evidence" rebuttable presumption established by section 4660(c) is a presumption affecting the burden of proof, particularly in view of the amendments made to section 4660 by SB 899. By providing that the scheduled permanent disability rating will apply unless contradicted and overcome by other evidence, section 4660(c) helps implement the Legislature's expressly declared public policy of promoting "consistency, uniformity, and objectivity" in permanent disability ratings (Lab. Code, § 4660(d)). (Cf. *Garcia*, *supra*, 126 Cal.App.4th at p. 314 [70 Cal.Comp.Cases at p. 118] (" '[t]he presumptions of industrial causation found in sections 3212 et seq. are rebuttable; and, because they reflect public policy, they are presumptions affecting the burden of proof' " [quoting from *Reeves v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 22, 30 [65 Cal.Comp.Cases 359, 365])[22]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425-1426 [67 Cal.Comp.Cases 236, 240-241] (former section 4062.9, which provided that "the findings of the treating physician are presumed to be correct," was a presumption affecting the burden of proof " 'because it was part of an effort by the Legislature to implement a public policy of reducing medical-legal costs and expediting resolution

[22] See also *Zipton v. Workers' Comp. Appeals Bd.* (1990) 218 Cal.App.3d 980, 988, fn. 4 [55 Cal.Comp.Cases 78, 84, fn. 4]; *Gillette v. Workmen's Comp. Appeals Bd.* (1971) 20 Cal.App.3d 312, 319-320 [36 Cal.Comp.Cases 570, 575].)

of medically related issues' ")[23]; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Welcher*) (1995) 37 Cal.App.4th 675, 682-683 [60 Cal.Comp.Cases 717, 721-722] [section 5402(b), which provides that "[i]f liability is not rejected within 90 days after the date the claim form is filed …, the injury shall be presumed compensable," is a presumption affecting the burden of proof "because it was created by the Legislature to implement the public policy of expediting workers' compensation claims"].)

The effect of a presumption affecting the burden of proof is to impose upon the party against whom the presumption operates the burden of overcoming the presumption. (Evid. Code, § 606.) Therefore, the burden rests with the party, be it the injured employee or the defendant, seeking to overcome the presumptively correct scheduled rating that is "prima facie evidence" of the employee's percentage of permanent disability. (See also Lab. Code, § 5705 ("[t]he burden of proof rests upon the party … holding the affirmative of the issue").) This party must carry its burden by a preponderance of the evidence. (Lab. Code, § 3202.5; see *Garcia*, *supra*, 126 Cal.App.4th at p. 315 [70 Cal.Comp.Cases at p. 118] (applying section 3202.5 preponderance of evidence standard to employer's burden to controvert section 3212.1 cancer presumption, once employee has produced evidence to trigger the presumption).)

E. One Method of Rebutting a Percentage Permanent Disability Rating Under the 2005 Schedule Is to Successfully Challenge One of the Component Elements of that Rating, Such as the Injured Employee's WPI under the AMA Guides

Section 4660(c) provides that "[the] schedule … shall be prima facie evidence *of the percentage of permanent disability* to be attributed to each injury covered by the schedule." (Emphasis added.) Therefore, it is the percentage of permanent disability established by the Schedule – i.e., the scheduled permanent disability rating – that is rebuttable.[24]

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[23] Quoting from *Davis v. Interim Healthcare* (2000) 65 Cal.Comp.Cases 1039, 1043 (Appeals Board en banc) [which cited to *Minniear v. Mt. San Antonio Community College Dist.* (1996) 61 Cal.Comp.Cases 1055, 1059-1060 (Appeals Board en banc)].

[24] See *Lewis*, *supra*, 99 Cal.App.3d at pp. 657, 662-663 [44 Cal.Comp.Cases at pp. 1138, 1143] ("*The percentage of disability* determined by use of the rating schedule is only prima facie evidence of *the percentage of permanent disability* to be attributed to each injury. Thus it is not absolute, binding and final. … It is therefore not to be considered all of the evidence *on the degree or percentage of disability*" (emphasis added)); *Glass*, *supra*, 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449] ("While the Rating Schedule is prima facie evidence *of the proper disability rating*, it may be controverted and overcome").)

There are various ways that a permanent disability percentage rating established by the 2005 Schedule might be rebutted. This is illustrated by cases under the prior Schedules,[25] when diminished ability to compete in the open labor market was the foundational basis for assessing an injured employee's permanent disability (see former Lab. Code, § 4660(a)) and when the component elements of the Schedule's rating formula were the employee's "disability" as modified by his or her occupation and age at the time of injury. (See 1997 Schedule, at pp. 1-4 & 1-6; 1988 Schedule, at p. 1; see *National Kinney v. Workers' Comp. Appeals Bd.* (*Casillas*) (1980) 113 Cal.App.3d 203, 209 [45 Cal.Comp.Cases 1266, 1270] (*Casillas*).) Under the prior Schedules, the "disability" portion of the rating formula was based either on the employee's work restrictions or on his or her objective and subjective factors of disability. (See 1997 Schedule, at pp. 1-3 – 1-4, 1-7 – 1-8.)

With the prior Schedules, an injured employee or a defendant could attempt to challenge any one of the individual component elements of the formula in an employee's particular case. Most commonly, an injured employee or a defendant would attempt to rebut the scheduled rating by successfully challenging the index of "disability" used in the rating formula that, when subsequently adjusted for age and occupation, would result in the scheduled percentage of disability. (See, e.g., *Lewis*, *supra*, 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133];[26] *Glass*, *supra*, 105 Cal.App.3d 297 [45 Cal.Comp.Cases 441][27]; *Abril*, *supra*, 55 Cal.App.3d 480 [40

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[25] For reference, the 1997 Schedule may be viewed at http://www.dir.ca.gov/DWC/PDR1997.pdf and one of the pre-1997 Schedules (i.e., the 1988 Schedule) may be viewed at http://www.dir.ca.gov/DWC/PDRSpre1997.pdf.

[26] In *Lewis*, the Court of Appeal held that the WCAB erred in basing the scheduled rating on a semisedentary work restriction, where: the employee had merely sprained her ankle; there were only minimal objective findings; and the AME did not believe the employee's condition would worsen if she exceeded a semisedentary restriction. The Court stated: "There is no objective evidence … that Lewis is permanently restricted … to semisedentary work. [There are no] findings of … any physical abnormality or any functional disability of Lewis' left foot. … [¶] It is no answer to this lack of evidence to say that the rating[] schedule[] … cannot be questioned. The [cases cited] fully controvert any such 'hands-off' attitude toward the schedule or the presumptions used to create the schedule or resulting therefrom. [¶¶] The percentage of disability determined by use of the rating schedule is only prima facie evidence of the percentage of permanent disability to be attributed to each injury. Thus it is not absolute, binding and final. [Citations]. It is therefore not to be considered all of the evidence on the degree or percentage of disability. Being prima facie it establishes only presumptive evidence. Presumptive evidence is rebuttable, may be controverted and overcome."

Cal.Comp.Cases 804][28]; *Luchini*, *supra*, 7 Cal.App.3d 141 [35 Cal.Comp.Cases 205][29].) Also, a party could rebut the scheduled percentage of disability by successfully challenging the individual component of the rating relating to the injured employee's occupation at the time of injury. (*Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497 [37 Cal.Comp.Cases 393][30]; see also *Casillas*, *supra*, 113 Cal.App.3d 203 [45 Cal.Comp.Cases 1266].)

The 2005 Schedule also uses a formula made up of component elements to determine the percentage of permanent disability in any particular case. That is, the percentage rating established by the 2005 Schedule is arrived at by following a formula that takes the injured employee's WPI percentage as determined in accordance with the AMA Guides, multiplies this WPI percentage by a DFEC adjustment factor, and then adjusts the result based on the employee's occupation and age at the time of injury to arrive at the final percentage rating.

Therefore, consistent with case law on the prior Schedules, an injured employee or a defendant may rebut the percentage of permanent disability under the 2005 Schedule by successfully challenging any one of the individual component elements of the formula that resulted in the employee's scheduled rating – such as the injured employee's WPI under the AMA Guides.

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[27] In *Glass*, the Court of Appeal held that WCAB erred in failing to include a limitation to light work as one of the employee's factors of disability even though the "Guidelines for Work Capacity" of the Schedule then in effect provided that a limitation to light work applied only to other body parts. The Court said: "The Board may not rely upon alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award which accurately reflects his true disability. … While the Rating Schedule is prima facie evidence of the proper disability rating, it may be controverted and overcome."

[28] In *Abril*, the Court of Appeal found that the WCAB erred when it awarded the injured employee only the scheduled rating for legal blindness of the left eye due to loss of the lens, without also including work restrictions imposed to avoid the risk of further retinal detachment and other eye problems. The Court declared: "The increase in disability [caused by the work restrictions] may be 'intangible,' but it is nonetheless real. … [¶] … [A] rating that ignores the intangible or non-bodily element 'is not rationally related to Applicant's diminished ability to compete on the open labor market … . It is, therefore, arbitrary, unreasonable and not supported by the evidence in light of the entire record.' " (55 Cal.App.3d at p. 486 [40 Cal.Comp.Cases at p. 808].)

[29] In *Luchini*, the Court of Appeal held that the WCAB erred in concluding that prophylactic work restrictions are not ratable factors of permanent disability under the old Schedule. The Court stated "the [WCAB] cannot rely on some administrative procedure [(i.e., the Schedule)] to deny to petitioner a disability award commensurate with the disability that he has suffered."

[30] In *Dalen*, the expert opinion of the disability evaluation specialist (rater) was that the injured employee fell within Occupational Group 1, which was the scheduled Group for "house wrecker" in the Schedule. The Court of Appeal held, however, that the employee "was entitled to show that his actual duties did not conform to the duties contemplated under the generic term 'house wrecker' as found in the schedule."

F. When Determining an Injured Employee's WPI, It Is Not Permissible to Go Outside the Four Corners of the AMA Guides Because Section 4660(b)(1) Mandates that Impairment Ratings "Shall Incorporate" the AMA Guides and Because Section 4660(d) Mandates that "the Schedule Shall Promote Consistency, Uniformity, and Objectivity"; However, a Physician May Utilize any Chapter, Table, or Method of Assessing Impairment in the AMA Guides that Most Accurately Reflects the Injured Employee's Impairment

Section 4660(b)(1) provides: "For purposes of this section, the 'nature of the physical injury or disfigurement' *shall incorporate* the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the [AMA Guides]." (Emphasis added.) Further, section 4660(d) provides that "[t]he schedule *shall* promote consistency, uniformity, and objectivity." (Emphasis added.)

Unless the context otherwise requires (see Lab. Code, § 5), the term "shall" is ordinarily interpreted as mandatory. (Lab. Code, § 15; see *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907.) Therefore, by providing that impairment determinations "shall incorporate" the AMA Guides, section 4660(b)(1) mandates that the WPI component of any scheduled permanent disability rating *must* be based on the AMA Guides, i.e., the WPI component cannot be predicated on the opinion of a physician who has gone outside the four corners of the Guides to make an impairment determination. This is consistent with the language of section 4660(d) because, by requiring use of the AMA Guides to determine impairment, the Legislature furthered its expressly stated goal of achieving "consistency, uniformity, and objectivity." The AMA Guides itself states that it "uses objective and scientifically based data" whenever possible (AMA Guides, § 1.5, at p. 10), that its goal is to have "consistent and reliable acquisition, analysis, communication, and utilization of medical information through a single set of standards" (*id*., Introduction to Chapter 2, at p. 17), and that "consistency tests are designed to insure reproducibility and greater accuracy" (*id*., § 2.5c, at p. 19).

Notwithstanding the "shall incorporate … [the AMA Guides]" language of section 4660(b)(1) and the "the schedule shall promote consistency, uniformity and objectivity" language of section 4660(d), the dissent asserts that a WPI need not be predicated on the AMA Guides in all

cases. In making this argument, the dissent states that not even the Schedule itself requires that all impairments be assessed under the Guides because the Schedule provides that "psychiatric impairment shall be evaluated … using the Global Assessment of Function (GAF)." (Schedule, at p. 1-12; see also pp. 1-13 – 1-16), instead of using Chapter 14 of the Guides.

Yet there is a reason why the Schedule does not use the AMA Guides for evaluating psychiatric impairments.[31] This reason is explained in Chapter 14 of the Guides, entitled "Mental and Behavioral Disorders," which relates to mental disorders that do not originate from verifiable neurologic impairments (e.g., stroke, head injury). (See AMA Guides, § 13.3f, at p. 325.) Chapter 14 states "there are no precise measures of impairment in mental disorders," "[t]he use of [WPI] percentages implies a certainty that does not exist," and "[n]o available empirical evidence supports any method for assigning a percentage of impairment of the whole person" in psychiatric cases. (AMA Guides, § 14.3, at p. 361.) Chapter 14 further states that "the Committee on Disability and Rehabilitation of the American Psychiatric Association advised *Guides* contributors against the use of percentages in the chapter on mental and behavioral disorders." (*Id*.) Therefore, Chapter 14 of the Guides expressly provides that "[p]ercentages are not provided to estimate mental impairment in this edition of the *Guides*." (*Id*.) Given that the Guides do not provide a

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[31] We are aware section 4660(b)(1) states that "the 'nature of the *physical* injury or disfigurement' shall incorporate the descriptions and measurements of *physical* impairments and the corresponding percentages of impairments published the [AMA Guides]." (Emphasis added.) However, the AD's decision not to use the Guides for rating *psychiatric* impairments does not appear to be based on this wording.

For one, we take judicial notice of the rule-making record for AD Rule 9805. (Evid. Code, §§ 451(b); 452(c); Gov. Code, § 11347.3.) Nothing in the Initial Statement of Reasons, the 15-day and 45-day comment charts, or the Final Statement of Reasons suggests that the AD interpreted section 4660(b)(1) as being inapplicable to psychiatric impairments. (See http://www.dir.ca.gov/dwc/dwcpropregs/PDRS_ISOR.doc, at pp. 2, 8-9; http://www.dir.ca.gov/dwc/dwcpropregs/PDRS_CommentChart/PDRS15daycommentschart.doc; http://www.dir.ca.gov/dwc/dwcpropregs/PDRS_CommentChart/PDRS45daycommentschart.doc; http://www.dir.ca.gov/dwc/dwcpropregs/PDRSFinalStatementofReasons.doc, at pp. 2-3.).

Moreover, the phrase "the nature of the *physical* injury or disfigurement" has been an element of the statutory language since the first mandatory Workers' Compensation Act was enacted in 1917 and the Act's initial codification in 1937. Yet, despite the reference to "*physical* injury or disfigurement," the prior Schedules have provided ratings for psychiatric disability for a great many years. (See, e.g., 1997 Schedule, at pp. 2-2 – 2-3, & 1988 Schedule, at p. 1-B [both rating psychiatric disability based on impairment in performing eight different work functions]; *U.S. Auto Stores v. Workmen's Comp. Appeals Bd.* (*Brenner*) (1971) 4 Cal.3d 469, 474, fn. 3 [36 Cal.Comp.Cases 173, 175, fn. 3] [discussing 1966 Schedule rating for "neurosis"].) There is no reason to believe that, suddenly, the AD interpreted "the nature of the physical injury or disfigurement" not to cover *psychiatric* injuries in the context of section 4660(b)(1) and its "shall incorporate... the [AMA Guides]" language. To the contrary, AD Rule 9805 expressly "adopt[ed] and incorporate[d]" the entire AMA Guides into the Schedule, without excluding Chapter 14 on "Mental and Behavioral Disorders."

WPI for any non-neurologically based psychiatric impairment, it was entirely appropriate for the AD not to use Chapter 14 of the AMA Guides for assessing WPI for such impairment.

However, when the AMA Guides provides a WPI for a condition, the Schedule incorporates it. This is true even in the context of mental conditions that arise from neurological conditions. For example, Chapter 13 of the Guides, entitled "The Central and Peripheral Nervous System," provides a WPI for certain types of mental conditions, including emotional, mood, and behavioral disturbances that originate in verifiable neurologic impairments (e.g., stroke, head injury). (AMA Guides, § 13.3f & Table 13-8, at pp. 325-327.)[32]

Nevertheless, although the WPI component of a scheduled rating must be founded on the AMA Guides (except in the case of psychiatric impairments), a physician is not inescapably locked into any specific paradigm for evaluating WPI under the Guides. Section 4660(b)(1) provides that the WPI component of a scheduled rating is to be rooted in "the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the [AMA Guides]." Therefore, section 4660(b)(1) does not mandate that the impairment for any particular condition must be assessed in any particular way under the Guides. Moreover, while the AMA Guides often sets forth an analytical framework and methods for a physician in assessing WPI,[33] the Guides does not relegate a physician to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgment. Instead, the AMA Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill in assessing WPI.

Specifically, the AMA Guides provides: "The physician's role in performing an impairment evaluation is to provide an independent, unbiased assessment of the individual's

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[32] See also, e.g., § 13.3a & Table 13-2, at pp. 309-311 & Table 13-2 ("Criteria for Rating Impairment of Consciousness and Awareness"); § 13.3d & Table 13-6, at pp. 319-322 ("Criteria for Rating Impairment Related to Mental Status").

[33] See, e.g. AMA Guides, § 15.2, p. 379: "Spinal impairment rating is performed using one of two methods: the diagnosis-related estimate (DRE) or range-of-motion (ROM) method. [¶] The DRE method is the principal methodology used to evaluate an individual who has had a distinct injury …" (italics omitted).

medical condition, including its effect on function, and identify abilities and limitations to performing activities of daily living … . Performing an impairment evaluation requires considerable medical expertise and judgment." (AMA Guides, § 2.3, at p. 18.) Similarly, the Guides states: "The physician must use the entire range of clinical skill and judgment when assessing whether or not the measurements or tests results are plausible and consistent with the impairment being evaluated. If, in spite of an observation or test result, the medical evidence appears insufficient to verify that an impairment of a certain magnitude exists, the physician may modify the impairment rating accordingly and then describe and explain the reason for the modification in writing." (*Id*., § 2.5c, at p.19.) Further, the Guides recites: "In situations where impairment ratings are not provided, the *Guides* suggests that physicians use clinical judgment, comparing measurable impairment resulting from the unlisted condition to measureable impairment resulting from similar conditions with similar impairment of function in performing activities of daily living. [¶] The physician's judgment, based upon experience, training, skill, thoroughness in clinical evaluation, and ability to apply the *Guides* criteria as intended, will enable an appropriate and reproducible assessment to be made of clinical impairment." (*Id*., § 1.5, at p. 11.)

Therefore, based upon the physician's judgment, experience, training, and skill each reporting physician (treater or medical-legal evaluator) should give an expert opinion on the injured employee's WPI using the chapter, table, or method of assessing impairment of the AMA Guides that most accurately reflects the injured employee's impairment. (See *Glass*, *supra*, 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449] ("The Board may not rely upon alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award which accurately reflects his true disability.").) This does not mean, of course, that a physician may arbitrarily assess an injured employee's impairment. As stated by the AMA Guides, "[a] clear, accurate, and complete report is essential to support a rating of permanent impairment" and the report should "explain" its impairment conclusions. (AMA Guides, § 2.6, at pp. 21-22.) In other words, a physician's WPI opinion must constitute substantial evidence upon which the WCAB

may properly rely, including setting forth the reasoning behind the assessment. (See *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc).)

A physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence because it is inconsistent with the mandate of section 4660(b)(1). (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97] ("Medical reports and opinions are not substantial evidence … if they are based … on incorrect legal theories"); *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 799 [33 Cal.Comp.Cases 358, 360] ("an expert's opinion which … assumes an incorrect legal theory cannot constitute substantial evidence").)

G. The Language of Section 4660(b)(1) Does Not Preclude a Physician from Assessing Impairment Using Any Chapter, Method, or Table of the AMA Guides

MUSD and SCIF both point out that section 4660(b)(1) states that "the descriptions and measurements of physical impairments and the corresponding percentages of impairments" of the AMA Guides "shall [be] incorporate[d]." Therefore, they argue that the Legislature did not intend wholesale adoption of the full text of the Guides. Rather, section 4660(b)(1) permits a physician to consider only the Guide's impairment percentage measurement system and does not allow a physician to consider any other portion of the Guides. We reject this argument.

Section 4660 vested the AD with the authority to create the 2005 Schedule (Lab. Code, § 4660(e); see also § 4660(c)) and, in creating it, the AD "adopt[ed] and incorporate[ed]" the whole AMA Guides without limitation. (Cal. Code Regs., tit. 8, § 9805.) Therefore, the entire AMA Guides is part of the Schedule.[34]

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[34] MUSD suggests that the AD exceeded her statutory authority in adopting and incorporating the entire AMA Guides. However, the burden is on the party challenging a regulation to show its invalidity. (*Mineral Associations Coalition v. State Mining and Geology Bd.* (2006) 138 Cal.App.4th 574, 589.) In this regard, a regulation comes "freighted with the strong presumption of regularity" (*Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 175) and "[a]n administrative agency is not limited to the exact provisions of a statute in adopting regulations" but it is "authorized to ' "fill up the details" ' of the statutory scheme." (*Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 362-363.) Here, although section 4660(b)(1) states that impairment determinations "shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments [of the AMA Guides]," section 4660(b)(1) does *not* state that the balance of the AMA Guides shall *not* be incorporated. Accordingly, MUSD has not met its burden of establishing that AD Rule 9805 is invalid.

MUSD also asserts that we have usurped the AD's regulatory authority to create a Schedule. However, the AD's authority to create a Schedule does not encompass the authority to determine under section 4660(c) either how a

Moreover, there is no separate portion of the AMA Guides which sets forth "the descriptions and measurements of physical impairments and the corresponding percentages of impairments" that stands alone from and may be dissociated from the balance of the Guides, particularly Chapters 1 and 2. The AMA Guides consists of 18 chapters. Chapter 1 discusses the philosophy, purpose, and appropriate use of the Guides. Chapter 2 explains how an impairment evaluation should be performed and reported. Chapters 3 through 17 each address different organs/body systems and Chapter 18 addresses pain. Yet, Chapters 3 through 18 all explicitly or implicitly refer back to Chapters 1 and 2.[35] Thus, the AMA Guides is an integrated document and its statements in Chapters 1 and 2 regarding physicians using their clinical judgment, training, experience and skill cannot be divorced from the balance of the Guides.

H. The Ordinary Progression of a Challenge to the AMA Guides Component of a Scheduled Permanent Disability Rating

If a party disputes a treating physician's opinion regarding the injured employee's WPI under the AMA Guides, or if the treating physician is unable to offer such an opinion, the parties may obtain an AME or a panel qualified medical evaluator (QME) to address the issue of the employee's WPI under the Guides. (See Lab. Code, §§ 4062.1, 4062.2.) Once a treating physician, AME, or QME has offered an opinion regarding the injured employee's WPI under the AMA Guides, then the injured employee or the defendant may seek to challenge that opinion through rebuttal evidence. (Lab. Code, § 4660(c); see also Lab. Code, § 5704.) Generally, to reduce costs and to expedite proceedings (see Cal. Const., art. XIV, § 4), this rebuttal evidence initially should be obtained either through deposing the physician[36] or through a supplemental report. (Cf. *McDuffie v. Los Angeles County Metropolitan Transit Auth.* (2002) 67

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prima facie correct scheduled permanent disability rating may be rebutted or whether such a rating has been rebutted. It is the WCAB, and not the AD, that is charged with interpreting and enforcing the Labor Code in workers' compensation proceedings. (Lab. Code, §§ 5300, 5301; see also, e.g., *Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1511 [73 Cal.Comp.Cases 466, 470] (the WCAB is "the constitutional agency charged with enforcement and interpretation of the Workers' Compensation Law").)

[35] See, e.g., AMA Guides, §§ 3.1, 5.1, 6.1, 7.1, 8.1, 9.1, 10.1, 11.1, 12.1, 13.1, 14.1, 15.1, 16.1, 17.1, 18.1, at pp. 26, 88, 118, 144, 174, 192, 212, 246, 278, 306, 358, 374, 434, 524, 566.

[36] Cross-examination of a physician is normally not permitted at trial. (Cal. Code Regs., tit. 8, § 10606.)

Cal.Comp.Cases 138, 142 (Appeals Board en banc) ("where … the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case").) Also, in some instances, the rebuttal might be through the medical report or medical-legal report of another physician – if permissible under the Labor Code. In any event, the rebuttal evidence may, for example, attempt to establish that a different chapter, table, or method of assessing impairment of the AMA Guides more accurately reflects the injured employee's impairment than the chapter, table, or method used by the physician being challenged. (See *Glass*, *supra*, 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449].)

Of course, section 4660(c) provides that "the schedule … shall be prima facie evidence *of the percentage of permanent disability* to be attributed to each injury covered by the schedule." (Emphasis added.) Therefore, if read strictly, section 4660(c) would suggest that rebuttal evidence may be presented only *after* the presumptively correct (prima facie) percentage of permanent disability under the Schedule has been determined, i.e., after a trial and an initial decision on the issue of permanent disability – thereby necessitating a second trial. However, by constitutional mandate, workers' compensation proceedings "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [sic] of any character." (Cal. Const., art. XIV, § 4; see also Lab. Code, § 3201.) This policy favoring expeditious proceedings is reflected by the fact that discovery closes at the pre-trial mandatory settlement conference (MSC), except as to evidence that could not have been discovered by the exercise of due diligence prior to that time. (Lab. Code, § 5502(e)(3).)

In the ordinary case, once a physician has issued a WPI opinion based on the AMA Guides, a party should be able to anticipate the approximate percentage of permanent disability that would result from utilizing that WPI in the Schedule's rating formula.[37] In turn, that party should be able to determine whether it wishes to challenge that WPI opinion. If so, the party typically should be

[37] If a party is unable to independently rate the WPI of a particular physician's medical report, that party may obtain a summary rating, consultative rating, or informal rating determination from the Disability Evaluation Unit. (See Cal. Code Regs., tit. 8, § 10150 et seq.)

able to obtain rebuttal evidence prior to the first MSC involving permanent disability issues. However, although the prudent practitioner should exercise reasonable diligence to obtain rebuttal evidence before the initial MSC relating to permanent disability, there may be instances where post-MSC rebuttal evidence will be allowed.

An injured employee's permanent disability rating and each component element of that rating are questions of fact to be resolved by the WCAB. (Lab. Code, § 5953; *Tanenbaum v. Industrial Acc. Com.* (1935) 4 Cal.2d 615, 618 [20 I.A.C. 390, 391-392]; *Subsequent Injuries Fund v. Industrial Acc. Com.* (*Rogers*) (1964) 226 Cal.App.2d 136, 152 [29 Cal.Comp.Cases 59, 69].) Therefore, once all of the evidence relating to permanent disability has been presented – including both original and rebuttal evidence regarding the injured employee's WPI under the AMA Guides – the WCAB will determine the injured employee's percentage of permanent disability. In this regard, it is the WCAB and not any particular physician that is the ultimate trier-of-fact on medical issues. (*Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 [54 Cal.Comp.Cases 251, 252]; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792-793 [52 Cal.Comp.Cases 419, 425].)

I. Other Issues Presented by the Parties and Amicus Curiae

After our February 3, 2009 opinion, the parties and amicus curiae submitted briefs raising various arguments regarding asserted errors in that opinion. We will now address those arguments, taking into consideration the clarifications and modifications made in our current opinion.

1. The Relationship Between the "Prima Facie Evidence" Language of Section 4660(c) and the "Shall Incorporate … the [AMA Guides]" Language of Section 4660(b)(1)

In our February 3, 2009 opinion, we concluded that the "prima facie evidence" language of section 4660(c) meant that a scheduled permanent disability rating based on the AMA Guides could be rebutted by showing that the resulting permanent disability award would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability. Our February 3, 2009 opinion further concluded that when a scheduled permanent disability rating

based on the Guides had been rebutted, the WCAB could make a WPI determination founded on medical opinion not based or only partially based on the Guides.

A number of briefs contended that this interpretation of the "prima facie evidence" language of section 4660(c) was inconsistent with the language of section 4660(b)(1), which provides that impairment assessments "shall incorporate" the AMA Guides.

On reconsideration, we have been persuaded by this argument. Therefore, we have modified our prior opinion. Although we still conclude that the "prima facie evidence" language of section 4660(c) means that a scheduled permanent disability rating founded on a WPI based on the AMA Guides may be rebutted, we now conclude that any such rebuttal evidence also must be founded on the Guides. Thus, consistent with section 4660(b)(1), our current opinion "incorporates" the AMA Guides into any WPI rebuttal evidence presented under section 4660(c).

2. The Relationship Between the "Prima Facie Evidence" Language of Section 4660(c) and the "[t]he Schedule Shall Promote Consistency, Uniformity, and Objectivity" Language of Section 4660(d)

A number of briefs also asserted that our February 3, 2009 interpretation of the "prima facie evidence" language of section 4660(c) was inconsistent with the language of section 4660(d), which provides that "[t]he schedule shall promote consistency, uniformity, and objectivity."

We have concluded that these assertions also have merit. In our February 3, 2009 opinion, we held that a scheduled permanent disability rating could be rebutted "by showing that an impairment rating based on the AMA Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability."

We are now persuaded that this is not consonant with the expressly declared legislative intent to "promote consistency, uniformity, and objectivity" because it is subjective and may lead to inconsistent and non-uniform permanent disability ratings, i.e., what is inequitable, disproportionate, and not fair and accurate to one trier-of-fact may be equitable, proportionate, and fair and accurate to another. Therefore, instead of using the subjective standard set forth in our February 3, 2009 opinion, we have modified our interpretation of section 4660(c) in a manner that

is entirely consistent with section 4660(d) by recognizing that the Legislature promoted consistency, uniformity, and objectivity by requiring that impairment determinations be based on the AMA Guides. Under our current opinion, parties seeking to challenge the WPI component of a scheduled permanent disability rating cannot go outside the AMA Guides.

We also are now persuaded that the "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability" standard is not supported by either the California or the out-of-state cases which were cited in our February 3, 2009 opinion and upon which the dissent continues to rely. The California cases were interpreting former section 4660, which focused on the injured employee's diminished ability to compete in the open labor market. These cases did not involve new section 4660, which uses both WPI under the AMA Guides and DFEC to determine an injured employee's percentage of permanent disability. Although the out-of-state cases do involve the AMA Guides, those cases do not interpret statutes that also incorporate DFEC into any permanent disability determination.[38]

3. The Relationship Between the "Prima Facie Evidence" Language of Section 4660(c) and the Legislature's Declaration in Section 49 of SB 899 that the Act Was Necessary "to Provide Relief to the State from the Effects of the Current Workers' Compensation Crisis"

Various briefs claimed that our February 3, 2009 interpretation of the "prima facie evidence" language of section 4660(c) was inconsistent with the language of section 49 of SB 899, in which the Legislature declared that "[t]his act is an urgency statute" and that "it is necessary for this act to take effect immediately" to "provide relief to the state from the effects of the current workers' compensation crisis." (Stats. 2004, ch. 34, § 49.) The briefs point out that the appellate courts have repeatedly interpreted this statement to mean that SB 899 was intended to reduce the

[38] The dissent posits extreme cases in which it would be "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability" to require use of the AMA Guides for determining impairment. However, as we have just stated, a "fairness" standard is not a true standard at all. Moreover, a requirement that impairment must be determined within the four corners of the AMA Guides does not mean that an injured employee with relatively little impairment under the Guides will necessarily receive a small permanent disability award. As we held in *Ogilvie v. City and County of San Francisco* (2009) 74 Cal.Comp.Cases 248 (Appeals Board en banc) (*Ogilvie I*) and as we are affirming in our companion decision in *Ogilvie II*, an injured employee may attempt to challenge the DFEC component of any scheduled permanent disability rating. If the employee's challenge is successful, the WPI under the AMA Guides may be significantly increased by the employee's individualized DFEC adjustment factor. Moreover, the language of section 4662 *might* permit a permanent total disability finding even in cases with relatively little AMA Guides impairment. However, this question is not before us now.

costs of the workers' compensation system.[39] The briefs then assert that our February 3, 2009 interpretation of the of the "prima facie evidence" language of section 4660(c) would result in increased costs because, if WPI does not have to be based on the AMA Guides, then permanent disability awards will increase beyond the levels intended by the Legislature.

We agree that one of the ways the Legislature helped to reduce permanent disability costs was by requiring that WPI be based on the AMA Guides. Our current opinion is consonant with this legislative action because we are holding that, if a party seeks to rebut the WPI element of a scheduled rating, it must stay within the four corners of the AMA Guides.

4. Judicial Notice Requests

We received numerous requests from the parties and amicus curiae to judicially notice various documents. Most of these documents are being offered because they allegedly demonstrate a legislative intent that the AMA Guides must be the sole basis for any WPI determination. Because of our disposition, we will not specifically discuss any of these judicial notice requests other than to state that they are granted (see Evid. Code, § 452(c); Gov. Code, § 9080), except as noted below.[40]

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[39] See fn. 20, *supra*.

[40] We deny CWCI's request that we take judicial notice of the April 13, 2004 "DRAFT Response to Request for Information on Cost-Benefits of Potential Workers' Compensation Reforms" of the Commission on Health and Safety and Workers' Compensation (CHSWC), which recites that it was prepared for Governor Arnold Schwarzenegger and then Senate President Pro Tem John Burton. Of course, CHSWC is part of the executive branch (Lab. Code, § 75) and its role is to "conduct a continuing examination of the workers' compensation system" (Lab. Code, § 77), so its official acts may be judicially noticed. (Evid. Code, § 452(c).) Nevertheless, there is no indication that the "draft" was ever: (1) actually adopted by CHSWC (no "final" version of this report appears in CHSWC's webpages for "Research Studies and Reports [by] date of issue" and "Research Studies and Reports by topic" at http://www.dir.ca.gov/chswc/CHSWC_Research.html); or (2) actually submitted to and considered by the Legislature. (See *Benson*, *supra*, 179 Cal.App.4th at p. 1554, fn. 16 [74 Cal.Comp.Cases at p. 127, fn. 16] (Court declined to take judicial notice of the minutes of a February 24, 2005 meeting of CHSWC "[b]ecause there is no indication that the Legislature considered" those minutes).)

We also deny Walker's request that we take judicial notice of the 2008 Legislative Cost Monitoring Report of the Workers' Compensation Insurance Rating Bureau (WCIRB). Although the WCIRB provides data and information to CHSWC (Lab. Code, § 77.7(c)) and the AD (Lab. Code, § 138.6(a)), the WCIRB is an unincorporated, nonprofit association. (See https://wcirbonline.org/wcirb/about_wcirb/about_wcirb.aspx.) Therefore, its report does not constitute an "official" act. (Evid. Code, § 452(c).) Moreover, the Legislature obviously did not take into consideration the WCIRB's *2008* report when it enacted SB 899 on April 19, *2004*.

5. Our Current Opinion Is Not an Invalid Underground Regulation

MUSD argues, in substance, that our February 3, 2009 opinion constitutes a "regulation" that is invalid because it was not adopted in accordance with the rule-making provisions of the Administrative Procedures Act (APA). (Gov. Code, § 11340 et seq.) We will address this argument in the context of our current clarified and modified opinion.

MUSD's argument relies in large part on the Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 (*Tidewater*). *Tidewater* held that any "regulation" not adopted in accordance with the rule-making provisions of the APA is "void." (*Tidewater*, *supra*, 14 Cal.4th at p. 572.) In reaching this holding *Tidewater* stated, "The APA … defines 'regulation' very broadly to include 'every rule, regulation, order, or standard of general application … adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure … .' " (*Tidewater*, *supra*, 14 Cal.4th at p. 571 [quoting from former Gov. Code, § 11342(g) (now, § 11342.600)].) *Tidewater* then said: "A regulation subject to the APA thus has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or … govern [the agency's] procedure.' " (*Tidewater*, *supra*, 14 Cal.4th at p. 571 [internal citations omitted].)

The principles articulated in *Tidewater* apply to the Appeals Board. (*Rea v. Workers' Comp. Appeals Bd.* (*Milbauer*) (2005) 127 Cal.App.4th 625, 646 [70 Cal.Comp.Cases 312, 329].) While the Board's rule-making powers are largely governed by the Labor Code (Lab. Code, §§ 5307, 5307.4; see also §§ 133, 5309, 5708), the Board is also subject to the APA to some extent (Gov. Code, § 11351), including its definition of a "regulation." (Gov. Code, § 11342.600.)

Nevertheless, MUSD disregards the further holding of *Tidewater*, which states: "Of course, *interpretations that arise in the course of case-specific adjudication are not regulations*, though

they may be persuasive as precedents in similar subsequent cases." (*Tidewater*, *supra*, 14 Cal.4th at p. 571 (emphasis added).)

Also, MUSD disregards Government Code section 11425.60(b), which became effective after *Tidewater* (*Milbauer*, *supra*, 127 Cal.App.4th at p. 647 [70 Cal.Comp.Cases at p. 331]) and which "is applicable to the WCAB." (*Id.*, 127 Cal.App.4th at p. 646 [70 Cal.Comp.Cases at p. 330].) Section 11425.60(b) specifically states:

> "An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. *Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5* (commencing with Section 11340) [i.e., rule-making provisions of the APA]." (Gov. Code, § 11425.60(b) (emphasis added).)[41]

Moreover, the Law Revision Committee comments on section 11425.60(b) state, in relevant part:

> "The first sentence of subdivision (b) *recognizes the need of agencies to be able to make law and policy through adjudication as well as through rulemaking*. … Under the second sentence of subdivision (b), *this section applies notwithstanding Section 11340.5 ('underground regulations')*." (Emphasis added.)

Therefore, section 11425.60(b) expressly allows the Appeals Board to issue a "precedent" decision that addresses a significant legal or policy issue of general application that is likely to recur. Furthermore, section 11425.60(b) expressly provides that such a precedent decision "is not rulemaking" and need not be issued in accordance with the rule-making provisions of the APA – i.e., a precedent decision is not an illegal "underground regulation." (See *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083, 1095 (citing to section 11425.60(b) and stating, "The department designated [its] decision in this case as precedential,

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[41] Section 11425.60(b) falls within the administrative adjudication provisions of the APA. (Gov. Code, § 11400 et seq.) These APA administrative adjudication provisions apply to all state "agencies" (see Gov. Code, § 11500), except as otherwise expressly provided by statute. (Gov. Code, § 11410.20(a); see also, § 11415.10(a).) The WCAB falls within a statutory exclusion because its adjudicative proceedings are expressly governed by the Labor Code and by its own rules of practice and procedures and because it is not bound by any other statutory rules of procedure. (Lab. Code, § 5708; see also § 5309.) Nevertheless, "by regulation, ordinance, *or other appropriate action*, an agency may adopt [the APA's administrative adjudication] chapter *or any of its provisions* for the formulation and issuance of a decision, even though the agency or decision is exempt from application of this chapter." (Gov. Code, § 11410.40.) Here, in issuing our en banc decision, we have expressly declared it to be precedent decision and, in doing so, we have expressly invoked the provisions of section 11425.60(b). (See fn. 1, *supra*.)

thereby exercising its ability to make law and policy through adjudication.").)

Finally, MUSD disregards the express provisions of Labor Code section 115, which specifically allows "the appeals board as a whole" to issue en banc decisions "*in order to achieve uniformity of decision*, or in cases presenting novel issues." (Lab. Code, § 115 (emphasis added).) The Appeals Board's statutory authority to issue en banc decisions "in order to achieve uniformity of decision" is consistent with the fact that the Board is vested with "*judicial* powers." (Lab. Code, § 111(a) (emphasis added).) In accordance with its judicial status and the authority granted it by section 115, the Appeals Board periodically issues en banc decisions that "are binding on [all] panels of the Appeals Board and workers' compensation judges as legal precedent under the principle of *stare decisis*." (Cal. Code Regs., tit. 8, § 10341.)[42] In the context of proceedings before the WCAB, en banc decisions of the Appeals Board have the same effect as published appellate opinions. (*Signature Fruit Co. v. Workers' Comp. Appeals Bd.* (*Ochoa*) (2006) 142 Cal.App.4th 790, 796, fn. 2 [71 Cal.Comp.Cases 1044, 1047, fn. 2] ("An en banc decision of the WCAB binds future WCAB panels and WCJ's as legal precedent in the same manner as a published appellate opinion."); accord: *Garcia*, *supra*, 126 Cal.App.4th at p. 313, fn. 5 [70 Cal.Comp.Cases at p. 120, fn. 5].)

Therefore, our current en banc decision is not a regulation because it is being issued both under the authority of section 115 "in order to achieve uniformity of decision" and under the authority of section 11425.60(b) to designate as precedent a "decision that contains a significant legal or policy determination of general application that is likely to recur" without having to undertake rulemaking. Our current decision also accords with the holding of *Tidewater* that "interpretations that arise in the course of case-specific adjudication *are not regulations*, though they may be persuasive as precedents in similar subsequent cases." (*Tidewater*, *supra*, 14 Cal.4th at p. 571 (emphasis added).)

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[42] WCAB Rule 10341 was adopted through the rule-making provisions of Labor Code section 5306.

We recognize that one appellate court has concluded that the Appeals Board's power to issue en banc decisions in lieu of regulations is not unlimited. (*Milbauer*, *supra*, 127 Cal.App.4th at pp. 647-649 [70 Cal.Comp.Cases at pp. 329-332].) In *Milbauer*, the Court was reviewing an en banc decision of the Appeals Board which had determined that the Uninsured Employers Fund (UEF) could be ordered to provisionally appear at a hearing to assist an employee of an illegally uninsured employer in determining the employer's correct legal identity; then, when the illegally uninsured employer had been properly named and served with an application and special notice of lawsuit, UEF could be formally joined as a party defendant and its statutory liability for benefits would attach. The Court concluded that the procedures set forth in the Board's en banc decision violated the APA and *Tidewater*. However, the Court reached this conclusion because the Board's en banc decision had "adopted and announced a whole body of entirely new procedures" relating to the joinder and the responsibilities of UEF and because these "new procedures [were] much more extensive than general legal conclusions or policies produced after interpretation of applicable statutes or law in the context of a specific case." (*Milbauer*, *supra*, 127 Cal.App.4th at p. 648 [70 Cal.Comp.Cases at p. 331].)

Our current en banc decision in *Almaraz* and *Guzman* is readily distinguishable because it does not impose a whole series of new procedural requirements. To the contrary, our current decision is not procedural at all. Rather, in substance, our decision simply interprets the "prima facie evidence" language of section 4660(c) to mean that a permanent disability rating established by the Schedule is rebuttable – including by successfully challenging a component element of that rating, e.g., the injured employee's WPI based on the AMA Guides. Moreover, our decision further holds that, if a party seeks to challenge a WPI based on the Guides, section 4660(b)(1) requires that this rebuttal evidence also must be founded on the Guides. Our decision, however, does *not* mandate that any party must attempt to challenge a WPI based on the Guides; it does *not* mandate that if any such attempt is made it must be done in any particular manner (other than it must be based on the Guides); and it does *not* mandate that a WCJ or Appeals Board panel must admit or follow any rebuttal evidence presented.

Moreover, consistent with *Tidewater*'s holding that "interpretations that arise in the course of case-specific adjudication are not regulations" (*Tidewater*, *supra*, 14 Cal.4th at p. 571), we reach our holdings in the context of two specific cases in which the injured employees assert that they are entitled to present medical evidence to rebut the permanent disability rating called for by the 2005 Schedule. If the *Milbauer* case were interpreted to apply in this context, this would effectively eradicate both the Appeals Board's power to issue en banc decisions "in order to achieve uniformity of decision" (Lab. Code, § 115) and its power to "designate as a precedent decision … a decision that contains a significant legal or policy determination of general application that is likely to recur [and that] is not rulemaking" (Gov. Code, § 11425.60(b)).

III. CONCLUSION

For the reasons above, we now hold that: a permanent disability rating established by the Schedule is rebuttable; the burden of rebutting a scheduled permanent disability rating rests with the party disputing it; one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's WPI under the AMA Guides; and when determining an injured employee's WPI, it is not permissible to go outside the four corners of the AMA Guides; however, a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment.

Therefore, we will again remand both the *Almaraz* and *Guzman* cases to their respective assigned WCJs for further proceedings – if deemed appropriate by the assigned WCJ (including possible development of the record) – and for new decisions on the permanent disability-related issues, including attorney's fees.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (en banc) in *Almaraz v. Environmental Recovery Services*, Case No. ADJ1078163 (BAK 0145426), that the Findings of Fact and Award of April 23, 2008 is **AMENDED** such that Findings of Fact Nos. 3, 4 and 7 and the Award in its entirety are **STRICKEN** therefrom and the

following are **SUBSTITUTED** therefor:

FINDINGS OF FACT

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3. The issue of permanent disability is deferred.

4. The issue of defendant's credit against its liability for permanent disability indemnity is deferred.

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7. The issue of reasonable attorney's fees is deferred.

AWARD

AWARD IS MADE in favor of **MARIO ALMARAZ** and against **STATE COMPENSATION INSURANCE FUND** of:

(a) Temporary disability indemnity in accordance with Finding of Fact No. 2, less credit to defendant for any amounts previously paid therefor;

(b) All further medical treatment reasonably required to cure or relieve the effects of the injury; and

(c) Medical treatment and medical-legal liens in an amount to be adjusted by the parties, with jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (en banc) in *Guzman v. Milpitas Unified School District*, Case No. ADJ3341185 (SJO 0254688), that the Amended Findings and Award issued on October 7, 2008 (and re-issued on October 22, 2008) is **AMENDED** such that Findings of Fact Nos. 3 and 4 and the Award in its entirety are **STRICKEN** therefrom and the following are **SUBSTITUTED** therefor:

FINDINGS OF FACT

***

3. Applicant has sustained permanent partial disability of 41% in Case No. ADJ2705099 (SJO 0244266). The issue of permanent disability in Case No. ADJ3341185 (SJO 0254688) is deferred.

4. The issues of reasonable attorney's fees in both Case Nos. ADJ2705099 (SJO 0244266) and ADJ3341185 (SJO 0254688) are deferred.

***

AWARD

AWARD IS MADE in favor of **JOYCE GUZMAN** and against **MILPITAS UNIFIED SCHOOL DISTRICT** (Keenan & Associates, Adjusting Agent) of:

(a) In Case No. ADJ2705099 (SJO 0244266), permanent partial disability indemnity in the total amount of $37,555.00, payable at $185.00 per week for 203 weeks, less credit to defendant for any sums previously paid on account thereof, and less 15% to be held in trust by defendant pending further order of the WCAB on the issue of reasonable attorney's fees;

(b) In both Case Nos. ADJ2705099 (SJO 0244266) and ADJ3341185 (SJO 0254688), all further medical treatment reasonably required to cure or relieve the effects of the injuries herein; and

(c) In both Case Nos. ADJ2705099 (SJO 0244266) and ADJ3341185 (SJO 0254688), medical treatment and medical-legal liens in an amount to be adjusted by the parties, with jurisdiction reserved.

IT IS FURTHER ORDERED that the *Almaraz* and *Guzman* matters are each **REMANDED** to their respective assigned workers' compensation administrative law judges for

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further proceedings and new decisions, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ James C. Cuneo
JAMES C. CUNEO, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Gregory G. Aghazarian
GREGORY G. AGHAZARIAN, Commissioner

WE DISSENT
(See attached Dissenting Opinion)

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

/s/ Alfonso J. Moreso
ALFONSO J. MORESI, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

9/3/09

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

Mario Almaraz
The Law Offices of William Wolff
State Compensation Insurance Fund-Legal Division
Joyce Guzman
Law Offices of J. Bruce Sutherland
Law Offices of Bradford & Barthel, LLP

NPS/jr

DISSENTING OPINION

We would affirm our February 3, 2009 en banc decision.

For the reasons stated in that decision, which we adopt and incorporate by reference, we disagree with the majority that a party may never go outside the AMA Guides[1] to rebut a scheduled permanent disability rating.

Long-standing California case law is clear that a scheduled permanent disability rating may be rebutted if it is shown that the scheduled rating would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability.

In *Universal Studios, Inc. v. Workers' Comp. Appeals Bd*. (*Lewis*) (1979) 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133] (*Lewis*), the WCAB awarded an employee the scheduled rating for a semi-sedentary work restriction based on the findings of the agreed medical evaluator (AME). The Court found that a scheduled semi-sedentary permanent disability rating was inequitable and not supported by the evidence, declaring:

> "[T]he only evidence which supports the theory that the employee should be confined to semisedentary work … is the evidence of the employee's own subjective complaints and the [AME's] acceptance of that subjective complaint. …
>
> "It is no answer to this lack of evidence to say that the rating[] schedule[] … cannot be questioned. The [cases cited] fully controvert any such 'hands-off' attitude toward the schedule or the presumptions used to create the schedule or resulting therefrom.
>
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> "… [A] court of review must… examine … the result … for fairness, reasonableness and proportionality in the overall scheme of the law and the purposes sought to be accomplished by that law. … [*W]hen we discern an inequitable result, it is our duty to require reexamination. … [W]e conclude here that the award is so disproportionate to the disability and the objectives of reasonably compensating an injured worker as to be fundamentally unfair. … [It is] not just and fair compensation.*
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[1] All references to the "AMA Guides" or to the "Guides" are to the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (5th Edition, 2001).

> "The percentage of disability determined by use of the rating schedule is only prima facie evidence of the percentage of permanent disability to be attributed to each injury. Thus it is not absolute, binding and final. [Citations]. It is therefore not to be considered all of the evidence on the degree or percentage of disability. Being prima facie it establishes only presumptive evidence. Presumptive evidence is rebuttable, may be controverted and overcome."
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> (*Lewis*, 99 Cal.App.3d at pp. 657, 658-659, 662-663 [44 Cal.Comp.Cases at pp. 1138, 1139-1140, 1143] (emphasis added).)

In *Glass v. Workers' Comp. Appeals Bd*. (1980) 105 Cal.App.3d 297 [45 Cal.Comp.Cases 441 (*Glass*)], the WCAB did not include a limitation to light work as one of the employee's factors of disability, where the Schedule then in effect provided that light work limitations applied only to other body parts. The Court of Appeal said: "The Board may not rely upon alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award *which accurately reflects his true disability*. … While the Rating Schedule is prima facie evidence of the proper disability rating, it may be controverted and overcome." (*Glass*, 105 Cal.App.3d at p. 307 [45 Cal.Comp.Cases at p. 449] (emphasis added).)

Other California cases are consistent. (E.g., *Luchini v. Workmen's Comp. Appeals Bd.* (1970) 7 Cal.App.3d 141, 146 [35 Cal.Comp.Cases 205, 209] ("the [WCAB] cannot rely on some administrative procedure [(i.e., the Schedule)] to deny to petitioner a disability award commensurate with the disability that he has suffered."); accord: *Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 508 [37 Cal.Comp.Cases 393, 401]; *Young v. Industrial Acc. Com*. (1940) 38 Cal.App.2d 250, 255 [5 Cal.Comp.Cases 67, 70] ("[i]t is apparent … from the … provisions of the Labor Code and the schedule itself, that it was not intended that [the schedule] should be applied in a case … where it did not even approximately cover the disability involved"); see also *Duke v. Workers' Comp. Appeals Bd.* (1988) 204 Cal.App.3d 455, 460 [53 Cal.Comp.Cases 385, 388] (where a "rating is not rationally related to [the] Applicant's diminished ability to compete on the open labor market," then the rating is "arbitrary, unreasonable and not supported by the evidence in light of the entire record."); accord: *Abril v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 480, 486 [40 Cal.Comp.Cases 804, 808];

Nielsen v. Workmen's Comp. Appeals Bd. (1974) 36 Cal.App.3d 756, 758 [39 Cal.Comp.Cases 83, 84].)

Consequently, it follows that a scheduled permanent disability rating predicated on the AMA Guides should be subject to the same standard of rebuttal.

The majority asserts that the cases just cited are inapposite because they interpreted former section 4660, which focused on diminished ability to compete in the open labor market in determining an injured employee's scheduled permanent disability rating, and not current section 4660, which focuses on WPI under the AMA Guides and DFEC in determining permanent disability. However, the question of what standard is used to determine a scheduled permanent disability rating is not relevant. The pertinent question is what standard is used to *rebut* a scheduled permanent disability rating under section 4660(c). The majority fails to explain why the long-standing standard for determining when a scheduled permanent disability rating has been rebutted is now somehow inapplicable, especially given that the "prima facie evidence" language of section 4660(c) was not changed by SB 899. Indeed, the long-established "inequitable, disproportionate, and not a fair and accurate measure" standard is fully consistent with the constitutional declaration that "[a] complete system of workers' compensation includes *adequate* provisions for the … general welfare of any and all workers" and the constitutional mandate that "the administration of [workers' compensation] legislation *shall accomplish substantial justice*." (Cal. Const., art. XIV, § 4 (emphasis added).) These constitutional provisions "are expressly declared to be the social public policy of this State, binding upon all departments of the State government" (*id*.) and they must be viewed to have been subsumed into all of the workers' compensation provisions of the Labor Code (Lab. Code, § 3201), including section 4660.

In most cases the AMA Guides will be both the starting point and the ending point of any assessment of an injured employee's WPI. However, we cannot rule out the possibility that exceptional circumstances may arise where a WPI based on the AMA Guides simply will not fairly and accurately measure an injured employee's impairment.. This is consistent with the language of the AMA Guides and case law of other jurisdictions.

The AMA Guides recognizes that it cannot always be the ultimate determinant of industrially-caused impairment. Specifically, the Guides states that: (1) its WPI ratings "estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work*" (AMA Guides, § 1.2a, at p. 4 (italics in original); see also §§ 1.2b, 1.8, at pp. 9, 13)[2]; (2) in some cases it is appropriate for a physician to consider factors outside the Guides (*id*., §§ 1.2a, 1.2b, 1.9, 1.12, 2.2, at pp. 5, 8, 13-14, 15, 18); (3) an evaluating physician can modify an impairment rating through the exercise of his or her judgment, training and experience (*id*., § 1.2a, 1.2b, 1.5, 2.3, 2.5c, at pp. 5, 8, 11, 18, 19); and (4) it has inherent limitations, including acknowledging that it "cannot provide an impairment rating for all impairments" (*id*., § 1.5, at p. 11; see also, § 1.2a, 1.5, at pp. 4-5, 10).

Also, several other jurisdictions (i.e., Arizona, Florida, New Hampshire, Hawaii, New Mexico, and South Dakota) have allowed departures from the AMA Guides under some circumstances even though those jurisdictions have or have had statutes or regulations that either require use of the Guides or generally call for its use.[3]

New Hampshire law provides that, "[i]n order to reduce litigation and establish more certainty and uniformity in the rating of permanent impairment," permanent disability awards "shall" be based on the most recent edition of the AMA Guides. (N.H. Revised Stats., § 281-A:32(IX) & (XIV); see also § 281-A:31-a.) Nevertheless, in *Appeal of Rainville* (N.H. 1999) 143 N.H. 624 [732 A.2d 406] (*Rainville*), the New Hampshire Supreme Court said:

> "[I]n view of the *AMA Guides*'s own instructions and our liberal construction of [the permanent impairment statute] … , we hold that if a physician,

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[2] The activities of daily living (ADLs) covered by the Guides are: (1) self-care and personal hygiene (e.g., urinating, defecating, brushing teeth, combing hair, bathing, dressing oneself, eating); (2) communication (e.g., writing, typing, seeing, hearing, speaking); (3) physical activity (e.g., standing, sitting, reclining, walking, climbing stairs); (4) sensory function (e.g., hearing, seeing, tactile feeling, tasting, smelling); (5) nonspecialized hand activities (e.g., grasping, lifting, tactile discrimination); (6) travel (e.g., riding, driving, flying); (7) sexual function (e.g., orgasm, ejaculation, lubrication, erection); and (8) sleep (e.g., restful, nocturnal sleep pattern). (AMA Guides, § 1.2a, at p. 4 [Table 1-2].) These ADLs were developed *not* to assess the extent to which injured employees could function in work environments, but to assess the abilities and needs of institutionalized patients and the elderly; even now, many of the ADLs are more suited to a chronically ill, disabled population. (*Id*., § 1.2a, at p. 5.)

[3] Some states strictly adhere to the AMA Guides and do not allow them to be departed from under any circumstances. Because California law provides that its scheduled permanent disability ratings may be rebutted (Lab. Code, § 4660(c)), the case law of those states is not relevant to our discussion.

> exercising competent professional skill and judgment, finds that the recommended procedures in the *AMA Guides* are inapplicable to estimate impairment, the physician may use other methods not otherwise prohibited by the *AMA Guides*. … The reasons for such a deviation must be fully explained and the alternative methodology set forth in sufficient detail so as to allow a proper evaluation of its soundness and accuracy.
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> "… [T]he board may not disregard a physician's impairment evaluation solely because it deviates from the express recommended methodology of the *AMA Guides*." (*Rainville,* 143 N.H. at pp. 631-633.)

Florida law formerly mandated that "[the AMA Guides] shall be the … [permanent disability] schedule and shall be used for purposes hereof." (Fla. Stats. 1979, ch. 79-312, § 8 [repealed Fla. Stats. 1990, ch. 90-201, § 20, eff. July 1, 1990.)[4] Nevertheless, in a unanimous 12-justice en banc opinion in *Trindade v. Abbey Road Beef 'N Booze* (Fla.App. 1983) 443 So.2d 1007 (*Trindade*), the Florida Court of Appeal stated, in part:

> "… [A]s a practical matter, over four years of experience have shown the futility of attempting to view the *Guides* as a comprehensive, all-inclusive schedule of permanent impairments. This valuable treatise, viewed by the Division [of Workers' Compensation] as the 'best available,' is nevertheless – according to much credible medical testimony reflected in the cases coming before us – incomplete and unsuited to the determination of permanent impairment resulting from certain types of injuries. …
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> "We therefore hold that … the existence and degree of permanent impairment resulting from injury shall be determined pursuant to the *Guides*, unless such permanent impairment cannot reasonably be determined under the criteria utilized in the *Guides*, in which event such permanent impairment may be established under other generally accepted medical criteria for determining impairment.
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> "… The *Guides*, where applicable, shall be used as the primary rating schedule, but shall not be used to deny benefits simply because the *Guides* do not make provision for the conditions causing the impairment." (*Trindade*, 443 So.2d at pp. 1008-1013.)

Arizona law provides that a "physician should rate the percentage of impairment using the standards for the evaluation of permanent impairment as published by the most recent edition of

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[4] Florida stopped using the AMA Guides per se in 1990, when its Legislature amended its permanent disability law to require the establishment of a permanent disability schedule that, although it may be based on "systems and criteria set forth in the [AMA] Guides …," it nevertheless "shall expand the areas already addressed and address additional areas not currently contained in the [G]uides." (Fla. Stats., § 440.15(3)(b).)

the [AMA Guides], if applicable." (Ariz. Admin. Code R20-5-113(B)(1) [formerly known as R4-13-113(D) or "Rule 13(d)"].) Yet, the Arizona Supreme Court has stated that: "[a]lthough the AMA Guides [is] important in the disability rating, [it is] not the philosopher's stone"; the AMA Guides is not "all-encompassing" and is "not to be blindly applied regardless of a claimant's actual physical condition"; the AMA Guides is applicable only if it "truly reflect[s] the claimant's loss"; if the AMA Guides "do[es] not provide a fair, accurate measure of the degree of impairment," then an ALJ "must use other factors to determine the degree of impairment" and "a medical expert cannot bind the ALJ to unreasoning adherence to the AMA Guides"; "[a]ny relevant factors … may be considered," including the injury's "[e]ffect on job performance"; and "[e]vidence regarding such factors may come from experts, from the literature, lay witnesses or any other competent source." (See *Slover Masonry, Inc. v. Industrial Commission* (*Williamson*) (1988) 158 Ariz. 131 [761 P.2d 1035] (*Williamson*); *W.A. Krueger Co. v. Industrial Commission* (*Puma*) (Ariz. 1986) 150 Ariz. 66 [722 P.2d 234]; *Gomez v. Industrial Commission* (Ariz. 1985) 148 Ariz. 575 [716 P.2d 32]; *Smith v. Industrial Commission* (Ariz. 1976) 113 Ariz. 304 [552 P.2d 1198]; *Adams v. Industrial Commission* (Ariz. 1976) 113 Ariz. 294 [552 P.2d 764].)

The courts from other jurisdictions have been particularly troubled where: (1) the injured employee's condition is not even covered by the AMA Guides;[5] (2) the Guides "covers" the condition but provides no WPI because the condition does not affect or minimally affects the employee's activities of daily living outside of work, even though it substantially affects the

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[5] See, e.g., *Trindade*, *supra*, 443 So.2d 1007 (employee's knee injury rated based on American Academy of Orthopedic Surgery Guides because AMA Guides dealt only with loss of range of motion and employee's knee instability was due to excessive range of motion); *Rainville*, *supra*, 143 N.H. 624 [732 A.2d 406] (employee had multifocal myofascial pain syndrome, which could not be assessed under the AMA Guides); *Cantalope v. Veterans of Foreign Wars Club* (S.D. 2004) 674 N.W.2d 329 (employee sustained industrial subcutaneous pneumomediastinum, a condition not covered by the AMA Guides).

employee's ability to work and earn;[6] or (3) the Guides both "covers" the employee's condition and provides some impairment rating for it, but alternative approaches more accurately and completely rate the impairment.[7]

The majority holds that the language of section 4660(b)(1)[8] restricts all rebuttal evidence to the four corners of the AMA Guides. For the reasons that follow, we respectfully disagree.

The Schedule itself does not require that all impairments be assessed under the AMA Guides. Notwithstanding the fact that Chapter 14 of the Guides sets out principles for assessing mental and behavioral impairment due to psychiatric disorders, the Schedule directs practitioners that "psychiatric impairment shall be evaluated … using the Global Assessment of Function (GAF)." (Schedule, at p. 1-12; see also pp. 1-13 – 1-16.)

The majority reasons that the Schedule's departure from the AMA Guides is appropriate in cases of psychiatric impairment because the Guides states that "[p]ercentages are not provided to

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[6] See, e.g., *Benafield v. Industrial Commission* (Ariz.App. 1998) 193 Ariz. 531 [975 P.2d 121] (secretary had no ratable impairment under the AMA Guides after bilateral carpal tunnel surgery, but had permanent restrictions that precluded her from returning to her secretarial job); *Cassey v. Industrial Commission* (Ariz.App. 1987) 152 Ariz. 280 [731 P.2d 645] (delivery truck driver's chronic thoracolumbar sprain was not ratable under the AMA Guides, but the condition prevented him from returning to work); *Hunter v. Industrial Commission* (Ariz.App. 1981) 130 Ariz. 59 [633 P.2d 1052] (meat wrapper's bronchial hypersensitivity due to fumes from polyvinyl chloride (PVC) used to wrap meat not ratable under the AMA Guides, but permanently precluded her from any employment exposing her to PVC or other lung irritants); *Dayron Corp. v. Morehead* (Fla. 1987) 509 So.2d 930 (machinist suffered significant wage loss when he could not continue at his job because he developed contact dermatitis from a new oil-based coolant for his metal-cutting machinery; however, he had no ratable AMA Guides impairment because his condition did not affect his activities of daily living outside of work); *OBS Co., Inc. v. Freeney* (Fla.App. 1985) 475 So.2d 947 (*Freeney*) (journeyman plasterer developed contact dermatitis from exposure to wet cement, but he had no ratable AMA Guides impairment because his condition did not affect his activities of daily living as long as he does not work in his job – i.e., "Essentially, as long as claimant does nothing, there is no impairment").

[7] See, e.g., *Williamson*, *supra*, 158 Ariz. 131 [761 P.2d 1035] (AMA Guides provided a 50% impairment rating for fractured tibial condyle of hod carrier's right knee; however, Arizona Supreme Court affirmed a finding of 70% impairment, where the increased impairment rating was predicated on the facts that: (1) the employee testified he could not perform seventy-eight percent of his job; (2) the evaluating physician "made it clear that the AMA Guides did not actually measure ability to perform a specific job or occupation," he agreed with the employee's assessment of which job functions he could no longer perform, and he concluded that "the working disability the applicant suffers is not totally covered by the Guides"; and (3) a labor market consultant confirmed that employee's injury disabled him from performing sixty-five percent of a hod carrier's job); *Cabatbat v. County of Hawai'i, Dept. of Water Supply* (Haw. 2003) 103 Haw. 1 [78 P.3d 756] (Hawaii Supreme Court concluded it was error to rate an injured employee's temporomandibular joint injury based on the AMA Guides, where the treating dentist and the parties' respective evaluating dentists all found higher impairments using methods other than the Guides).

[8] Section 4660(b)(1) states: "For purposes of this section, the 'nature of the physical injury or disfigurement' shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the [AMA Guides]."

estimate mental impairment in this edition of the *Guides*." (AMA Guides, § 14.3, at p. 361.) This rationale does not withstand scrutiny.

It is true the Guides does not assign or suggest any *specific* WPI percentages for psychiatric impairment. Nevertheless, section 14.3 of the Guides, entitled "A Method of Evaluating Psychiatric Impairment" (*id*., at pp. 361-364), sets out an "approach [that] may be helpful in estimating the extent of mental impairments" (*id*., at p. 361). Also, section 14.4, entitled "Assessing Impairment Severity" (*id*., at pp. 361-366), provides further information for evaluating psychiatric impairment.

The GAF scale does not remedy the absence of specific WPI percentages for psychiatric impairment in the AMA Guides, because neither the GAF scale nor the text from which the GAF is derived[9] makes *any* reference to WPI.[10] Therefore, the majority cannot properly justify the Administrative Director's departure from the AMA Guides with respect to psychiatric impairments on the basis that the GAF scale provides WPI percentages whereas the AMA Guides does not.

There is no inherent inconsistency between the language of section 4660(b)(1) that WPI assessments "shall *incorporate* … the [AMA Guides]" and the conclusion that, under the "prima facie evidence" language of section 4660(c), a WPI determined in accordance with the AMA Guides may be rebutted by non-AMA Guides evidence. In most cases, the WPI will be based entirely on the AMA Guides. In those rare cases where a WPI under the Guides does not fairly and accurately reflect the injured employee's impairment, the AMA Guides are not binding and a physician may consider other generally accepted medical literature or standards to assess

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[9] The most current GAF scale is set forth at page 32 of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, 2000 (commonly called the DSM-IV-TR) of the American Psychiatric Association.

[10] The WPI percentages assigned by the Schedule to be GAF scale appear to have been administratively created.

impairment.[11]

Moreover, section 4660(b)(1) says to "incorporate" the AMA Guides. A usual and commonsense interpretation of the word "incorporate" is that it means to "to take in or include as a part or parts."[12] Thus, while the AMA Guides must be included as a part of any assessment of permanent impairment, it is not absolutely conclusive. This interpretation harmonizes section 4660(b)(1) with section 4660(c), while also allowing a party to rebut a scheduled permanent disability rating that is predicated on a WPI assessment under the Guides.

Further, the language of section 4660(b)(1) that "the 'nature of the physical injury or disfigurement' shall incorporate … the [AMA Guides]" relates back to the language of section 4660(a) which provides: "In determining the percentages of permanent disability, *account shall be taken of the nature of the physical injury or disfigurement* … ." (Emphasis added.) A reasonable interpretation of the phrase "account shall be taken" is that although the AMA Guides must be taken into account, an impairment rating based strictly on the Guides will not be controlling.

Arguments have been made that allowing rebuttal evidence outside of the AMA Guides or, in fact, allowing *any* rebuttal evidence somehow abrogates both the language of section 4660(d) and the language of uncodified section 49 of SB 899.

Section 4660(d) provides, "[t]he schedule shall promote consistency, uniformity, and objectivity." To interpret this language to mean that the AMA Guides component of a scheduled permanent disability rating cannot be rebutted by evidence outside of the AMA Guides imposes restrictions that simply are not there. Although in most cases permanent disability will be

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[11] See, generally, *Cantalope*, *supra*, 674 N.W.2d at pp. 336-337 (an "alternative methodology" may be used to rate impairment "if supported by competent medical evidence"); *Cabatbat*, *supra*, 103 Haw. at p. 9 ("According to the AMA Guides and [the three reporting physicians], the Board should not have relied solely upon the AMA Guides to evaluate [the employee's] injury"); *Williamson*, *supra*, 158 Ariz. at pp. 135-137 ("[a]ny relevant factors" and "all competent and relevant evidence" may be used to establish an accurate rating of functional impairment); *Morehead*, *supra*, 509 So.2d at pp. 931-932 (impairment determination may be "based upon other generally accepted medical standards"); *Trindade*, *supra*, 443 So.2d at pp. 1008-1013 (if "permanent impairment cannot reasonably be determined under the criteria utilized in the *Guides,* … such permanent impairment may be established under other generally accepted medical criteria for determining impairment").)

[12] See *Dictionary.com Unabridged (v 1.1)*, Random House, Inc., http://dictionary.reference.com/browse/incorporate (accessed: September 3, 2009).

determined by the AMA Guides, a requirement that the Schedule shall *promote* consistency, uniformity, and objectivity does not confer exclusivity on the Guides.

Former Florida law and current New Hampshire law have mandated that the AMA Guides "shall" be used "[i]n order to reduce litigation and establish *more certainty and uniformity* in the rating of permanent impairment." (Fla. Stats. 1979, ch. 79-312, § 8 (emphasis added) [repealed Fla. Stats. 1990, ch. 90-201, § 20, eff. July 1, 1990]); (N.H. Revised Stats., § 281-A:32 (XIV) (emphasis added).) Yet, despite this mandate, the appellate courts of both states have interpreted this language to mean that the AMA Guides is not absolute and may be departed from under some circumstances. (See *Morehead*, *supra*, 509 So.2d 930; *Freeney*, *supra*, 475 So.2d 947; *Trindade*, *supra*, 443 So.2d 1007; *Appeal of Wal-Mart Stores* (*Hargreaves*) (N.H. 2000) 145 N.H. 635 [765 A.2d 168]; *Rainville*, *supra*, 143 N.H. 624 [732 A.2d 406].) The Florida and New Hampshire courts reached their conclusions even though, unlike California, neither state even had a statutory "prima facie evidence" or other provision allowing a permanent disability rating to be rebutted.

Section 49 of SB 899 declares that "[t]his act is an urgency statute" and that "it is necessary for this act to take effect immediately" to "provide relief to the state from the effects of the current workers' compensation crisis." (Stats. 2004, ch. 34, § 49.) Appellate courts have interpreted this statement to mean that SB 899 was intended to reduce the costs of the workers' compensation system.[13]

There is no question that SB 899 has been effective in reducing workers' compensation costs. SB 899 has achieved this in numerous ways, such as by amending section 5814 to severely limit penalties and by amending section 4663 and adding section 4664 to limit a defendant's liability to only the permanent disability directly caused by the injury. Yet, although section 49 of SB 899 declared a legislative intent to reduce the *overall* costs of workers' compensation, there is no indication that the Legislature intended to reduce the cost of each and every workers'

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[13] See *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 [72 Cal.Comp.Cases 565, 578]; *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1555 [74 Cal.Comp.Cases 113, 128]; *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640, 655 [73 Cal.Comp.Cases 785, 796]; *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd.* (*Chavez*) (2007) 151 Cal.App.4th 148, 155 [72 Cal.Comp.Cases 582, 587].

compensation benefit in each and every possible way or that it intended to entirely sacrifice fair and adequate compensation to injured workers. To the contrary, "both workers and employers were to benefit from Senate Bill No. 899 as a whole." (*Benson*, *supra*, 170 Cal.App.4th at p. 1557 [74 Cal.Comp.Cases at p. 130]).) Certainly, as cited above, some elements of SB 899 were intended to and did reduce various costs, including the cost of permanent disability. However, there also was legislative concern about "diminishing the arguably meager benefits injured workers received in this state." (*Benson*, *supra*, 170 Cal.App.4th at p. 1557 [74 Cal.Comp.Cases at p. 131] (quoting from Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 899 (2003–2004 Reg. Sess.) as amended July 14, 2003, pp. 1-2).) Consistent with this concern, SB 899 *increased* permanent disability benefits for those employees who were the most disabled or who could not return to work. (Lab. Code, § 4658(d)(1) (increasing the number of weeks of benefits for permanently disabled employees with disability from 70% to 99.75%); § 4658(d)(2) (increasing by 15% benefits for permanently disabled employees who were not promptly offered regular, modified or alternative work with the same employer).)

Our conclusion that the AMA Guides component of a scheduled permanent disability rating may be rebutted – including by other generally accepted medical standards – is not inconsistent with either section 49 or SB 899 as a whole. Indeed, SB 899 preserved the right to rebut a scheduled permanent disability rating by making no changes to the language of section 4660 that such a rating is "prima facie evidence."

We are not persuaded that the continued existence of the "prima facie evidence" language of section 4660(c), as our February 3, 2009 opinion interpreted it, will have any particular effect on the overall costs of permanent disability indemnity. First, in the vast majority of cases, impairment will be assessed under the AMA Guides. Impairment may be assessed outside the Guides only in rare cases where assessment under the Guides would be manifestly inequitable. Second, our February 3, 2009 opinion allowed *either* party to rebut a scheduled permanent disability rating by successfully challenging the WPI under the AMA Guides. Thus, in some cases, an injured employee might succeed in increasing the permanent disability award. In other

cases a defendant might succeed in decreasing it. (Cf. *Lewis*, *supra*, 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133].)

Therefore, for all the reasons above, we would affirm the holding of our February 3, 2009 joint en banc decision that a scheduled permanent disability rating may be rebutted if it is shown that the rating would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability.

Nevertheless, we agree with the majority that: (1) the language of section 4660(c) unambiguously means that a permanent disability rating established by the Schedule is rebuttable; (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing it; and (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's whole

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person impairment (WPI) under the AMA Guides.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

9/3/09

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

Mario Almaraz
The Law Offices of William Wolff
State Compensation Insurance Fund-Legal Division
Joyce Guzman
Law Offices of J. Bruce Sutherland
Law Offices of Bradford & Barthel, LLP

NPS/jr